CHAPTER III
TERRORISM- LEGAL ASPECT

“Every man when driven to the well by a murderous assailant, will override all laws to protect himself and this is called the great right of self defence.” 
Abraham Lincoln

3.1 INTRODUCTION

It is the great right of self-defence of Lincoln\(^1\) from which the moral justification to all anti-terrorism law is derived. But the states and the executive overtake the thin line of self-defence to dictatorial exercise of legitimate power. The way the execution is done; normally adopt the process of suppression and oppression as a state vehicle to attain their object miserably. Terrorism has been an area where in the name of stringent measures; the state empowered the police to act with scant accountability. As an example, a 12 years old boy was put to arrest under TADA for inciting the tribals against the state. It is funny and horrifying at the same time. Power should never be placed in those hands that are not driven by reason.

Terrorist attack on humanity is a global phenomenon. US Supreme Court upheld the right of the government to detain the enemy combatants, even if they are American Citizens. In the present barbaric activities of the terrorists, the International law is not applicable to the terrorists. Terrorist groups ranging from separatists like the PKK in Turkey, Chechen rebels in Russia or the Pak backed Harkat-Ul-Mujahideen, Talibans, TTP etc. operating in India and Palestinian groups like HAMAS, Palestinian Islamic Jehad, Aqsa Martyrs Brigade, Al-Qaida Network, LeTetc all fail in the test of International Human Rights Law. Hijacking civilian planes and flying them in to official buildings, using human bombs to blow up trains are not protected by the customs of war. Taliban also forfeits claim to the prisoners of war status.

US policy in its war against terror is consistent with the Geneva Convention. But Human rights advocates such as Anthony Dwarkin feel that the maltreatment of the terrorists in US detention violates the fourth Geneva Convention related with protection of Civilian prisoners in times of war. UN Security Council adopted Resolution No. 1373 in September, 2001 as a counter terrorism measure. It is the mandatory duty of the member countries of UN to initiate steps to curb terrorist activities. Under this resolution, the problem of investigation was solved in case of 26/11 attack on Taj Hotel Mumbai in Nov, 2008. Terrorist activities are inhuman, barbaric, against ethics and against humanity. Thus the provisions of International Human Rights should not be applied to them, being a time of public emergency. It is a grave threat to life and unity and integrity of the nation. It should be out rightly condemned by the

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\(^1\) Singh, Surat and Singh, Hemraj; *Law Relating to Prevention of Terrorism*, Universal Law Publishing Co. Pvt. Ltd., Delhi – 2003 pp. 3-4
International community.

Liberty as a concept occupies a pivotal place in democracy and its guarantee is primary right that has to be assured by all reasonable means by the state\(^2\). This culture is to start from the individual and one has to be protected from the arbitrary arrest by the police and security forces. He is not supposed to be tortured in custody. All this is entrenched in Art 21 of the Constitution. The Cardinal principle of Criminal Jurisprudence that every prisoner shall be presumed to be innocent till his guilt is proved beyond reasonable doubt. Still it has been experienced that the indiscriminate arrests are being made.

The police has the powers to arrest a person involved in cognizable offence subject to the latest amendments in CrPC but the guidelines of arrest given by the courts are not being complied. The National Police Commission in its report mentioned that the powers of arrest by the police are the major source of corruption in police. It added that 60% of the arrests are either unnecessary or unjustified.\(^3\) The Supreme Court in case *Joginder Singh v. State of UP*\(^4\), gave guidelines to the police for the arrest of accused persons. Inspite of this rampant instances of arbitrary arrest reported through writs is the testimony to the continuing violation of human rights by the police. Though, constitution has given us golden Art 32 & 226 to go to the courts through writs of Habeas Corpus for the release from unlawful detention but the poor people do not have the money to approach the superior judiciary. It is high time that the police should be taught about the genesis of human rights.

While arresting through warrants, the accused person has to be explained about the reason of the arrest and is to be assisted for getting bail. In case *Sheela Barsev. State of Maharashtra*,\(^5\) the Supreme Court has taken serious view of non-disclosure of grounds of arrest. At least, one of the relatives of the accused is to be informed so that he can get in touch with him and be informed about the arrest. The purpose is to provide the immediate legal aid to the arrestee as per Art 39 A. Though, the courts are not supposed to interfere in the investigation, yet the courts cannot leave the citizens at the mercy of the police and security forces if they happen to cross the legal limits. The High Court can use inherent powers u/s 482 of the CrPC in the interest of justice. In case *Vinod Kumar Sethi v. State of Punjab*,\(^6\), the High Court laid down some guidelines for the exercise of inherent powers.

There should be proper checks and balances on the police on its powers to make arrest


\(^3\) The National Police Commission, 1977-80, 3\(^{rd}\) Report p. 91

\(^4\) AIR Cr. L.J. 1994 1981 (S.C.C.)

\(^5\) AIR 1983 SC 378

\(^6\) AIR 1982 P&H 372
of a person. The violation of human rights of an accused person can be prevented if the prescribed procedural safeguards are scrupulously followed by the police and the Magistrates at the initial stage of the criminal proceedings. The ruthless powers of the police of making arrest in cognizable offences can be contained to a great extent if the arrested person is produced before the Magistrate forthwith as is required in the Constitution and Code. It is the obligation of the state to provide adequate legal service to the poor so that they should not suffer because of poverty. National Human Rights Commission and State Human Rights Commission should also play effective role in this regard.

The idea that every individual possesses certain inherent rights to be exercised “equally with others”, developed in the course of freedom struggle. It may indeed said that the freedom movement in India was predominantly a struggle for rights to equality, freedom and justice; which were denied to the Indian people in colonial subjectivity. The long struggle for equal rights against colonial rule was marked by slow and piecemeal reforms by the rulers. A tiny section of propertied and affluent was given limited political right i.e. voting and sitting in governing bodies. In general, all Indians were put to demeaning restrictions. Thus struggle against colonial rule forms the context in which the language of the rights was developed. Thus the idea of equality of freedom as primary condition of deprived human existence was the moving force behind the freedom struggle. It led to the setting up of Constituent Assembly. The Assembly framed the Constitution of India which became the source of sovereignty of the people of independent nation. The rights which were hitherto denied by the colonial rule become the Basic and Fundamental Rights of the people. The year 1857 saw the Indians losing their first war of Independence. The colonial people ruled over India as the representative of British Crown. The Indians were deprived of their human rights as there was already inequality among people because of caste and economic inequalities. Resistance against colonial rule was articulated in the form of demands for rights denied to them. Thus, a range of rights including right to freedom of press, greater opportunity in senior govt. jobs, security of land tenure, rights of the working class etc. were demanded.

Karachi Session of Congress in 1930 adopted the Fundamental Rights Resolution which became the guiding spirit in the formulation of Fundamental Rights in the Constitution of India. The resolution demanded a full franchise for all Indian men and women including education and development for all and social and economic justice for individual and groups.


Human Rights in India, Indira Gandhi Open University, Block-III, Indian Constitution and Human Rights, 2000, p. 5
In the manifesto prior to elections in 1945-46, the Congress envisaged a free, democratic and federal state with the Fundamental Rights and liberties of all its citizens granted in the constitution.

The demand for framing a Constitution for India was really an assertion of self-determination. The Constitution was seen as the source of sovereignty and the rights of the people of India. The Britain does not have a written Constitution. But the Irish Constitution had a list of Fundamental Rights. The ideas that the Constitution was the source of people's right and self determination of nation merged in the context of freedom struggle. The first effort to draft Constitution was made in 1928, when all parties’ conference met in Delhi and appointed a committee under the chairmanship of Sh. Motilal Nehru to draft a Constitution of India. The Nehru committee recommended a set of Fundamental Rights which was not accepted by the Govt. Simon Commission did not favour the grant of any such right. In May 1934, a section of Indian National Congress demanded a Constituent Assembly containing representatives of all sections of the Indian people. Govt. of India Act 1935 was the result of Round Table Conference, of course, which did not meet the demands of rights for the Indian people. The Congress rejected the India Act of 1935. Congress agitated that the framing of Indian Constitution would be primarily the responsibility of Indian themselves. The Cabinet Mission visited India in March 1946 and offered the opportunity to Indians to make a Constituent Assembly for that purpose. The Constituent Assembly in an objective resolution resolved to constitute India into a sovereign republic. The sovereignty of the constitution would be derived from the people, who would secure justice, equality and freedom.

The freedom movement in India was pre-dominating a struggle for the rights to equality, freedom and justice which were denied to the Indian people in Colonial subjectivity. In this context, the framing of Fundamental Rights was a significant exercise. The rights embodied the aspirations of the people and also the democratic ideals which the Constituent Assembly set itself in the Objective Resolution. The Objective Resolution was moved by Pt. Nehru in the Constituent Assembly on Dec 13, 1946 and promised to all citizens of India justice, equality and freedom. The Advisory Committee to which the Fundamental Rights Sub-committee reported took into account both the final report of the Fundamental Rights Sub-committee as well as the minority rights sub-committee. Existing procedures were also taken into consideration. The Constituent Committee consulted and took into account the Fundamental Rights those have been guaranteed in several democratic countries of the world i.e. USA, Ireland, Australia etc. Regarding the form and substance of Fundamental Rights, the dilemma was resolved by the Constituent Assembly in favour of working the rights
positively and giving the judiciary the role of an independent protector of the rights of the people. The rights which came into be incorporated were divided into two parts i.e. justifiable rights which were adopted as Fundamental Rights and non-justifiable rights which were adopted as Democratic Principles of State Policy. The chairperson of the Drafting Committee, Dr. B.R. Ambedkar was well known for his passion for social and economic equality and there was an almost total agreement on the rights to equality in the Constituent Assembly.

Though the concept of human rights is of recent, post Second World War origin, yet India’s traditional heritage as a possible source of inspiration is a witness to human rights perspective. We must go back to the Indian traditions and identify those elements that essentially constitute certain features of a human right perspective like humanism, concern for lower social groups, respect for their emancipation, an acceptance of their rights to protest, compensation, non-violence etc., which register an abundance presence. Though, there was discrimination on the basis of caste and religion but we have to see the Indian traditions as a huge ocean of elements, beliefs, attitude and structure of various kinds. This complexity of Indian’s cultural heritage has made it possible for both positive and negative traditions to co-exist. Some of the features of our traditions pertaining to tolerance respect for plurality and upliftment of the lower sections of society etc can be considered the forerunner of the modern day human rights perspective. An analysis of the totality of Indian society today has to account for variety of transitions taking place resulting in basic change in social values.

Two statements in Rig Veda i.e. truth is one, wise men interpret it differently and “let noble thoughts come from everywhere”, contained vital clues to any enquiry into the nature of truth and justice to be pursued by everyone. Any human rights activist would do well to begin his enquiry into the nature of the truth and justice to be pursued by everyone. Any human right activist would do well to begin his enquiry from these twin concerns laid down in Rig Veda. In order to give justice to the lower castes, we will have to turn to Buddhist and Jain texts and sources. Buddhism forms an important part of non-Brahmanism or non-Sanskritic traditions that stood up for the down-trodden in the society. Buddha rejected the caste system for it was based upon inequality and treatment of some individuals and morally superior purely on ground of birth. Buddha himself gave up all luxuries and comforts in search of remedies for all human suffering on this earth. The basic tenets of Buddhism are non-violence, non-hatred and friendliness to all. Emperor Ashoka adopted non-violence and

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9 Id. p. 20.
humanistic philosophy of Buddhism. One of the most significant contributions of Buddhism was the introduction and spread of secular education for all. Nirvana could be attained by any in this world and for this; he should follow the right conduct. He came out strongly against animal sacrifice.

Jainism constituted another parallel non-sanskritic tradition that carry forwarded this compassion for all human beings. It advocated the existence of right of not only of the downtrodden but also for plants & animals. Every creature has a life and they are all similar in their sensitivity to pain and pleasure. Jainism defined “sin” as a violence and encroachment on the rights of life. Jainism extended this right to all individuals, animals and all living species.

Lekakayta School of thought founded by Charrak demanded categorically Karma, Punrakarma and Mokshaand Varna System. There cannot be any distinction on the basis of caste and varna. Real moksha lies in freedom.

Ashoka adopted non-violence in practical life. He gave up war. The tradition of tolerance continued to flourish in medieval times as well. Akbar was notable in extending a symmetrical treatment to the population without making any discrimination on the grounds of religion and he stood firmly for religious tolerance. He extended freedom to all religions and abolished Jajiya. Bhakti and Sufi tradition gave a new look to the religious approach to people. The teachers like Kabir, Guru Nanak etc. practiced and taught tolerance. The spirit of mutual understanding, tolerance and cooperation were to a large extent prompted by the rise and spread of Sufi and Bhakti ideas. Kabir gave utmost importance to human equality on caste, religion and wealth. Guru Nanak was exclaimed as “Guru Nanak is a royal Pauper.” He is Guru to Hindus and Pir to Muslims. In modern India Raja Ram Mohan Roy, Bankim Chander Chatter ji, Ishwar Chander, Vidya Sagar, Swami Vivekananda, Justice Ranade, Tilak and J. Phule played an important role of equality and brotherhood. Sir Syed Ahmed and Maulana Abdul Kalam Azad were highly secular. Gandhi Ji, Vaiko movement, Dr. B.R. Ambedkar and M.N. Roy did the maximum for Dalit emancipation.

3.2 TERRORISM AND HUMAN RIGHTS

Human Rights flourish in a climate of peace. The relationship of human rights and terrorism is a vexed one. Lexicon meaning of the term, “human rights” is; claims asserted or those which should be or sometimes stated to be those which are legally recognized and protected to secure for each individual the fullest and freest development or personality and

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spiritual, moral and other independence.

The protection of Human Rights Act, 1993 defines Human Rights as: the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by the courts in India. This is as per sec 2(d) of the Act.\textsuperscript{11}

3.2.1 INTERNATIONAL SCENARIO

There is growing consciousness in the international community of the negative effects of terrorism and the enjoyment of the human rights, fundamental freedoms, establishment of rule of law and democratic freedoms as enshrined in UN Charter and International Covenants on Human Rights. General Assembly meetings of 168 countries in October 2001 assailed the terrorism in specific words. This is a direct threat to the mankind. It is not only the direct killings but its impact on the common man creates an atmosphere of extreme terror. Hence, respect for human rights; fundamental freedoms and he rule of law are essential tools in the efforts to combat terrorism.

On 28\textsuperscript{th} September, 2001, the Security Council adopted resolution 1373, under which the obligating states to implement more effective counter-terrorism measures at the national level and to increase International cooperation in the struggle against terrorism. The resolution created the Counter-Terrorism Committee (CTC) to monitor action on this issue and to receive reports from states on measures taken. It was emphasized that the only strategy to isolate and defeat terrorism is by respecting human rights, hastening social justice, enhancing democracy and upholding the primacy of the rule of the law.

In resolution 1456 of 2003, the Security Council declared that states must ensure that any measure taken to combat terrorism comply with all their obligations under International law, and should adopt such measures in accordance with International Law, in particular International Human Rights, Refugee and Humanitarian Law\textsuperscript{12}. Human rights law has sought to strike a fair balance between legitimate national securities concerns and the protection of fundamental freedoms. High Commissioner of Human Rights has been asked to advise, guide and monitor the states regarding human rights. This office also implements the findings of the Secretary General’s policy working groups on terrorism, in particular the sub group on human rights and terrorism. Even Justice Krishna Iyer warned that the criminal Justice System should not be subverted in the name of protection of human rights and fundamental

\textsuperscript{11} Singh, Kavita; Human Rights and Anti-terrorism Laws in India, Central Law Publications, 2010 pp. 160-161
\textsuperscript{12} Id p. 162
freedom.\textsuperscript{13}

\textbf{Amnesty International}- According to the Amnesty International report, there was increasing concern at the erosion of human rights protection in the context of anti-terrorism measures against armed political groups\textsuperscript{14}. Religious minorities, women, children, dalits and adivasis are highly vulnerable. Terror remained high in Gujarat aftermath of widespread communal violence in 2002. Malimath Committee report on reforms of criminal justice system suggested hard measures to curb the terrorism.

\section*{3.2.2 TERRORISM AND NATIONAL SCENARIO}

\textbf{Terrorism and Specific Rights}

1. \textbf{Right to life}: The right to life is protected by Article 6 of the ICCPR Covenant and is one of the non-derivable rights mentioned in Article 4\textsuperscript{15}. The number of persons killed by the security forces and also by the terrorists is a matter of concern. In case \textit{Suarez de Guerrero v. Columbia},\textsuperscript{16} the Human Rights Committee examined a case in which the police killed the alleged victim and six other persons during a raid because they were suspected of kidnapping a former ambassador. The committee came to conclusion that it is a clear cut case of human right violation as the security forces had no right to take life.

The concept of right to life and personal liberty enshrined under Art 21 of Indian Constitution is a Fundamental Right and is very wide in scope and applicability. The existence of Fundamental Right to life and liberty is one thing but the extent of the obligation of the state to protect the life and liberty is slightly different matter. The balance, therefore, is to be struck between obligation of the state to protect life in the light of sources available as also the practical problems and difficulties faced in day to day administration of the state. In \textit{Maneka Gandhi Case}, SC held that procedure contemplated in Art 21 of the Constitution is a right, just and fair procedure and not an arbitrary and oppressive procedure. In \textit{Kartar Singh v. State of Punjab}\textsuperscript{17} the validity of TADA 1987 was tested in the light of Art 21 of the constitution. The court reaffirmed that Art 21 asserts a basic human right to life and liberty. It is the state which is prevented from taking away this right except in accordance with into the procedure established by law. The Apex Court has referred to

\textsuperscript{13} Id p. 164
\textsuperscript{14} Id p. 165
\textsuperscript{15} Id pp. 184-189
\textsuperscript{16} case no. 45/1979, views adopted on 31\textsuperscript{st} March, 1982
\textsuperscript{17} (1994) Cr.L.J. 3139
classic judgement of Field, J on the meaning of life in Munn v. Illinois\textsuperscript{18}

“Life is something more than mere animal existence and the inhibition against the
deprivation of life extends to all those limbs and faculties in which life is enjoyed. The
provision equally prohibits the mutilation of body or amputation of an arm or leg or the
pulling out an eye or the destruction of any other organ of the body through which the soul
communicates with the other world. By the term liberty as used in the provision, something
more is meant than mere freedom, physical restraint or the bounds of person. Art. 21 has
come to the rescue of all persons whether undergoing punishment in jail or under trial and
the criminal justice has taken the protection umbrella of Art. 14, 19 & 21”

Prohibition of Torture or cruel, inhuman or degrading treatment

The right to freedom from torture and from cruel, inhuman or degrading treatment is
under both the universal and regional systems\textsuperscript{19}. In UN, Art 7 of the convention on Torture,
the Human Right committee underlined the non-degradable nature of the provision. Even in
case of emergency, no degradation from Art 7 is allowed and its provisions must remain in
force. The Supreme Court in D.K. Basu v. State of West Bengal\textsuperscript{20} gave detailed guidelines
regarding the arrest of suspected persons. In this case, it was held that a suspect could not be
tortured even if there is a prospect of the crime going unpunished.

There are certain other rights as follows

1. Conditions of detention
2. Pre-trial and administrative detention
3. Right to fair trial
4. Right to appeal
5. Principle of legality (nullumcrimennulla paean sine lege)
6. Access to counsel
7. Freedom of thought, conscience and belief.
8. Right to political participation and freedom of expression, opinion and assembly
10. Freedom from discriminations.
11. Treatment of non-nationals (including any asylum, expulsion and non refoulement)

Human Rights Commissions – Under the Protection of Human Rights Act 1993,
NHRC and SHRCs have been setup but their recommendations are not being implemented in

\textsuperscript{18} (1876) 94 US 113
\textsuperscript{19} Id p. 190
\textsuperscript{20} AIR 1997 SC 610
Toto. Certain amendments have been made in Protection of Human Rights Act in 2006 to make it more effective qua implementation of human rights. NHRC has given guidelines in case of death in encounter with the police or death in police custody. NHRC has also issued guidelines on pre-arrest, arrest and post-arrest of persons.

Members of the security forces continued to enjoy virtual impunity for human rights violations like in Punjab, J &K and Gujarat. Therefore, SC asked the NHRC to examine the 2097 people’s dead bodies cremated illegally by Amritsar Police. The cremation took place following widespread disappearances in police custody and possibly extra judicial execution in the mid1990s. The allegations were against the Special Operation Group (SOG). The action was taken against the defaulting officials. Similarly, Chief Security J & K was asked by NHRC to look into the disappearances in the State. At the same time, killings by the terrorists groups continued in J & K, A.P., Chhattisgarh and Jharkhand. Also, the death penalties were given by the courts in rarest of rare cases. Human Rights organizations were in favour of abolition of the death penalty. However, it is a matter of satisfaction that there was a fair balance between human rights concerns, fundamental freedoms and National Security concerns. However, it is alleged that TADA, POTA and other strong measures adopted to curb terrorism were misused by the states especially Punjab and Gujarat and Naxal hit states.

3.2.3 TERRORISM AND HUMAN RIGHTS: JUDICIAL APPROACH

Art. 20 provides various rights to the citizens, which cannot be taken away as such; no one can be punished unless proved guilty by the law, no one can be detained in the prison for longer period than he or she is sentenced, no one can be forced to be witness against himself/herself, no one can be punished twice for the same offence and no prisoner should be subjected to inhuman treatment. The prisoner in jail is authorized of basic human rights. Justice Krishna Iyre in Sunil Batra’s case has categorically observed, “in our constitutional order, it is axiomatic that the proven laws do not swallow the Fundamental Rights of the internee and as sentinels on the qui vive courts will accord freedom behind bars tampered of course by environmental realism”.

Intolerance of Torture by Executive Echelons: The Supreme Court has taken very serious notice of human rights violations in criminal justice system in Hussainara Khatoon v. State of Bihar case. There was clear cut violation of Art. 21. The court immediately gave direction to release all the women and children who were brought for protective custody as witnesses or

22 AIR 1979 SC 1369
who have served their sentence. The Judiciary was directed to grant bails to those who had been rottoning in jails without trial for number of years. Supreme Court gave direction to improve the conditions of lock ups & jails.

Human Rights and basic freedom are enforced through independent judicial process. In fact, the right to seek constitutional remedies against violations of guaranteed rights is itself a Fundamental Right under Art 32 of the Constitution of India. The higher judiciary has done yeomen’s service in upholding the human rights. Nevertheless, one may argue from the perspective of contemporary experience that a legal culture conducive to democracy, human rights and rule of law is yet to develop in some section of the police, the bureaucracy and political leadership.

Terrorism is allowing intensity warfare and it imposed new structural challenges on law enforcement agencies. The criminal justice administration has its main objectives i.e. the adjudication of the cases relating to crimes i.e. offences punishable by law, punishment of the offenders and prevention of such offences and the protection of the people from the onslaught of such crimes and offences. Rights relating to life, liberty, equality and dignity of individual have been guaranteed by the Constitution and these are judicially enforceable rights in categorical terms and there provision have over the years been expanded by the SC/HCs with spectacular amplitude and magnitude. The human rights mentioned in UDHR, 1948, ICCPR, 1686 and ICESC, 1966 get the legal mandate of the protection of Human Rights Act, 1993 and they are enforceable by Courts in India. One can got to SC/HC under Art. 32 & 226 to get these enforced through public interest litigation. Dr. B.R. Ambedkar has remarked that Art. 32 is the soul of the constitution as it is the gate way to freedom and upholding the dignity of the individual.

To uphold the rule of law, judiciary has played an important role in the enforcement of anti-terrorist laws in India. Indian judiciary led by Supreme Court has exhibited the judicial activism in recognizing and enforcing these laws. Though judicial activism in preserving and promoting human right is not restricted to public interest litigation cases alone but it also includes landmark judgements in case of routine crime and criminal nature.

The original view of the court in A.K. Gopalan v. State of Madras was that expression personal liberty means only liberty relating to or concerning the person or a body of the individual. This was a restricted interpretation of Art 21 and has not been followed by

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23 Dogra, S.K; The study of terrorism and Anti-terrorism laws in India, 2003, P 139
24 AIR 1950 SC 27
the courts in later decisions. The Supreme Court in cases *Maneka Gandhi v. UOI*\(^{25}\) and *Kharak Singh v. State of U.P.*\(^{26}\) held that the personal liberty is not limited to bodily restraint alone, it has widest amplitude under Art. 21 and covers a variety of rights. In case *Kasturi Lal v. State of J&K*\(^{27}\), *Justice P N Bhagwati* stated that the concept of reasonableness pervades the entire Constitutional scheme and it was like a golden thread through the entire fabric of Fundamental Rights.\(^{28}\)

The SC has taken a stern view of the violation of human rights of the prisoner in various prisons. Art. 10 of the ICCPA enjoins upon the State parties to provide certain safeguards to the prisoners in respect of inherent dignity of the human person. It has been held that the Fundamental Rights guaranteed under Art 14 & 21 of the Constitution are available even to non-citizens and not merely to citizens alone. This was held in case *NHRC v. State of Arunachal Pradesh*\(^{29}\). In case *Hussainara Khatoon v. Home Secretary Bihar*,\(^{30}\) the SC held that keeping witnesses under protective custody is illegal. Further, the procedural law must provide for speedy justice and the legal aid is a Fundamental Right. Even, keeping the under trial beyond the maximum limit of prison is violative. In case *M.H. Hoskot v. State of MHR*\(^{31}\), *Justice Krishna Iyer* declared that the copy of judgement should be supplied in time to the convict to file the appeal in time. The court has held that a prisoner entitled to all his Fundamental Rights except those outlined as a nature of imprisonment. This was held in case *Sunil Batra v. Delhi Administration*\(^{32}\). In case *Prem Shankar Shukla v. Delhi Administration*\(^{33}\), the court said that the under-trial could not be handcuffed routinely during his transit as the hand-cuffing is prima facie in human, unreasonable and over harsh. In *Upendra Baxi v. State of UP*\(^{34}\), the court passed orders for the improvement of living conditions in a mental asylum in Agra. In *Sheela Barse v. State of MHR*\(^{35}\) the court laid down safeguards for those in custody by the police making it mandatory to inform the relative of the arrested person. In case *Nandini Satpathy v. P.N. Dani*\(^{36}\), *Justice V.K. Krishna Iyer* laid down guidelines to provide protection to an accused person in custody and taking that right against self-

\(^{25}\) AIR 1978 SC 597  
\(^{26}\) AIR 1963 SC 1295  
\(^{27}\) AIR 1980 SC 1992  
\(^{28}\) Sidhu, Harpreet Singh; *Judicial Activism and protection of Human Rights*, The Perspective, PPA Phillaur–2001 p. 10  
\(^{29}\) AIR 1996 SC 1234  
\(^{30}\) AIR 1979 SC 1369  
\(^{31}\) AIR 1980 SC 1348  
\(^{32}\) AIR 1978 SC 1348  
\(^{33}\) AIR 1980 SC 1579  
\(^{34}\) AIR 1980 SC 1335  
\(^{35}\) (1986) 4 SCC 106  
\(^{36}\) (1987) 2 SCC 612
incrimination extends not only to court proceedings but also to police interrogation.

Judicial activism extended to the interest of public at large. SC took upon the supervision of investigation of Hawala Case and 2G Spectrum case. Similarly, Patna High Court took up the supervision of investigation of CBI of “Fodder Scam” case. This is a mode of enforcing the public right to the rule of law and equality before law.

In case *Nilbati Behera v. State of Orissa*, the Supreme Court took a strong stand against custodial violence and negated the defence of sovereign immunity. The sovereign immunity cannot be given where the dead body under custody is found next day after arresting the previous day. In *Praful Kumar Sinha v. State of Bihar*, where the police violence had caused the death of three young men, the court issued the direction for the payment of ex-gratia amount to the relatives of the deceased person prejudice to their pursuing further action in the concerned courts.

Economic, social and cultural rights form an important part of human rights and have found a place of prominence in international instruments. The International Covenant on Social, Economic and Cultural Rights has enumerated many of their rights in Part III & Part IV of the constitution. Art 37 states that DPSPs shall not be enforceable through court but there are important part of the governance of the system. The directives include the right to adequate means of livelihood, equal pay for equal work for both men women, fair distribution of the material resources of the country, protection of child and adult labour, living wages for workers, right to work, free and compulsory education for children up to the age of fourteen etc. The question of relationship between DPSP and fundamental rights have been discussed in case, *Keshavananda Bharti v. State of Kerala*. The Court held that DPSPs are part of the constitutional law of the land and are fundamental in the governance of the country. In case of *Minerva Mills v. Union of India*, it was held that both DPSPs and fundamental Right are in fact equally fundamental and efforts should be made to harmonize them. In case *Vincent v. UOI*, the Supreme Court held that Art. 21 imposed a positive obligation on the state to take steps to ensure an individual a good quality of life and dignity.

As long as means are not illegal, the court has made the right of livelihood a Fundamental Right. In case *Olga Tellis v. Bombay Municipal Corporation*, the court held that which alone makes it possible to live must be declared to be the integral component of

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37 AIR 1993 SC 1960  
38 AIR 1989 SC 677  
39 AIR 1973 SC 146  
40 AIR 1980 SC 1789  
41 AIR 1987 SC 990  
42 AIR 1986 SC 80
the right to live.

Under Sec 18 (3) of the Protection of Human Rights Act, 1993, the commission is empowered to award immediate interim relief for the violation of human rights. The SC has relied on Art. 32 with Article 142 to make such orders as may be necessary for doing complete justice in any course or matter before it.

Earlier in our society, we had kept the interests of society a head of interests of individuals. We generally make reference to the maxims “Interest Republican Supreme Lex”, “Salus Populi SpremeLex,” which means that the interest of the state and welfare of the people are the supreme laws and Roman maxim, “Necessitus Publica Major Est Qualm Private” meaning that the necessity of the people in general shall prevail over private interest.

We have adopted adversarial system of criminal justice system where the judge is passive and acts as a referee only. The judge should act as active participant in the trial in order to discover the truth, so that unreasonable acquittals are warded off.43

In case of Tate v. short44, the American Supreme Court has held that paying some amounts to purchasing liberty is violative of equality clause. Whereas, in India, the person gets free after paying fine.

In case State of Gujarat v. High Court of Gujarat45, the SC has declined to treat the hard labour resulting from a sentence of rigorous imprisonment to be forced labour within the prohibition of Art. 23(1). The money should be paid to the nature of hard labour. Normally, the bails are rejected keeping in view the FIR and some statements under sec 161 CrPC, where the defence lawyer has no access to documents under sec 172 CrPC. This hits the liberty clause under Art 21. The Supreme Court has expanded the area of Public Interest litigation. The laws of locus standi and law of procedure have been dispensed with keeping in view the human rights of the Individual. In case Francis Ceralic Mullin v. U.T. Delhi46, the Supreme Court has expanded the right to life to include the right to food, clothing and shelter as also the right to live with dignity.

The Police leaders must understand the concept of human rights clearly and undergo a change in thinking style and functioning with the conviction that human right are irresistible, inconvertible, and undisputed and a technique for better governance. This is made out in case V.G. Rao v. State of Madras47. The court has awarded compensation to the person whose

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43 India Police Journal – April to June – 2004 P 19
44(1971) 401 US 395 28 L.Ed 2nd 130
45(1998) 7 SCC 392
46AIR 1981 SC 746
47AIR 1952 SC 196
rights have been violated as held in case *MC Mehta v. U.O.I.*\(^{48}\)

There is another aspect where the superior courts have taken tough stand against the accused persons involved in cases of terrorism. In case *Usman Bhai Dawood Bhai Menon and others v. State of Gujarat*,\(^{49}\) the Supreme Court held that bail rejected by the High Court in TADA case is correct as there is no other way to keep check on the persons involved in terrorism cases.

The courts have upheld the Constitutional validity of the Anti-terrorist Legislations.

In case *Kartar Singh v. State of Punjab*,\(^{50}\) the petitioner challenged the Constitutional validity of the special courts to try TADA cases. The Supreme Court upheld the constitutional validity of the special courts in the interest of general public and to check the nefarious activities of the terrorists.

In case *Sanjay Dutta v. State of MHR*,\(^{51}\) the petitioner a detainee in TADA case applied for bail and the SC took a strict view and of course, returned the case to designated court for construction as per the wishes of the legislature.

In case *State of MHR v. Som Nath Thapa*,\(^{52}\) Thapa was additional collector, customs at sea port Mumbai, five quintals of explosives were permitted to be smuggled by him which was used in 1993 blasts in Mumbai. He was challenged under conspiracy and the charges were framed by the designated court, which were upheld by the Supreme Court. Ultimately, he was convicted.

In case *State of Punjab v. Gian Singh*,\(^{53}\) the main accused Gian Singh was sentenced to death by the special judge in infamous case of assassination of Sant Harchand Singh Longowal. The SC reduced the punishment to life imprisonment keeping in view the 13 years long period of trial and languishing in jail.

In case *Simranjit Singh Mann v. UOI*,\(^{54}\) the former IPS Officer questioned the validity of POTA-2002, that it infringes the basic rights of the people enshrined under Art. 21. He also challenged some of the provisions of POTA, 2002. The SC rejected the contention of the petitioner with a view that sovereignty and integrity of the nation has to be preserved. Liberty does not mean licence to create terror and resort to killings.

Thus, it is seen that the courts have taken a balanced view with scale setting towards

\(^{48}(1987) ISCC 395\)

\(^{49}\) AIR 1988 SC 922

\(^{50}\) Singh, Kavita; *Human Rights and Anti-terrorism Laws in India*, Central Law Publications, 2010 p. 569

\(^{51}\) AIR 1995 SC W 3893

\(^{52}\) (1996) CrLJ 2448

\(^{53}\) AIR 1999 SC 3450

\(^{54}\) (2002) CrLJ 3368
upholding the human rights. It is high time that the security forces should keep in mind the genesis of human rights in mind, while dealing any situation.

It has been seen that the Judiciary has done well and won laurels in protecting the human rights. Judiciary has certain problems like the number of judges is very small as compared to other countries. The pendency of cases is worrying the nation. Under these circumstances, Justice delayed is justice denied. However, Judiciary has always balanced the rights of the individuals as the terrorists have been rebuffed and the rights of the innocent persons protected. Judiciary has always taken tough stand against the terrorists who act against the sovereignty and integrity of the country. It is high time that the legislature should play their part and frame laws which should be in the best interest of the country. The security forces should be warned to keep up the human rights of the citizens at all levels. We should act in a manner that all the three wings of the govt. play their part in the best possible manner so that judiciary may not have to play an over reactive role to preserve the human rights.

3.3 PREVENTION OF TERRORISM THROUGH LAW

The government took the national measures to curb the terrorism as follows:

i. Ratification of International Conventions
ii. Extradition and Prosecution
iii. Implementation of Bilateral Treaties
iv. Mutual Cooperation
v. Effective Anti-Terrorist Legislations

The measures to combat terrorism can be classified into two parts.

1. International legal Principles
2. National legal principles

3.3.1 INTERNATIONAL LEGAL PRINCIPLES

India has ratified some of the International Conventions relating to terrorism and implemented the International norms by bringing in Acts, Statutes and Ordinances to deal with the problem\textsuperscript{55}. Since, the normal law cannot meet the ordinary situations created by the terrorists, hence special laws have been framed to meet the abnormal situations.

The General Assembly of the United Nations has adopted various resolutions on prevention of terrorism under its Resolution No. A I 56/164

\textsuperscript{55} Singh, Kavita; \textit{Human Rights and Anti-terrorism Laws in India}, Central Law Publications, 2010 pp. 91-95
I. It has expressed its alarm that act of terrorism in its form and manifestation aimed at the destruction of human rights have continued despite national and international efforts.

II. It bore in mind that the external and most basic human rights is the right to life.

III. It also bore in mind that terrorism creates an environment that destroys the right of people to live in freedom from fear.

IV. It expressed serious concern about the gross violation of human rights perpetrated by terrorists groups, adding that such acts cannot be justified under any circumstances.

V. It emphasized the importance of member states taking appropriate steps to deny safe heavens to those who plan, finance or commit terrorist acts by assuring their apprehension and prosecution or extradition.

VI. It reiterated its unequivocal condemnation of the acts, methods and practices of terrorism, in all its forms and manifestations, as activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening the territorial integrity of states, destabilizing legitimately constituted Govt, undermining plurality, civil society and having adverse consequences for the economic and social development of states.

VII. It condemned the incitement of ethnic hatred, violence and terrorism.

VIII. It called upon states to take all necessary and effective measures in accordance with the relevant provisions of International law, including international human rights standards to prevent, combat and eliminate terrorism in all its forms and manifestations wherever and whenever committed and

IX. It urged the International community to enhance the cooperation at regional and international levels in the fight against international terrorism, in accordance with international instruments, including those relating to human rights, with the aim of its eradication.

A. General Assembly Adhoc Counter-terrorism Committee under the Security Council.

By the draft resolution on “Measures to eliminate international terrorism”, the General Assembly reiterated its call upon all states to adopt further measures to strengthen international cooperation in combating terrorism and to remind them of their obligations to ensure that perpetrators were brought to justice. The Adhoc committee on Terrorism was
asked to report to the General Assembly at its Current Session in the event of completion of the draft comprehensive convention on International terrorism. The Adhoc committee would also arrange high level conference on terrorism under U.N. auspices. The Ad-hoc committee has negotiated the texts of three treaties on Terrorism i.e. the International Convention for the Suppression of Terrorist Bombings, the International convention for the Suppression of the Financing of Terrorism, and the International Convention for the Suppression of Act of Nuclear Terrorism.

B. Highlights of Draft Resolution on International Terrorism

By the draft resolution on “Measures to Eliminate International Terrorism”, the Assembly would call on all states and International Organization to implement the UN Global “Counter Terrorism Strategy” of Sept 8, 2006 without delay. The terrorism prevention branch of the UN office on Drugs and Crime in Vienna would be asked to enhance the capabilities of prevention of terrorism. Also, the Assembly would call all the states to refrain from financing, training, helping and encouraging the terrorist activities and to ensure the perpetrators to be brought to justice.

C. Action on Text

The list issued of terrorist organizations was objected by many countries like Syria, Iran, Qatar etc. The list should have been printed in all the languages and in advance so that member states should come prepared. The observance of voluntary code of ethics to fight terrorism was emphasized.

D. Action on Committee’s 2007 Work Programmes

The committee approved the draft resolution on its provisional programmes of work for the Assembly’s sixty second session entitled “Revitalization of the work of the General Assembly” without vote. The committee emphasized to eliminate international terrorism and diplomatic protection. Other topics include the rule of law at the national and international level, report of the International Law Commission and administration of Justice at the UN.

League of Nations

Terrorism has been on the International agenda since 1934, when draft convention for the prevention and punishment was held. The convention was eventually adopted in 1937 but it never came into force.

United Nations Charter, 1945

The problem of international terrorism in general has been under consideration of
General Assembly since 1972. On September 23, 1972, the Assembly recorded the following item to be included in the agenda before the sixth committee “A measure to prevent International Terrorism, which endangers, takes innocent human lives or jeopardizes fundamental freedoms, Study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievances, and despair and which cause some people to sacrifice human lives, in an attempt to effect radical changes.”

On the recommendation of the General Assembly, on Dec 8 1972, it was decided to establish an Adhoc committee on International Terrorism of 35 countries. The committee held its first session in 1973 without achieving any positive results. Again in 1976, G.A. invited the adhoc committee to work in accordance with the mandate originally entrusted to it. The Adhoc committee submitted reports in 1977, 1979 but no progress was made. Adhoc committee restarted the work in 2002 and worked to some extent on definition, the activities of the armed forces and the seeking of international cooperation to combat terrorism.

The role to observe human rights & rule of law by the Universal Declaration of Human Right 1948 and International Convention on Civil and Political Rights, 1966 is highly commendable and noteworthy.

**United Nations and Regional Conventions on Terrorism**

A. Convention on Offences and Certain other Acts Committed on Board Aircraft, Tokyo, 1963
B. Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention), 1970
D. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents (New York), 1973
F. International Convention on the Physical Protection of Nuclear Material, known as Nuclear Material Convention, Vienna, 1980

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56Id pp.100-114

The convention held at Montreal (Canada) was against the use of unmarked and undetectable plastic explosives by the terrorists.

M. International Convention for the suppression of funding of Terrorism, 1999.
N. The chemical weapons convention Act, 2002
O. International Law Commission, 1954
P. The European convention on the Combating of Terrorism.
Q. Bonn Declaration concerning Air Piracy, 1977
R. The SAARC Regional Convention on Suppression of Terrorism.

Despite all the convention against terrorism, it is to be noted that these convention have not been able to suppress the act of terrorism as these convention have not been ratified by some of the countries. Until and unless, all the states adhere to these conventions, no fruitful results can be achieved.

**UN Conference on Measures to eliminate International Terrorism:**

According to resolution 46/51 of Dec 9, 1991 and its decision 48/411 of Dec 9, 1993; UN General Assembly passed resolution 49/60 dated Dec 9, 1994 for the elimination of International terrorism. UN asked the secretary General to inform all the states about resolution and to take adequate steps for the elimination of terrorism. UN General Assembly was determined to eliminate international terrorism in all its forms and manifestation and those responsible for acts of terrorism must be brought to justice. UN stressed the need of overall cooperation of different states and their people. UN stressed the need of public awareness of the problem. All earlier treaties in this respect have also be reiterated, the resolution has been adopted in four chapters.

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Resolution\textsuperscript{58}-The U.N. Security Council adopted anti-terrorism resolution after terrorist attack in America i.e. resolution 1368 (2001). This resolution no 1373 was passed vide dated Sept 28, 2001. Security Council adopted that UN was determined to combat by all means threats to International peace and security caused by terrorist acts. It condemned in unequivocal terms the terrorist’s attack of 9/11, 2001 in New York, Washington and Pennsylvania. It declared that acts, methods and practices of terrorism are contrary to the purposes and principles of UN and those knowingly financing, planning and inciting terrorist acts are also contrary to the purpose. The same resolution was reiterated by the Security Council at its 4413\textsuperscript{rd} meeting on 12\textsuperscript{th} November, 2001. Security Council declared that acts of international terrorism constituted a challenge to all states and to all of humanity. It called all states to intensify their efforts to eliminate the scourge of international terrorism. Security Council adopted Resolution 1378 (2001) at its 4415\textsuperscript{th} meeting dated 14\textsuperscript{th} November 2001. It condemned the Taliban for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaida network and of the terror groups. UN Security Council adopted Resolution 1383 (2001) at its 4434\textsuperscript{th} meeting dated Dec 6, 2001. It reaffirmed its strong commitment to the sovereignty, independence, territorial integrity, national unity of Afghanistan. It decided to remain actively seized of the matter. UN Security Council adopted resolution No. 1386 (2001) at its 4443\textsuperscript{rd} meeting, Dec 6, 2001. It reaffirmed the earlier resolution on Afghanistan. It adopted resolution no. 1388 at its 4449\textsuperscript{th} meeting dated 15-01-2012. Also it adopted Resolution 1390 at is 4452\textsuperscript{nd} meeting dated 16-01-2012. It reiterated its previous resolution on Afghanistan. It reiterated the support for international efforts to root out terrorism in accordance with the charter of the United Nations. It reiterated that acts of international terrorism constitute a threat to international peace and security.

U.N. convened the International Convention in Geneva in Nov, 1973 to combat terrorism. It adopted two conventions: the Convention for the Prevention and Punishment of Terrorism and the Convention for Creation of an International Criminal Court. The first convention was ratified in 1981 by India only. UNO concluded some Conventions for combating terrorism.

1. **Air Craft Hijacking:** International Civil Aviation Organization (ICAO) adopted three conventions.

a. The Convention on offences and certain other Acts committed on the Board of Aircraft at Tokyo (the Tokyo Convention-1963)

\textsuperscript{58} Id pp. 202-215
c. The Convention for the suppression of Unlawful Acts Against the safety of Civil Aviation (The Montreal Convention 1971)

II. Acts against Internationally Protected Persons, 1974 – The purpose of the Convention was to render punishment of the crime committed against persons entitled to special protection.

III. Taking of Hostages- The main object was to take effective measures for prevention, prosecution and punishment of all acts of taking hostages and manifestation of International terrorism.

IV. Convention to Ensure Safety and Security of the UN and Associated Personnel, 1994 – The purpose was to give the legal status to U.N. Operations and personnel

V. Convention for the Suppression of Terrorist Bombings-1997- The aim of this convention was to prevent the activities of the terrorists in respect of use of bombs, explosives, detonators and other related lethal devices.

VI. Convention for the Suppression of the Financing of Terrorism, 1999 – The purpose of this convention is to suppress the funds utilized by the terrorists.

The SAARC Convention of Suppression of Terrorism Act, 1993

This convention was held in Kathmandu (Nepal) in November 1987 for the suppression of terrorism in SAARC countries. India signed the convention on 4th Nov, 1987 in Kathmandu. The provision of Article I to VIII of the convention will have the force of law in India. As per sec 4, the offence of the hostage taking shall attract the punishment of imprisonment up to 10 years & fine. The provision of extradition has been made simpler& offence specified in Art. I will not be treated as an offence of political character for extradition purposes. Offences specified in Art I will be considered committed in India even if committed anywhere outside by a non-Indian. The sanction for prosecution will be enough that is given by the Central Government as in Sec 188 of the CrPC, 1973.

Article-I: The following offences will not be considered as offences of political character for extradition purposes

a) An offence within the scope of the Convention for the suppression of Unlawful Seizure of Aircraft, signed at Hague, on December 16, 1970.

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b) An offence within the scope of the Convention for the Suppression of Lawful Acts against the safety of Civil Aviation, signed at Montreal, on September 23, 1971.

c) An offence with the scope of Convention of the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, signed at New York on December 14, 1973.

d) An offence within the scope of any Convention to which the SAARC member states concerned are parties and which obligates the parties to prosecute or grant extradition.

e) Murder, manslaughter, assault causing bodily harm, kidnapping, hostage taking and offences relating to firearms, weapons, explosives and dangerous substances when used as a means to perpetuate indiscriminate violence involving death or serious bodily injury to persons or serious damage to property.

f) An attempt or conspiracy to commit an offence described in sub-paragraph (a) to (e) aiding, abetting or counselling the commission of such an offence or participating as an accomplice in the offence so described.

Article-II: For the purpose of extradition within SAARC countries, any two or more than two states can decide to include any serious offence involving violence, which will not be considered as political offence.

Article –III:
1. The provisions of all extradition treaties between two countries are amended to be compatible to this Convention.
2. Any offence mentioned in Art I and Art 2, even if it does not attract the provision of extradition, will be considered as extraditable compatible to this convention.
3. Contracting states undertake to include these offences as extraditable offence if any future extradition treaty to be concluded between them.
4. Any extradition treaty under this Convention can be made applicable to any other controlling state for the offences mentioned in Art I and Art II.
5. Contracting states which do not make extradition conditional on the existence of a treaty, shall review the offences set forth in Art I or agreed in terms of Art II as extraditable offences between themselves, subject to the law of the requested state.

Article- IV: The extradition procedure will be taken up on priority and quick so that prosecution may be considered without delay. The decision shall be made in the same manner as in the case of offence of a serious nature under the law of that state.
Article V: For the purpose of Art V, the contracting state may take such measures consistent with the national laws, subject to reciprocity.

Article VI: On the request from the contracting state for extradition, the incumbent state will take immediate steps as per National laws & shall notify all the measures taken to the requesting state.

Article VII: Contracting state may refuse to eradicate the person in its national interest but it will certainly extend due cooperation especially in preventing terroristic activities.

Article IX: The Convention shall be open for signatures in SAARC Secretariat in Kathmandu. The ratification by the state shall be deposited in the office of Secretary General.

Article X: The convention will be operative on the 15th day following the ratification.

Article XI: All the ratification and other informations shall be informed immediately to the member states by the office of SAARC Secretariat.

Terrorism in America is generally a matter of Federal Law. 18 US Code Sec 2331 defined International Terrorism -

1. The term International Terrorism means activities that (A) involve violent act or acts dangerous to human life that are a violation of the criminal laws of the United States or of any state, or that would be a criminal violation if committed within the jurisdiction of the United States or of any state. (B) Appear to be intended (i) to intimidate or coerce a civilian population: (ii) to influence the policy of a government by intimidation or coercion: or (iii) to affect the conduct of a government by assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States or transcend national boundaries in terms of the mean by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.


Title I – Habeas Corpus Reform
Title II - Justice for Victims
Title III – International Terrorism Prohibitions
Title IV – Terrorist and Criminal Alien Removal and exclusion
Title V – Nuclear, Biological and Chemical Weapons Restrictions Convention

60 Id pp. 589-593
Title VI – Implementation of Plastic Explosive Convention.
Title VII – Criminal Law modifications to counter Terrorism.
Title VIII- Assistance to law enforcement
Title IX- Miscellaneous

Treaties – Terrorism – Aviation and Hijacking
1. Convention on international civil aviation-Chicago, December 7, 1944
2. Convention on offences and certain other acts committed on board Aircrafts- Tokyo, Sept 14, 1963

Biological and Chemical Weapons
1. Protocol for the Prohibition of the Use in War of Asphyxiating Persons or other Gases, and of Bacteriological Methods of Warfare-Geneva, June 17, 1925.

Genocide and Human Rights

62 Id p.260
Maritime


Nuclear Material

2. Treaty on the Non-Proliferation of Nuclear weapons – Washington, London and Moscow, July 1, 1968

Terrorism

4. International Convention for the Suppression of the Financing of Terrorism It was adopted by General Assembly in Resolution no. 54/109 of 9th December, 1999

Torture:
Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment, New York – December 10, 1948

3.4 NATIONAL LEGAL PRINCIPLES- After attaining independence, India is constantly facing the terrorist violence in one form or other. India has lost over 3 lac people till now. In order to curb the terrorist violence India has promulgated the various laws/Acts

63 Id p. 280
and the prominent are as below:-
I. The Armed Forces Assam and Manipur (Special Powers) Act, 1958
III. The J & K Safety Act, 1978
IV. The National Security Act, 1980
V. The Assam Preventive Detention Act, 1980
VI. The Anti-Hijacking Act, 1982
VII. The Suppression of Unlawful Acts against Safety of Civil Aviation Act, 1982
VIII. The Armed Forces (Pb. & Chd.) Special Powers Act, 1983
IX. The Terrorists Affected Areas (Special Courts) Act, 1984
X. The Terrorist and Disruptive Activities (Prevention) Act, 1985 (TADA)
XI. The Terrorist and Disruptive Activities (Prevention) Act, 1987
XII. The Terrorist and Disruptive Activities (Prevention) Amendment Act, 1993
XIII. Prevention of Terrorist Act, 2002 (POTA)

Even the Law Commission recorded that enactment of special legislation against terrorism i.e. to arm the state to fight terrorism more effectively in the need of the hour. As per Administrative Reforms Commission II, USA has arrived with PATRIOT Act 2001 to fight terrorism and amended in March 2006 by integrating the Anti-Terrorism Act. The British Parliament has also passed a Terrorism Act in March 2006. Australian Anti-Terrorism Act, 2005 and Canadian Anti-Terrorism Act, 2001 are other such examples.

3.4.1 FOLLOWING ARE THE SALIENT FEATURES OF ANY TERROR LAW
1. These laws define terrorism and disruptive activity.
2. These laws criminalize terrorism and disruptive activity and other acts related thereto i.e. conspiracy, preparation, attempt abetment, advocacy, incitement or facilitation.
3. These laws contain stringent punishment, including prescription of minimum punishment for various crimes.
4. Modification of general rules i.e. admissibility of confession made before designated police officers and of evidence gathered through electronic interceptions etc, is there
5. Facilitation of investigative procedures through amended provisions of CrPC
6. Protection of witnesses by way of in-camera trials and keeping identity of witnesses secret.
7. Declaration of certain organizations as terrorists organizations by the Central Govt.\textsuperscript{64}

3.4.2 ANTI-TERRORISM LAWS IN INDIA

Terrorism is one of the most menacing problem of our time. A clear understanding of the phenomenon is of great importance for our country whose capacity to govern has shown a marked decline in the recent past. On account of different political dispositions, different perceptions of terrorism exist. In broad terms, terrorism could be described as a war of attribution by invisible armies. Essentially, it is low tech, low cost and high result route to worldwide audience. Dealing with terrorism in a liberal democracy is a great challenge and must stretch the imagination and patience of govt and people alike. There is no some singular, pristine course of action that is guaranteed to succeed and is mere difficult for the security forces when they have to cope with the twin challenges of controlling the violence and maintaining the rule of law even as they must manage a thousand other matters of state.\textsuperscript{65} Terrorism is not a recent phenomenon\textsuperscript{66}. Early examples include the assassination of Julius Caesar in 44 BC and since then, the terrorism has been in practice in some form or the other round the corners of the world. In 1937, a Convention for the Prevention and Punishment of Terrorism was concluded. As per Art I, the expression “act of terrorism” means criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons, a group of person or general public. This treaty never came into existence as it was ratified by only one country i.e. British India. UN came into existence in 1945 and since then has been highly active in addressing the problem involved. Now very few countries are secure from terrorism, rather it has become a world phenomenon. Terrorism has caused challenge to the security of the nations but even to world peace. The highest dignitaries include John. F. Kennedy of US, Olaf Palma of Sweden, Anwar Sadaaf of Egypt, Aldo Moro of Italy, Indira Gandhi and Rajiv Gandhi of India besides several others were assassinated because of terrorism violence. After demolition of World Trade Centre 9/11, 2001, where around 5000 people were killed and property worth about twenty billion dollars was damaged, prompted the Security Council to take an equivocal stand through a comprehensive resolution, “with steps and strategies to combat international terrorism” In Punjab and J&K, we have lost more than one lakh persons and this is due to the cross-border terrorism. It is not only the Punjab and J&K, but Delhi, UP, Maharashtra, A.P., Bihar,

\textsuperscript{64}NPA Criminal Law Review, SVNPA Hyderabad, 2006 p. 87

\textsuperscript{65}Bajpai, Kanti; \textit{Roots of Terrorism}, special issue, The Spectrum, the Tribune, Jan 5, 2003 p.2

\textsuperscript{66}Jagmohan; \textit{Terrorism-Causes and Cure\textsuperscript{\#}}, Civil and Military Law Journal, New Delhi, V 28 No.4, Oct-Dec 1992 p.328
Jharkhand, Tamilnadu, Orissa, West Bengal and North Eastern states have also suffered. Now Central India is in the grip of PWG & Maoists.67

Like many other things, the scheme of preventive detention has also been inherited from the colonial regime. The British had enacted the defence of India Rules (DIR) to curb the national movement by resorting to arbitrary arrest and torture. After Independence, the Union and States had passed the various Preventive legislations such as Preventive Detention Act 1950, Maintenance of Internal Security Act (MISA) 1971, National Security Act 1980 and TADA-1985 etc. TADA was allowed to lapse in 1995 but efforts were made to revive through Criminal Law Amendment Bill, 1995, on the recommendations of Law Commission’s 173rd report.

However, due to political opposition, human rights groups and for lack of an immediate provocation, the Bill could not be enacted. 9/11 US terrorist attack and the bomb blast attack in J & K Assembly which took over 38 lives provided the Govt. much needed provocation to come out with a stringent law to combat terrorism. Then law in the form of POTA came into effect with the President K.R. Narayanan signing the ordinance on October 25, 2001. A Law under POTA was passed by Parliament in 2002. However, the safeguards against such laws are given in Constitution Arts. 21&22. However, the national security is of paramount importance. Without safety & security of the nation, individual rights cannot be protected. Article 21, which guarantees a life with dignity to each individual, is a fundamental right and is non-derogable particularly when Supreme Court has been making a very liberal interpretation of it. Both national integrity as well as individual dignity are core values in the constitution. There, any such law if found necessary to be enacted must have a human face as indicated in the decision of the Supreme Court68

3.4.3 SOME OF THE EARLIER IMPORTANT LAWS ENACTED BY THE CENTRE AND STATE LEGISLATURES ARE LISTED AS BELOW

I. The Preventive Detention Act, 1950 (Act No. IV of 1950) - This Act came into force when the President assented on 25.02.1950. The object of this Act was to provide for detention with a view to preventing person from acting in a manner prejudicial to the defence of India, the relation of India with foreign powers, the security of India or a State, the

67Jaitley, Arun, let us not abdicate our responsibility – State of Insecurity – Seminar, The Hindu, April 20, 2008 p. 11
68Tahsheen-Uz-Zaman, M; Can law provide solution - Competition Wizard, Jan 2002, p.56
maintenance of public order or the maintenance of supplies and services essential to the community. Any DM or SDM or the commissioner of Police may if satisfied can exercise the powers conferred by this Act.

When an order is made, the state has to be informed of the grounds and necessity of the order passed. When an order is passed to detain a person, the detainee is immediately informed about the grounds, purpose and immediate necessity of the order. The detainee is provided the facility to make representation about the order of detention at the earliest. If the authority things that grounds of the facts of cause of detention, to the detainee are not in public interest, it is not compulsory to communicate the cause of detention. The Central/State Govt. will constitute an Advisory Board and the detainee will represent his detention to the Advisory Board within 6 weeks of detention. The Advisory Board will examine the detention on the materials placed before it and will submit the report to the Centre/State Govt. within ten weeks from the date of detention under the detention order.

The Supreme Court in case of A.K. Gopalan v. State of Madras, declared Sec 14 of the Act ultra-virus of the constitution, which led to the passing of the Prevention Detention (Amendment) Act of 1950 and Sec 14 was omitted. This Act was again amended in 1951, 52, 54, 57, 60, 63, 1966 and then the Life of the Act was extended up to Dec 31, 1969.


In the year 1971, the President promulgated the Maintenance of Internal Security Ordinance 1971 which was subsequently replaced by the above cited Act. It provided for detention in certain cases for the purpose of maintenance of Internal Security and matter connecting therewith. There was urgent need for effective preventive action in the interest of national security keeping in mind the prevailing situation in the country and the development across the border. This Act was the re-imposition of Prevention of Detention Act 1950 under a new name. The Central or the State Govt. had the powers with respect to any person including a foreigner with a view to prevent him from acting in a manner prejudicial to the defence of India or the security of India or the maintenance of public order. DM, ADM and Commissioner of Police were the competent authority subject to the approval of the Central or State Govt. The action taken was required to be reported to the central govt. along with the grounds on which the order had been made and such other particulars as in the opinion of the

69 Acts of Dominian Legislature (India), All India reporter, Vol 37, p. 4
70 AIR 1950 SC 27
State Govt. had a bearing on the necessity for the order. When a person is detained in pursuance of detention order, the authority making the order shall communicate the detainee the ground of detention within five days and not later than fifteen days in exceptional circumstances. If authority thinks that it was against the public interest to disclose the facts of detention, then it was not compulsory to communicate the grounds of detention. The detention was to be approved by the Advisory Board within ten weeks from the date of detention.

The Constitutionality of the Maintenance of Internal Security Act, 1971 was challenged in number of cases. In case Haradhan Saha v. State of West Bengal, the Supreme Court held that the Act did not infringe the Constitutional validity and MISA is a Valid Act.

In case John Martin v. State of West Bengal Section 3 of the Act was challenged that it violated Art 19. The court held that MISA does not violate Art. 19 of the Constitution.

In case ADM Jabalpur v. S. Shukla Supreme Court held with majority view that no person has locus standi to move the writ petition under Art 226 before a High Court for Habeas Corpus or any other writ for direction to enforce any right to personal liberty of a person detained under MISA. In case Sambhu Nath Sarkar v. The State of W.B., some provisions were challenged in SC, which were struck down by the court.

This Act was further amended in 1975, 1976.


This Act received the assent of President on 27th December, 1980. The Stated goal of the Act was to prevent individual from acting in a manner prejudicial to national security, public order and the maintenance of supplies and services essential to the community. It provided for the detention of the individuals for up to a year by local authorities without charges, a trial or other rights that accused criminals take for granted in India and elsewhere. The impression was that NSA was widely abused by the authorities by detaining trade union leaders, human rights activists, political parties, under privileged castes and ordinary criminals. NSA is valid all over India except J & K where analogous law Public Safety Act (1978) was operative. NSA-1980 empowers the Govt. to issue a detention order on

71 Maintenance of Internal Security Act, 1971 Sec 3(1), 3(2)
72 AIR 1974 SC 21
73 AIR 1975 SC 775
74 AIR 1976 SC1207
75 AIR 1973 SC 1425
76 National Security Act 1980 Sec 3
the subjective satisfaction of the detained authority. This means that a detention is valid if the detaining authority is actually satisfied that the person should be detained, regardless of whether the detention is objectively warranted or not.

**In case Anil Dey v. State of W.B.** The Supreme Court held that the veil of subjective satisfaction of the detaining authority cannot be lifted by the courts with a view to evaluating its ‘objective sufficiency’ however the satisfaction must be honest and real not fanciful and imaginary.

**In case Naresh Chandra v. State of W.B.** The SC held that the executive is required to apply its mind to the decision to issue a detention order.

The grounds of detention are always to be treated as severable. This means that the grounds of detention offered for any order of detention shall be deemed to have been made separately on each of the said grounds, so long even one valid ground is available; the detention order must be sustainable. No detention order can be held inoperative or invalid on the grounds that the person to be detained is outside the territorial jurisdiction of the detaining authority or on grounds that the place of detention is outside of these limits.

Disclosure of detention is to be given to the detainee within five days of detention and it can be delayed up to 10 days under certain circumstances. The grounds of detention can be withheld in the public interest. The state will constitute the Advisory Board and the detention papers are required to be placed before the Advisory Board within three weeks of the detention. The Advisory Board will give its opinion within seven weeks of the date of detention. If Advisory Board does not agree with the detention order, the detainee is released forthwith. The maximum period of detention is 12 months but Punjab & U.T. Chandigarh extended the maximum period to two years for their regions. The detention period can be modified or revoked by the competent authority.

**In case A.K. Roy v. Union of India**, when the validity of NSA was challenged, the SC upheld its validity.

It is important to note that the existing legal and judicial system is already equipped to deal with offences referred to in the Act. The problem seems to be a lack of effective implementation, not inadequacy of laws. However, in India the reasons for terrorism may vary vastly from regions to geographical and to caste to history. Indian Supreme Court

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77 AIR 1974 SC 832  
78 AIR 1959 SC 1335  
79 National Security Act 1980 Sec 5  
80 Ibid Sec 6  
81 AIR 1982 SC 710
observed in *Kartar Singh v. State of Punjab*\textsuperscript{82} that the country has been in the firm grip of spiralling terrorist violence and caught between deadly pangs of disruptive activities. Very heinous offences have been committed by the terrorists and even women & children have not been spared. Normally, it is fact that anti-terrorists laws stand in the way of Fundamental Rights of the citizens granted by Part-III of the constitution. Intention of the legislatures was that these drastic laws are the necessity to fight divisive forces and should continue to remain till the effective management of terrorism.

### 3.4.4 TERRORISM AND CONSTITUTIONAL ASPECT

All laws are basically meant to uphold the human rights of the citizens. While during terrorism, terrorists & security forces often violate the human rights extensively. The framers of Indian Constitution have taken ample care to see that the concept of human rights finds a place of honour in the Constitution. The Constitution of India and various laws of our country contain invaluable provisions for protection of Fundamental Rights, DPSP and Protection of human rights and human dignity. What can be better enunciation of the tenets of Human Rights than the Preamble of the Constitution itself which reads?

“To secure to all its citizens:
Justice, Social, Economic and Political;
liberty of thought, expression, belief, faith and worship;
Equality of Status and of opportunity; and to promote among them all.
Fraternity assuring the dignity of the individual and the unity and the integrity of the Nation.”

In conformity with its Preamble, the constitution of India, incorporates the following Fundamental Rights:

1. Right to Equality (Art 14 to 18)
2. Right to Freedom (Art 19 to 22)
3. Right against Exploitation (Art 23, 24)
4. Right to Freedom of religion (Art 25 to 28)
5. Cultural and Educational Rights (Art. 29 & 30)
6. Right to Constitutional Remedies\textsuperscript{83} (Art. 32)

The Directive Principles of State Policy contained in Part IV of the Indian Constitutional enumerates certain important provision pertaining to human rights through these provisions pertaining to human rights, though these provision have not been made practicable but they guide the Govt. at time of framing policies, making laws and drafting rules & regulation.

\textsuperscript{82} Singh, Kavita; *Human Rights and Anti-terrorism Laws in India*, Central Law Publications, 2010 p. 569

\textsuperscript{83} Omparkash, S; “Roots of Riots” The Kanishka Publications and distributers New Delhi 1997 p. 177
Important Provisions:
1. The State shall strive to secure a social order for promotion of the welfare of the people (Art. 38)
2. Equal justice and free legal aid (Art. 39A)
3. Right to work, education and public assistance in certain cases (Art. 41)

It is evident that the framers of Indian Constitution had explored various areas where human rights and civil liberties could be infringed upon and therefore enunciated the rights of the citizens and provided for their Constitutional protection.

The country has suffered heavily due to rise of terrorism in India, though the terrorism is said to be low intensity war. In the wars, we have lost around 6000 persons in India but in terrorism, we have lost over 3 lac persons and over 10000 security personnel. Over 2 million people have become homeless in India as a result of terrorism. Over Rs 50000 crores have been the cost of war on terrorism in India i.e. Punjab, Delhi, J & K, North-Eastern States and rest of India. Almost, whole of central India is in the grip of the terrorism. Now Maoist terrorists are riding high in Jharkhand, Chhatisgarh, Bihar, Orissa & Bengal. Over 55 quintals of explosives have been recovered. We have lost our two enigmatic Prime Ministers. In terms of our sovereignty, unity & integrity, terrorism strikes at each of these. Our conviction rate is poor. So, it was incumbent on the Govt. to have stringent laws to deal with the menace of terrorism. Hence, the Prevention of Terrorism Act was legislated by Parliament in 2002, especially after the attack on Parliament. In the case People's Union for Civil Liberties v. UOI\textsuperscript{84}, the Constitutional validity of the said Act was discussed. The Court said that Parliament possesses of the powers under Art 248 and entry 97 of the List 1 of the 7\textsuperscript{th} Schedule of the Constitution to Legislate the Act. Mere possibility of abuse cannot be a ground for denying the vesting of powers or for declaring a Statute unconstitutional. The court upheld the various provisos of the Act.

Whoever, with the intent of threatening the unity\textsuperscript{85}, integrity, security and sovereignty of India or to strike terror in the minds of people or any section of the people does any act or thing by using dynamite or explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or toxins gases or other chemicals or any substances of a hazardous nature in such a manner as to cause death or injuries to any person or loss or

\textsuperscript{84} (2004) 9 SCC 580
\textsuperscript{85} Sec 3 (a) POTA, 2002
damage to property or disruption of any supplies or services essential for life.

Under Art. 20 of the Constitution:

1. No person shall be convicted of an offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of offence.

2. No person shall be prosecuted and punished for the same offence more than once.

3. No person accused of any offence shall be compelled to be a witness against himself.

Art. 22 Protection against arrest and detention in certain cases

(1) No person who is arrested shall be detained in custody without being informed as soon as may be, of the grounds for such arrest nor shall be denied the right to consult and to be defended by a legal practicener of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of Magistrate and no such person should be detained in custody beyond the said period without the authority of a Magistrate.

(3) Nothing in clauses (1) and (2) shall apply:-
   (a) To any person who for the time being is an enemy alien; or
   (b) To any person who is arrested detained under any law providing for preventive detention.

(4) No Law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless- the condition clauses 4(a) & 4(b) are fulfilled.

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in the clause to disclose facts such authority considers to be against the public interest to disclose.

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87 Ibid
As per clause 7, Parliament has the wide powers to make new laws or amendment in respect of Art. 22.

Art. 142 – Enforcement of decrees and orders of Supreme Court and Orders as to discovery etc.

(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

(2) Subject to the provision of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the abundance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

“The question before us is this, whether the exigencies of the freedom of individuals or the exigencies of the State is more important. When it comes to a question of shaking the very foundations of the State, which state stands not for the freedom of one individual but of several individuals, needs the first place to the state”

Another learned member P.K. Sen, a member from Bihar also supported such measure and observed;

“There may be certain things in the provisions of the Articles which appear to be rather against the Fundamental Rights, but an awareness of the troubled times which not only this country but also all other countries in the world are passing through, some special measures for the security of the State are necessary.”

Another member Mahavir Tyagi had opposed the preventive detention law on the ground that life, liberty and pursuit of happiness are three Fundamental Rights. The State is meant for the individual having inherent Fundamental Rights. The state is thus organized and constituted not for depriving the people of their inherent rights. Hence it is not the business of the Constitutional Assembly to vest in the hands of the future Government power to detain people. Dr. B.R. Ambedkar vehemently rejected the contention of members like Mahavir Tyagi and supported the preventive detention laws. Thus, the Constitutional Assembly took cognizance of the extreme situation, like terrorism and provided certain measures to curb
them.

3.4.5 LAW COMMISSION’S 173\textsuperscript{RD} REPORT\textsuperscript{88}

The Law Commission was set up in 1956 to review the laws and advising the Govt. on new laws keeping in view the changing circumstances. MHA requested the law commission to undertake the fresh examination of laws and to recommend the suitable legislation to combat terrorism and other anti-national activities. Law Commission had sent 43\textsuperscript{rd} report in 1972 on offences of National Security. The Govt. requested the Law Commission and was asked to take a holistic view in consultation with steps being taken to curb terrorism in other countries and submit the recommendations as there is a dire need to have comprehensive anti-terrorism laws in India. Accordingly, the law commission prepared a working paper and circulated to all concerned to elicit their views. Two seminars were held, the first in Dec 20, 1999 at the India International Centre, New Delhi and second on January 29, 2000 at the same place. The Law Commission recommended in April 2002 the adoption of harsh measures to deal the suspected terrorist and their activities. It opined that when the very existence of the liberal society is at stake, drastic measures meant to strengthen law enforcement and the maintenance of public order are a necessary evil. The Law Commission while examining the Prevention of Terrorism Bill, 2000 observed:

“Law Commission is of the opinion that a legislation to fight terrorism is today a necessity in India. It is not as if the enactment of such legislation would subdue terrorism. It may, however, aim the state to fight terrorism more effectively. There is a good amount of substance in the submission that the IPC was not designed to fight or to check organized issue of the nature we are faced with now. Here is a case of organized groups or gangs trained, inspired and supported by fundamentalists and anti-Indian elements trying to destabilize the country that make no secret of their intentions. The act of terrorism by its very nature generates terror and a psychosis of fear among the populace. Because of the terror and the fear, people are rendered sullen. They become helpless spectators of the atrocities committed before their eyes. They are afraid of contacting the police authorities about any information; they may have about terrorist activities much less to cooperate with the police in dealing with the terrorists. It is difficult to get any witness because people are afraid of their own safety and safety of their families. It is well known fact that during the worst days in Punjab, even the Judges and Prosecutors were gripped under such fear and terror that they were not prepared to try or prosecute the cases against the terrorists. That is also combating terrorism

\textsuperscript{88} Id pp. 115-116
state to be the position today in J&K and this is one reason which is contributing to the enormous delay in going on with the trials against the terrorists. In such a situation, insisting upon independent evidence or applying the normal peace time standards of criminal prosecution, may be impracticable. It is necessary to have a special law to deal with the special situation. An extra-ordinary situation call for extra-ordinary law, designed to meet and check such extraordinary situation. It is one thing to say that we must create and provide internal structures and safeguards against possible abuse and misuse of the Act and altogether a different thing to say that because the law is liable to be misused, we should not have such an Act at all.

3.4.6 TERRORISM AND INDIAN EVIDENCE ACT

Following sections of Indian Evidence Act relate to prosecution under terrorism laws

Sec 9: Facts necessary to explain or introduce relevant facts,
Sec 10: Things said or done by conspirator in reference to common design
Sec 15: Facts bearing an question whether act was accidental or intentional
Sec 24: Confession caused by indecent, threat or promise, when irrelevant in criminal proceedings
Sec 25: Confession to Police officer not to be proved. It is subject to certain laws like UAPA, POTA, TADA, MCOCA etc.
Sec 26: Confession by the accused while in custody of police and not to be proved against him.
Sec 45: Opinion of experts
Sec 73: Comparison of signature, writing or seal with other admitted or proved.

3.4.7 TERRORISM AND CRIMINAL PROCEDURE CODE

While fighting terrorism and taking action against the terrorists, the protection of human right is very vital. The provisions of CrPc have been particularly designed to protect the human rights and liberties of citizens of India. Though, the CrPc has given vast powers of arrest and detention of the persons and house search etc. to the police, here are certain provisions which ensure the protection of human rights too.

The Police while arresting has no rights to cause death of suspect unless one is accused of an offence punishable with death or imprisonment of life.

During search of a house, a female has to be given notice to withdraw.

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89 Id pp. 256-258
90 Criminal Procedure Code, 1973 Sec 46
91 Id-Sec47
Person arrested by the police has the right to be informed of grounds of arrest and right to bail\textsuperscript{92}.

On search of a person, a receipt of articles taken in to possession has to be given to the person. A female has to be searched by a female.\textsuperscript{93}

Medical examination of the arrested person at the request of the arrestee is compulsory. This is to avoid atrocities by the police in custody.\textsuperscript{94}

No arrested person is to be kept in police custody beyond 24 hours unless specially ordered by the Magistrate u/s 167 CrPc.\textsuperscript{95}

House Search is to be carried out in the presence of independent witnesses preferably of locality\textsuperscript{96}.

No woman or male under 15 yrs is to be called to P.S. for recording any statement/evidence. It is to be recorded at their place of residence.\textsuperscript{97}

Nobody can be compelled to give any statement before police\textsuperscript{98} Confession before the Magistrate is, purely voluntarily\textsuperscript{99}.

The Competent Magistrate shall have to hold an enquiry in to the cause of death of a person who dies in police custody\textsuperscript{100}. Sec 67, 154, 162, 239, 240, 246, 313, 377, 465, all these Sections of CrPc which concern prosecution under terrorism under certain circumstances.

It is in chapter X of CrPc with section 129-132 which enumerates the action to be taken in connection with maintenance of public order and tranquillity.
Sec 129 – Dispersal of Assembly by use of force.
Sec 130 – Use of Armed forces to disburse Assembly
Sec 131- Powers of certain Armed forced officers to disburse Assembly
Sec 132 – Protection against prosecution for act done under preceding sections.

It was in the code of 1872, the above provisions were introduced as a duty of soldiers in dispersing rioters and the protection against bonafide action has been justified in section 132 of CrPc. As per Article 19 (1) b of the Constitution of India, it guarantees the right to assemble peacefully and without arms. Unlawful assembly is defined in section 141 of IPC. The Unlawful character of an assembly has to be determined with reference to section 141 of

\textsuperscript{92}Id Sec 50
\textsuperscript{93}Id Sec 51
\textsuperscript{94}Id Sec 54
\textsuperscript{95}Id Sec 57
\textsuperscript{96}Id Sec 100
\textsuperscript{97}Id Sec 160
\textsuperscript{98}Id sec 161
\textsuperscript{99}Id sec 164(3)
\textsuperscript{100}Id Sec 176
IPC. An assembly which is lawful at the time of assembling may turn into unlawful assembly. All the section of unlawful assembly extends from sec 141 to 158 IPC. The power to issue orders under section 129 (1) and 129 (2) of CrPc is given to an Executive Magistrate or an Officer Incharge of Police Station in the absence of such officer, any other police officer not below the rank of S.I. 101

In case Chinapa Shantirappa v. Emperor, 102 the court held that it is right of the civil authority to demand the aid and it is the duty of military to furnish all the armed aid that may be necessary in the supervision of its order and breach of peace.

In case State of Karnatka v. Padamanabha Beliya 103, the court took the view that the death was caused without justification due to unlawful firing by the police. The state would be responsible for consequences including payment of compensation to the victims.

In case Ram Adhar Yadav v. Ramchandra Mishra 104, The court held that sanction of state is required for taking any action against the officials committing an offence by taking an action under section 129 CrPC, Indemnity for prosecution is not only to be given from state prosecution but also from private prosecution but to get the benefit of this section, the accused has to show 105,

I. That there was an unlawful assembly of five or more persons likely to cause disturbances of public peace

II. That such an assembly was commanded to disperse.

II. That either the assembly did not disperse on such command or if no command has been given its conduct had shown a determination not to disperse.

III. That in the circumstances, he used force against the members of such assembly.

Sec 130 leaves entirely to the discretion of the officer in command as to how he will disperse the assembly but minimum force has to be used.

In case Naga People’s Movement of Human Right v. UOI 106

Supreme Court held that as per sec 130 of CrPc, the action to disperse the unlawful assembly can be taken by the Executive Magistrate by use of armed forces, using minimum force. When the action is taken by the armed forces under AF(S)P Act 1958, then the arrest by the Armed Forces is justified.

102 AIR 1931 Bomaby 157
103 1992 CrLJ 634 (Karnataka)
104 1992 CRLJ 2216 (Allahabad)
106 AIR 1998 SC 431
3.4.8 TERRORISM AND INDIAN PENAL CODE, 1860

The acts of terrorism are prosecuted under section 121, 121A, 122, 123, 124, 124 in Chapter VI of Indian Penal Code, 1860. Section 121 of IPC says that whoever wages war against the Govt. of India or attempts to wage such war or abets the waging of such war, shall be punished with death or imprisonment for life and also bailable to fine. Sec 121 A is regarding conspiring to conduct any of the offences punishable by Sec 121 or conspire to over-awe by means of criminal force or the show of criminal force the Central Govt. or any offer State Govt. Sec 122 of IPC is regarding the collection of arms and ammunition to wage war against India. Sec 123 is regarding the concealing of designs to wage war against Govt. of India. Sec 124 is the intention or compelling the President or Governor of State not to perform lawful duty. Sec 124 A is attempt or cause to cause to bring into hatred or contempt or excites or attempt to excite disaffection towards govt. established by law in India. The terrorists can be prosecuted under the above mentioned provisions of IPC. Apart from above, Sec 109 (Punishment of abetment of act abetted is committed in consequences and where no express provision is made for punishment), Sec 120 A, 120B, Sec 141 (unlawful assembly), Sec 146 (rioting), Sec 147 (punishment for rioting), Sec 148 (Rioting armed with deadly weapons), Sec 149, Sec 153 A (Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language etc. and during acts prejudicial to maintenance of harmony, Sec 153 (B) (Imputation, assertions, prejudicial to national integration), Sec 154 (owner or occupier of land on which an unlawful assembly is held), Secs 155, 156, 157, 158, 299, 300, 301, 302, 321, 322, 323, 324, 325, 326, 503 (Criminal Intimidation) 504, 505, 506 and 508 are all related to the prosecution of individual relating to terrorist crime too. Chapter V A was introduced to the Criminal Law of India, be new offence i.e. the offence of criminal conspiracy by Criminal Law Amendment Act, 1913 i.e. Secs. 120 A, 120 B. This was to deal the freedom fighters during English regime. Kehar Singh, the accused in Indira Gandhi murder case has been convicted in conspiracy.107

3.4.9 STATUTORY SAFEGUARDS AGAINST TERRORISM

Terrorism has become a menace to humanity and it has practically spread all over the world. Atal Bihari Vajpayee urged the international community to work towards establishing a broad based, representative and neutral govt. in the country so that a political vacuum could be avoided at the end of military campaign and terrorism could be effectively dealt with. Dr. Manmohan Singh while addressing the 58th batch of IPS probationers at NPA Hyderabad

108 Remarks by the Prime Minister of India to the 56th session of Un General Assembly on Nov 10, 2001
cautioned that today’s terrorists are most sophisticated, have transnational linkages and have adequate resources. Thus the probationers should have knowledge and determination if they have to succeed. Because of the growing danger from terrorism after 9/11 attack in New York, there is spurt in Anti-Terror legislations by the sensitive countries. We really need the effective anti-terror laws to check the menace of terrorism. The first Preventive Detention law was introduced by the British Govt. in 1793 in India and was meant solely for the purpose of detaining anybody, who was regarded a threat to the British settlement in India. The East India Company enacted the Bengal State Prisoner’s Regulation in 1818 in West Bengal. It was opposed to all fundamental liberties. In 1908, the Govt. passed the following Acts.

i.  The Newspaper (Incitement of offences) Act, 1908
ii.  The Explosive Substance Act, 1908
iii. The Indian Press Act, 1908
iv.  The Criminal Tribes Act, 1908
v.   The Prevention of Seditious Meeting Act, 1908

The aim of all these legislations was to break the backbone of the revolutionary movements by curbing meetings, printing and circulation of seditious materials and propaganda and to detain suspects. Further the Foreigners Ordinance of 1914 was enacted for the purpose to restrict the entry and movement of foreigners in India. The Defence of India Act, 1915 was also enacted. Rowlatt Act also known as Anarchical and Revolutionary Crimes Act, 1919 was also passed giving the unbridled powers to the colonial govt. to arrest and imprison suspects without trial to crush the civil liberties. To deal with the terrorism, govt. has passed a number of laws as follows:

I. The Inflammable Substance Act, 1952
II. The Arms Act, 1952
III. The Arms Rule, 1962
IV. The Unlawful Activities (Prevention) Act, 1967
VII. The Assam Preventive Detention Act, 1980

109 Ramesh Kandula; Terrorists’ most Dangerous Threat, The Tribune (New Delhi) Oct 27, 2006
110 Lacquer, Walter; No End to War, New york; continuum p. 11
111 http:/www/terrorism legal policy in India/raichenan/htm
IX. The Anti-Hijacking Act, 1982
XI. The Punjab Disturbed Areas Act, 1983
XII. The Chandigarh Disturbed Areas Act, 1983
XIII. The Terrorists Affected Areas (Special Courts) Act, 1984
XIV. National Security (Amendment) Ordinance Act, 1984
XV. The Terrorist and Disruptive Activities (Prevention) Act, 1985
XVI. The National Security Guard Act, 1986
XVII. The Terrorist and Disruptive Activities (Preventive) Act, 1987
XVIII. The Criminal Courts and Security Guards Courts Rules, 1987
XIX. The Special Protection Group Act, 1988
XX. The Prevention of Terrorism Act, 2002 (POTA)
XXI. The Prevention of Terrorism (Amendment) Act, 2003
XXIII. Prevention of Damage to Public Properties Act - 1984

All these laws were passed to curb the menace of terrorism in India. The Terrorists Affected Areas (Special Courts) Act, 1984 was passed with a view to control violence and disruptive activities by the terrorists. The Act is made applicable throughout the territory of India except J & K. The Act provides for the establishment of special courts in terrorist affected areas. The special court shall be presided over by a Judge of the rank of Session Judge or Additional Session Judge. These are radical changes in the procedure followed by these courts in the trial of offences. The courts may follow the summary procedure in the major trials with a view to dispose of the matter in a speedy manner. The proceedings of the courts were held in camera. The identity and the address of the witnesses are to be kept secret. The right of the appeal has been restricted and there is only one right to the appeal, only to the Supreme Court. The right of revision before High Court has been provided. Further section 111-A of the Indian Evidence Act after amendments, has been made applicable to the offenders under the Act, which provides presumption in favour of commission of offence in these areas under certain circumstances. Resultantly, the burden of proof is also shifted on to the accused. However, this Act was repealed & replaced by TADA, 1987.

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112 Kumar, Ashok; *Dynamics of Global Terrorism*, K.K. Publications, New Delhi – 2014 p. 253
113 Id pp. 254-260
In view of escalation of terrorists activities in many parts of the country especially in Punjab, J & K and North East, Parliament repealed the Special Court Acts and enacted the Terrorist and Disruptive Activities (Prevention) Act, 1985. In order to curb the menace of terrorism effectively, the Act provides for the establishment of Designate courts in the notified areas for dealing with the cases of terrorism. The Designated Court shall be presided over by the judge of the rank of Session Judge or of equivalent designation. These designated courts have wide powers for summary procedure and the proceedings were to be held in camera in order to keep the identity of the witness’s secret. A single appeal to the Supreme Court was to be allowed. The confession made before the police officers not below the rank of Superintendent of Police has been made admissible under the Act. There are provisions in the Act which provides for the presumption by the Designated Court of commission of certain offences specially where the recovery of the arms and explosives etc. have been effected. There are provisions in the Act which provide for the attachment, seizure and forfeiture of the property of the accused. However, this Act was repealed and replaced by a special law in the name of the Prevention of Terrorism Act, 2002 to fight against the terrorism and organized crime especially in view of attack on Indian Parliament in December, 2001\(^{114}\).

In order to break the backbone of terrorism, POTA-2002 was brought by NDA govt. as a replacement to TADA-1987. The Act was a special law to curb the terrorist activities effectively. The definitions of terrorist acts have been made very wide.

There are provisions in the Act, which give wide powers to the Govt. to forfeit and transfer the property of the terrorists to Government.\(^{115}\) Further, the Govt. can declare any organization as a terrorist organization under the Act, if it is found to assist, sponsor and support the terrorists’ activities directly or indirectly. The special courts were established under the Act with wide powers and jurisdiction to try the matters connected with the terrorists. The Court can follow special and summary procedure in certain cases. The protection has been given to the witnesses. The investigation agencies have been given wide powers in the matters of investigation including arrest, recording of confessional statements, taking of samples of blood, hair etc. of the accused. The interception of information of wire, electric, oral and any other mode is also provided. The Act provides that the accused shall be presumed guilty under certain circumstances where recoveries are made from the accused or where he is found involved in the prohibited activities in restricted areas. The Act had overriding effect and ordinary courts are debarred to interfere by way of injunction or stay

\(^{114}\) Ibid pp. 260-274
\(^{115}\) The Prevention of Terrorism Act, 2002, Sec 3 (1)
The UPA Govt. after coming to power repealed POTA, 2002 and passed the new Act to fight terrorism i.e. “The Unlawful Activities (Prevention) Amendment Act, 2004” which is partially similar to UA(P) Act, 1967 & POTA, 2002, 2003. The Unlawful Activities (Prevention) Act, 1967 was passed basically for effective prevention of certain unlawful activities of individuals and associations with a view to impose reasonable restrictions in the interest of sovereignty & integrity of India, freedom of speech and expression, right to assemble peacefully and without arms, right to form associations or unions. In 2004, the law has been radically amended to include the terrorist activities in its ambits and scope. Chapters IV & Vth in the amendment has been specially inserted for the purposes of prevention, control and abatement of terrorism and terrorist activities. The Act is made applicable throughout India including J&K. UA(P)A was amended in 2008 to include the U.N. Security Council Resolution.

The Act also provides for the forfeiture of proceeds of terrorism and property of terrorists etc. The witnesses have been given protection in the Act. The Act provides for the establishment of special tribunals with special powers including holding of summary trial in certain cases. Severe punishment have been prescribed under the Act for terrorist activities, raising funds for terrorist activities, conspiracy, harbouring, being member of the terrorist organization, holding proceeds of terror, air or abetment to terrorism etc. The ordinary courts are debarred from interfering in the matters under this Act.

There has been a lack of political will and consensus in implementation in anti-terrorism laws. In certain cases, the State Govt. and the security agencies misused the counter-terrorism laws. Some politician misused the provisions of anti-terrorism law against political opponents. TADA & POTA were grossly misused in certain states. In Jharkhand, maximum people were put behind bars under POTA, including a 12 years old child. Anti-Terrorism laws were also misused against Dalits, Women, and people yearning for socio-economic rights. The Law is there but it has not been implemented with proper letter & spirit.

**The Punjab Disturbed Areas Act, 1983**

This was an Act to make better provisions for the suppression of disorder and for the restoration and maintenance of public order in disturbed areas in Punjab. This was an Act No.

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117 Id p. 303
118 Id pp.312-314
283

32 of 1983. It came into force on 11th October, 1983. As per Sec 2, the disturbed area means an area which is declared by notification under sec 3 of the said Act. The State Govt. has the powers to declare whole or part of the state as disturbed area. As per Sec. 4 of the Act, any Magistrate, Police Officer not below the rank of SI & not below Havaldar in Army can fire or take stern action if any person or section of people contravene any law or order in force for the time being. Any arms dump or any fortified area being used as hide out can be destroyed. It has since been repealed.\textsuperscript{119}

\textbf{The Terrorist Affected Areas (Special Courts) Act 1984}\textsuperscript{120}

In order to provide for speedy trials of certain offences in terrorist affected areas and for matter connected, therewith, an Ordinance No. 9 of 1984 of the Terrorist Affected Areas (Special Courts) was promulgated which came out as an Act i.e. The Terrorist Affected Area (Special Courts) Act 1984. Sec 3 of the Act defines terrorist affected areas which empowers the Central Govt. to declare any area to be terrorist affected area. The offences to be tried by the special courts are mentioned in the schedule. Sec 3(1) of the Act specifies the period for which this Act would operate. The Act contains 21 sections relating to the establishment of special courts, their composition, jurisdictional, appointment of judges, provision for an appeal etc. Though in the scheduled offences many offences were included but by an amendment, only sections 121, 121A, 122, 123 of the IPC and section 4 and 5 of the Anti-hijacking Act 1982 were retained & other offences were deleted. The special courts were established in judicial zones in Jullundur, Patiala, Ferozepur and Chandigarh but were abolished. To try the cases relating to Blue Star, special courts were setup in Ajmer and Jodhpur and these have been abolished later on. The Act is in operation & not repealed.

\textbf{The Terrorist and Disruptive Activities (Prevention) Act, 1985 – The Punjab Aspect}

The above cited Act came into force on May 24, 1985 in whole of India for a period of Two Years\textsuperscript{121}. Earlier it was not applicable to J &K, but later on the provision for not applicable to J&K was omitted. The Preamble of this Act read that the special provisions of this Act were made “for the prevention of and for coping with, terrorist and disruptive activities for matters connected therewith or incidental thereto. The reason of this Act was that the terrorist had been indulging in wanton killing, arson, looting of properties and other heinous crimes mostly in Punjab and Chandigarh. Afterwards, the terrorists extended their activities to Delhi, Haryana, Uttar Pradesh and Rajasthan, as a result of which several


\textsuperscript{120}Singh, Kavita; \textit{Human Rights and Anti-terrorism Laws in India}, Central Law Publications, 2010 pp. 127-128

\textsuperscript{121}Id p.129
innocent lives have been lost. The explosives were planted in trains, buses and at public places with an object to terrorize, to create fear and panic in the mind of citizens and to disrupt communal peace and harmony. This overt phase of terrorism needed effective and expeditious handling. The bill was introduced to make provision for combating the menace of terrorism and disruptionist forces for following objectives.

(a) To provide for deterrent punishment for terrorist acts and disruptive activities.
(b) To confer on the Central Govt. adequate powers to make such rules as may be necessary or expedient for the prevention of, and for coping with, terrorist acts and disruptive activities.
(c) To provide for constitution of Designated Courts for the speedy and expeditious trial of offences under the proposed legislation. Section 2(c) 2 (f) define the disruptive activities & terrorist act respectively.

The Terrorists and Disruptive Activities (Prevention) Act No. 28 of 1987

The Terrorists and Disruptive Activities (Prevention) Act 1987 was meant for two years only. It was felt that this Act still needed to curb the rising terrorist activities. Since Parliament was not in session, The Terrorist and Disruptive Activities (Prevention) Ordinance 1987 was issued which came into force w.e.f. May 24, 1987. This Ordinance came in the shape of Act 28 of 1987 in September, 1987. TADA 1987 had many rigorous provisions. SC of India upheld its constitutional validity on the assumption that the law enforcing agencies would act in good faith and in public interest. The accused risked conviction on the basis of slander evidence, which would have been insufficient by the ordinary court. As per section 15, confession recorded by an officer not below the rank of SP in writing or by using mechanical device such as audio cassettes and video tapes was admissible in the court against the accused, co-accused & abettor. The burden of proof also lied on the accused. TADA, 1987 which was only for two years got extended up to 1995, when it was repealed. Even after lapse of TADA in 1995, incident of hijacking of Indian Airlines to Kandahar happened and three top terrorist were released.

Sec 3 of the Act defined terrorism, which has been given in definitions. This Act contained the following features.

1. Sec 3(1) defines the terrorist act.

122 Id pp. 129-133
2. The terrorist act resulting in death of any person attract the punishment of death or imprisonment of life and fine. In any other case, the punishment is not less than 5 years imprisonment and may extend to life & fine.

3. TADA provides for minimum punishment of five years and maximum imprisonment of life for conspiring to commit or knowingly facilitating the commission of terrorist act.

4. Harbouring and concealment of the terrorist will attract the punishment for five year extending to life imprisonment and fine.

5. Punishment for disruptive activities was imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life.

6. Disruptive activities means any action taken whether by act or by speech or through any other media which intent to disrupt sovereignty and territorial integrity in India.

7. TADA provided for punishment of five years to life imprisonment for possession of certain unauthorized arms.

8. It provided for forfeiture of property of the accused person. Central Govt. or State Govt. may constitute one or more than one designated court for a particular area.

9. Committed offences even not falling under TADA but connected with TADA cases will also be tried by the designated court.

10. Under the TADA, a designated court was to take cognizance of any offence without the accused being committed to it for trial upon receiving the complaint for a police report.

11. There was a special provision for summary trial of offences punishable with imprisonment for a term not exceeding three years.

12. Confession before an officer not below the rank of S.P. by an accused was to be admissible as evidence.

13. It provides that trial of any offence by a designated court should have precedence over the trial of any other case against the accused in any other court.

There was considerable criticism of abuse of TADA by the Govt. and security forces by NHRC, Minority Commission, Amnesty International and International and National Jurists of on basically the following charges.

1. Innocent persons were being proceeded against or arrested under the Act.
2. Confession’s admissibility was odious to the established procedure of criminal justice.
3. Minorities were being targeting under the Act.
4. Bail was not easily obtainable.
5. Burden of proof was on the accused.
This act was extended up to 1995 vide the Terrorist and Disruptive Activities (Amended) Act – 1993.

The widespread allegation of misuse of TADA compelled the Central Govt. to repeal it on May 23, 1995.

In *Usmanbhai Dawoodbhai Menon v. State of Gujarat*, SC ruled that TADA is a special Act and it is an extreme measure to be resorted to when the police cannot tackle the situation under the ordinary penal law. The purpose is to provide special machinery to combat the growing nuisance of terrorism in different parts of the country.

In *State of W.B. v. Mohd. Khalid*, the Apex court has pointed out that terrorism may be described as use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect, it produces or has the potential of producing on the society as a whole.

In Case *Rambhai Nathabhai Gadvi v. State of Gujarat*, the Apex Court ruled that the sanction before prosecution by the DGP u/s 20-A (2) of the Act is mandatory and the court has no jurisdiction to take cognizance of an offence under the Act without a valid sanction.

In Cases of *Sanjay Dutt v. State of MHR* and *State of MHR v. Som Nath Thapa* the court held that u/s 5 of the Act; any incriminating thing must be in conscious possession of the alleged accused person. The onus of non-existence of anything lies on the accused person.

In case *State of Tamilnadu v. Sivarasan Raghu Sivarasa* the SC defining explosive substance said that it must be a complete article or something capable of exploding. Empty cells or parts for making a bomb so long they are not assembled and filled with gun powder or other explosive substance are not explosive substance under sec 5 of the TADA Act. Gelatine sticks which were found from the possession of the accused would be an explosive substance. The accused was acquitted as the evidence showed that no terrorist or disruptive activities were ever intended to be committed within India.

**Confession in TADA cases (Sec 15)**

In *Sahib Singh v. State of Haryana* the SC said that the confession recorded by a police officer not below the rank of Superintendent of Police has to be an express acknowledgement of guilt of the offence charged or it must admit substantially all the facts
which constitute the offence. Confession should be voluntarily and truthful.

In *State of Gujarat v. Mohd. Atik*\(^{130}\) the Apex court said about the admissibility of the confession that the confessional statement recorded should fulfil the following conditions.

1. The confession should be before a police officer not below the rank of S.P.
2. It should be recorded by the said police officer.
3. The trial should be against the maker of confession.
4. Such trial must be under the offence of TADA or TADA rules.

This confession can be used in another crime if it fulfils the ambit of that crime. It is supported by case *State of Rajasthan v. Bhoop Singh*\(^{131}\). It was also held by SC that the moment the maker of confession dues, then the confession becomes of disuse.

In *State of Gujarat v. Gandvi Rambhai Nathabhai*\(^{132}\) the Apex Court held that the designated court while granting bail under TADA case need not give detailed account of the innocence of the alleged accused so that he should not get it advantage during trial. Designated Court should simply apply its mind that there are reasonable grounds for believing that the accused was not guilty of the offence. The Designated Court, at this stage, should not weigh the material collected during the investigation.

The Constitutional validity of the terrorist related laws i.e. TADA was challenged in *Kartar Singh v. State of Punjab*, which was heard by the five Judge Bench of SC and upheld the constitutional validity of all the provisions of Sec 22 of TADA.

**The Chemical Weapons Convention Act, 2000**\(^{133}\)

The Chemical Weapons Convention Act was enacted on the basis of Chemical Convention on the prohibition of development, production, stocking and the use of chemical weapons and their destruction. The statute was enacted in fulfilment of the country’s international commitments. As per Sec 3 of the Act, the provisions of the Convention set out in the schedule of the Act shall have the force of law in India. Sec 13 prohibits the development, production, acquisition, stockpiling, retention or use of toxic chemicals weapons. Section 15 prohibits the development, acquisition, retention or use of toxic chemicals or precursors. The observance of the statute makes elaborate provisions of inspection, search, seizure and forfeiture. Section 14 places the duty on the persons already holding such weapons to inform the authorities and the information is to be provided within

\(^{130}\) (1998) 4 SCC351

\(^{131}\) (1997) 10 SCC 675

\(^{132}\) (1994) 5 SCC 111

\(^{133}\) Kumar, Ashok; *Dynamics of Global Terrorism*, K.K. Publications, New Delhi – 2014 p. 135
seven days of the coming into effect of the Act. Failure of this will be punishable under section 46 of the Act.

**The Prevention of Terrorism Act, 2002**

After the repeal of TADA, there was spurt in terrorist crime and some foreign countries were prompting the terrorist groups. After the World Trade Centre 9/11 incident, Government felt the need of another act to handle the terrorism effectively. **Prevention of Terrorism Bill 2000** was taken for the discussion by the Law Commission of India (173rd report of law commission) since Dec 2000 by organizing the mega seminars in New Delhi. The Bill was first formulated on 24th October 2001 in the form of an ordinance. POTA Act was finally passed in the first session on 26th February, 2002. POTA was brought as twin legged approach, by dealing with terrorism as an offence on one hand and on the other for steps that could be termed as defensive in nature. Such laws, as per experience, were likely to be misused by the politicians & the security forces. There were enough safeguards against misuse in the Act itself.

The essential points of difference between TADA and POTA were

i. Provisions already misused or likely to be misused were deleted from the new legislation.

ii. Sec 5 of TADA, which had made unauthorized possession of arms in a notified area, an offence was deleted as the Arms Act is enough to deal this crime.

iii. Certain safeguards were incorporated against the misuse of sec 15 of TADA.

iv. Sec 21(1) (e) & (d) of TADA regarding presumption was deleted.

v. Sec 20 (8) (b) of TADA regarding the condition of bail was deleted

vi. Appeal in case of conviction in TADA case by the designated court lied in Supreme Court but under POTA, the appeal would lie in High Court too. The investigation in POTA cases would be done by an officer not below the rank of ASP/DSP.

**Salient Features of POTA:**

i. A time limit of 3 years was prescribed for the operation of POTA.

ii. The word ‘disruptive activities’ was substituted by ‘disruptive act’

iii. Keeping in view the possibility of misuse of the provisions even for petty communal disturbances “or to alienate any section of the people or to adversely affect the harmony amongst different section of the people” had been deleted.

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134 Id pp.136-137
135 Id pp. 40- 41
iv. The concept of knowledge was brought in for culpability relating to “whoever harbours or conceals, or attempts to harbour or conceal any persons knowingly that such person is a terrorist.”

v. Similarly, the concept of knowledge was brought in for offences relating to disruptive activities and it was incorporated i.e. “whoever harbours or conceals, or attempts to harbour or conceal any person knowingly that such person is disruptionist” Clause 4 (3) (h) had been deleted.

vi. The Review Committee both for the Centre as well as the States have been provided with a judge of the High Court as its Chairperson.

vii. Review Committee will review the cases of POTA & TADA both.

It says that any person who with intent of the following shall be punishable under POTA-2002.

a) To threaten the unity, integrity, security & sovereignty of India, or

b) To strike terror in the people or any section of the people, or

c) One does any act or uses anything, bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals, biological or other hazardous nature substances, or

d) Likely to cause death or injuries to any person or persons, or

e) Loss or damages to, or destruction of property or disruption of any supplies or services essential to the life of community or causes damage or destruction of any property, or

f) Equipment intended to be used for defence of India or in connection with any other purposes of the GOI, any state Govt. or any of their agencies, or

g) Detain any person or person or threatens to kill or injure such person in order to compel the govt. or any other person to do or abstain from during any act, or

h) Continues member of any association declared unlawful under the unlawful Activities (Prevention) Act, 1967, or

i) Voluntary does an act abiding or promoting in any manner the objects of such association and in either cases is in possession of any unlicensed firearms, ammunition, explosive or other instrument or substances capable of causing mass destruction and commits any act resulting in loss of human life, or
j) Causes grievous injury to any person or causes significant damages to any property.

The terrorism had become a challenge to whole world especially after 9/11 incident. The acts and methods adopted by the terrorist groups and organizations took advantage of modern means of communication and technology using high-tech facilities available in the form of communication system, transport, sophisticated arms and various other means. This had enabled the terrorists to attack the people at will. The existing criminal justice system was not designed to deal with the types of heinous crime. In view of this, it was felt necessary to have law to prevent and control such terrorist activities. Since the Parliament was not in session, an ordinance on Prevention of Terrorism Act 2001 was promulgated by the President. The bill could not be introduced in Parliament as it was adjourned till December, on 19th Dec, 2001. The second ordinance was also promulgated. Then the Prevention of Terrorism Bill was introduced in the Parliament & was passed but was defeated in Rajya Sabha. The Bill was passed in the first session of both the Houses of Parliament. The Bill was assented by the President on 28th March, 2002 & it came on the statute book as The Prevention of Terrorism Act, 2002. This was an Act to make provision for the Prevention of and for dealing with the terrorist activities and for the matters connected therewith. The definition of a terrorist act is given in sec 3 (a) (b) of the Act. As per sec 2 of the Act, whoever commits a terrorist act shall

(a) If such act has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to fine.

(b) In any other case, be punishable with imprisonment for a term which shall not be less than five years but may extend to imprisonment for life and shall also be liable to fine.

The investigating officer shall not be less than the rank of Superintendent of Police. He had the powers to seize the illegal property. The statement of the alleged/accused terrorist recorded in the presence of SP will be admissible in the Court. The terrorist organizations given in schedule under Sec 18, can be banned by the Central Govt. Fund raised by terrorist organizations was an offence & can be seized. The special courts were setup for trying the cases under POTA. This was the duty of the state to give protection to the witnesses. There was a provision to include the electronic communication.
3.4.10 THE SCHEDULE (Sec 18): THE LIST OF BANNED TERRORIST OUTFITS\(^\text{136}\)

1. Babbar Khalsa International
2. Khalistan Commando Force
3. Khalistan Zindabad Force
4. International Sikh Youth Federation
5. Lashkar-e-Tayyaba/Pasban-E-Ahle Hadis
7. Harkat-ul-Muzahidin/HUA/HUJI
8. Hizbul-Muzahideen/HizbulMuzahideenPirPanjal Regiment
9. Ul-Umar Muzahideen
10. J&K Islamic Front
11. ULFA
12. NDFB
13. People’s Liberation Army
14. United National Liberation Front
15. People’s Revolutionary Party of Kangleipak (PREPAK)
16. Kangleipak Communist Party (KCP)
17. KangleiyaolKanbalup (KYKR)
18. Manipur People’s Liberation Front (MPLF)
19. All Tripura Tiger Force
20. National Liberation Front of Tripura
21. Liberation Tigers of Tamil Eelam (LTTE)
22. SIMI
23. DeendarAnjuman
24. CP (ML)_PWG and all its formations and frontal organizations
25. MCC and its formations & frontal organizations
26. Al Badar (A.B.)\(^\text{137}\)
27. Jamiat-Ur-Mujahideen (JuM)
28. Al-Qaida (AQ)
29. Dukhtaran-e-Millat (DeM)
30. Tamil Nadu Liberation Army (TNLA)


\(^{137}\) Kumar, Ashok; *Dynamics of Global Terrorism*, K.K. Publications, New Delhi – 2014 p. 303
31. Tamil Nadu Retrieval Troops (TNRT)
32. Akhil Bharat Ekta Samaj (ABNES)

In *Jaywant Dettaray Suryarao v. State of MHR*,\(^\text{138}\) the court held whether the crime committed creates terror or not is dependent upon the facts and circumstances of each case and cannot be defined by precise words.

**The Unlawful Activities (Prevention) Act, 1967\(^{139}\) (UA(P)A)**

UA(P)A was designed to deal with association and activities that questions the territorial integrity of India. The ambit of Act was strictly limited to meeting the challenge to the territorial integrity of India and the provisions in the Act were for declaring sensitive associations unlawful and imposing penalties on the members etc. The act has all along been working holistically to curb the secessionist activities. The basic purpose was to impose reasonable restrictions in the interest of sovereignty and integrity of India on the

i. freedom of speech and expression,

ii. right to assemble peacefully and without arms and

iii. right to form associations or unions

**The Unlawful Activities (Prevention) Amendment Act – 2004**

By the 1967 legislation,\(^\text{140}\) UA(P)A was enacted with the object of empowering the Parliament to impose reasonable restrictions in the interest of the integrity and sovereignty of India. POTA was repealed by the new UPA Govt. and this was a major policy decision. People in general had a bad experience of TADA and POTA. Govt.’s view was that the country has already stringent laws in National Security Act and UA(P)Act to check the terrorism effectively. Whereas the officials view was that POTA was a great check on the functioning of the terrorist organizations. Repealing of POTA gave the boost to Civil Liberties Organizations but some provisions of POTA were included in UA(P)A Ordinance which ultimately came as an Act.

The difference between UA(P)AA and POTA is substantial even as lot of provisions are common with some cosmetic changes in it. The Act does not define the word terrorist in its definition clauses but define the terrorist as defined in Sec 2 (k) and Sec 15 of UA(P)AA. A tribunal is constituted to decide whether any organization is unlawful. The minimum punishment for any offence under UA(P)AA is not less than 5 years. The Act also provides

\(^{138}\) 2002 Cr.L.J. p.229


\(^{140}\) Kumar, Ashok; *Dynamics of Global Terrorism*, K.K. Publications, New Delhi – 2014 pp. 41-42
for protection of witnesses such as keeping their identities secret even in orders, judgements and records of the courts, issuing direction to secure the identity of the witnesses and by imposing punishment for contravention of any such direction.  

The Unlawful Activities (Prevention) Amendment Act 2008

Keeping in view the spurt in terrorist activities i.e. 26/11 in 2008 in Mumbai, the amendment Act UA(P)A-2008 with stringent measures against the terrorists was passed by the Parliament, which came into force on Jan, 2009. The Act Strengthened the provisions of investigation, prosecution and trial of terrorist cases, keeping in mind the steps taken for misuse of provisions. The bail provisions were hardened and the bail was not to be granted except in extraneous circumstances. The Police is at liberty to get the remand of the accused even while in jail. Stipulated period of 90 days for putting the challan to court is extended to 180 days. For raising the funds for terrorist organization, the minimum punishment is 5 years. The property because of proceeds of terrorism will be confiscated by the Govt., whether the terrorist is connected or not. Sec 43 E introduces the principle of presumption of guilt in respect of a terrorist act when arms, explosives or other substances specified in Sec 15 are recovered from the possession of the accused and there is reason to believe that substances of similar nature were used in the commission of the offence. Similarly, presumption is raised when fingerprints or any other suggestive evidence involving the accused is found at the site of an offence.

UA(P)A, 2004 was amended as UA(P)A, 2008 on the advice of UN Security Council Resolution to take firm steps against terrorist organizations. Section 15 of UA(P)A, 2004 has been replaced by a new section 15, where the terrorists act is whoever does any act with intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in foreign country by using bombs, dynamite or other explosive substances or inflammable substances or fire arms or other lethal weapons or possession of noxious gases or other chemicals or by any other substances (whether biological, radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause:

i. death of or injuries to, any person or persons or

ii. loss of, or damage to, or destruction of, property, or

141Id pp. 137-144
iii. disruption of any supplies or services essential to the life of community in India or in any other foreign country or

iv. damages or destruction of any property in India or in a foreign country used or intended to be used for the defense of India or in connection with any other purpose of the GOI, any State Govt. or any of their agencies

The amendments are given as below

i. The period prescribed in CrPC for detention i.e. 15, 60, 90 days in respect of different types of cases changed to 30, 90, 90 days respectively.

ii. Where it is not possible to complete investigation in 90 days, on the report of public prosecutor, a provision has been made to extend the period to 180 days.

iii. No court shall grant the bail under the Act without giving an opportunity of being heard to the public prosecutor.

iv. In cases, where the court is satisfied, after perusal of the case diary or the charge sheet/report u/s 173 CrPc, that the accusations made against the accused prima facie are true, the court shall not grant the bail.

v. In certain circumstances, where it is proved that weapons and explosives etc. were recovered from the possession of the accused and such weapons were used in the commission of the offence, or the fingerprints of the accused were found on weapons, vehicles etc used in the commission of offence or any other definitive evidence was found in this regard, the court shall draw a rebuttable adverse presumption unless proved to the contrary.

vi. Provision has been made to empower an officer of a designated agency with powers of arrest, search and seizure whenever, he may have knowledge or information that a particular person has committed an offence or has designs to commit an offence under this Act. The provision is there to seize the property connected with an offence under this Act and it should be deposited with the nearest Police Station.

The definition of terrorist act has been elaborated and several additional specific offence have been provided keeping in view the recommendation of the APC and the requirements flowing from various International Conventions etc. regarding terrorism, including recruitment, training for and financing of terrorism.

2012 Amendment in UA(P)A includes economic offences within the ambit of terrorist
acts. The definition of terrorist act has been expanded to include offences that threaten the country’s economic security, procurement of weapons, receiving funds for terrorist activities and counterfeiting Indian currency. It also granted additional powers to courts for forfeiting or attachment of property of the terrorists.144

National Investigation Agency Act, 2008 (NIA, 2008)

The National Investigation Agency Bill became a law w.e.f. Jan 1, 2009. It provides for setting up a special agency at the national level “to investigate and prosecute offences affecting the sovereignty, security and integrity of India. Under the law, NIA will be constituted in a concurrent jurisdiction frame work to investigate the scheduled offences. Regarding the scheduled offence, state will decide and send the report to the centre in this regard. The centre will decide whether it is a scheduled offence or not & accordingly it will send the case to NIA for further investigation. Central Govt. will constitute the special courts to try these scheduled offences. Special Courts will be presided over by a judge appointed by the Central Govt. on the recommendation of the Chief Justice of the High Court.

It limits the jurisdiction of the proposed agencies to certain scheduled offences under seven Central Acts relating to Atomic Energy, unlawful activities, Anti-hijacking, Civil Aviation Safety, Maritime safety, Weapons of Mass Destruction and SAARC Terrorism Convention Obligations. From the Indian Penal Code, offences against the State and offences relating to currency & bank notes are included in the scheduled offences.

As per Sec 2(1)(g) of NIA, Scheduled offences means offences specified in the schedule and schedule consists of various offences laid down in the Statutes listed below:-

1. The Atomic Energy Act, 1962
3. The Anti-Hijacking Act, 1982
5. The SAARC Convention on Suppression of Terrorism Act – 1993
8. Offences under (a) Chapter VI of the Indian Penal Code (a) Sections 121 to 130 (b) Sections 489 A to 489 E of the IPC.

144 Id p. 145
The superintendence of NIA shall vest in the Central Govt and the Administration to vest in Director General of NIA, who will be an IPS officer. The agency will also investigate any other offence connected with scheduled offence. Central Govt. shall constitute special courts for the trial of the scheduled offences.\textsuperscript{145}

\textbf{National Security Guard Act (NSG)-1986}\textsuperscript{146}

National Security Guard is a special force which was setup in 1984 as a Federal Contingency Deployment Force for handling counter terrorists and its counter-hijacking operations including the VIP Security. It is highly trained and motivated force for effectively dealing with terrorist activities in the country. It was raised by the Cabinet Secretariat under the National Security Guard Act-1986. It works completely within the Central Armed Police Forces structure. NSG is 100% deputation force from Army, Central Armed Police Force and State Police. NSG is headed by an IPS Officer and is under the administrative control of the MHA.

NSG’s specific goals include:

1. Neutralization of terrorist threats
2. Handling hijacking situation on lands & in air.
3. Bomb disposal (Search, disposal and neutralization of IEDs)
4. Engaging and neutralizing terrorists in specific situations
5. Hostage rescue

NSG carried out counter terrorism operations at Akshardham Temple (Ahmedabad) in Sept, 2002 and eliminated the terrorists. NSG performed operation Black Thunder in the Golden Temple in 1988. NSG performed operation Black Tornado and Operation Cyclone to flush out terrorists in 26/11 attack in 2008. Four new NSG hubs have been established in Mumbai, Hyderabad, Chennai, and Kolkata after this incident.

The National Bomb Data Centre (NBBC) under NSG maintains the National Bomb Data Centre at Manesar and conducts post blast studies in various parts of the country mostly on requests from State Authorities. It also maintains a data bank on explosives and incidents of blasts which may be of use to security forces.

\textsuperscript{145} Id p.146
\textsuperscript{146} Kumar Ashok and Vipul; \textit{Challenges to Internal Security of India}, McGraw Hill Education Pvt. Ltd., New Delhi, 2015 p.136
3.5 CONSTITUTIONAL VALIDITY OF THE ANTI-TERRORISM LEGISLATIONS

Hon’ble Supreme Court examined the constitutional validity of TADA in *Kartar Singh v. State of Punjab*\(^\text{148}\) Full bench of Punjab & Haryana Court in *Bimal Kaur Khalsa v. UOI*\(^\text{149}\) also considered the constitutional validity. SC in Kartar Singh’s case laid down the following guidelines so as to ensure that the confession obtained by an officer not below the rank of Superintendent of Police is not tainted with advice but is in strict conformity of the well-recognised and accepted aesthetic principles and fundamental fairness:

i. The confession should be recorded in a free atmosphere in the same language in which the person is examined and as narrated by him.

ii. After recording statement, the person should be produced before CJM/CMM along with the statement.

iii. CMM/CJM will record the statement of the alleged accused if he wants to give statement regarding torture etc. In case of complaint of any torture, the person should be got medically examined by a M.O. not lower in rank than of Assistant Civil Surgeon.

iv. The cases under TADA – 1987 should not be investigated by an officer of Police lower than the rank of Dy. SP/ASP.

v. If interrogation of a suspect in TADA is to be done when he is in judicial custody, I.O. will offer the reason of delay in seeking the police custody.

vi. The police must respect the right of silence of the suspect during interrogation and recording his statement of disclosure.

The Supreme Court also upheld the validity of section 16(g) and 20(3) of the Act, in view of the extraordinary circumstances i.e. witnesses were living in the reign of terror and were unwilling to depose against the terrorists in the court for fear of retribution or reprisal. The connected person in penal provisions other than TADA can appeal in the Supreme Court. Regarding recording of confessional statements, SC observed that it would prefer the Judicial Magistrate recording the statement and only in extreme circumstances, the confession statement should be recorded by the Executive Magistrate.

Challenges to TADA were also taken up in *Shaheen Welfare Association v. UOI*,\(^\text{150}\) the

\(^{147}\) Id p. 153
\(^{148}\) (1994) Cr.L.J. 3139 (SC)
\(^{149}\) (1988) Cr.L.J. 869 (FB) (P & H)
\(^{150}\) AIR 1996 SC 2957
court versions are as follows:

(i) In TADA cases, the deprivation of personal liberty cannot be avoided but where the trial is long and the accused persons have suffered imprisonment which is half of maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the Fundamental Right visualized by Article 21.

(ii) The court observed that while it is essential that innocent people should be protected from terrorists, it is equally necessary that terrorists are speedily tried and punished. It also causes ir-repairable damage to innocent persons who may have been wrongly accused of the crime and are ultimately acquitted by to remain in jail for long period pending trial because of the stringent provisions regarding bail under TADA

(iii) The proper course is, therefore, to identify from the nature of the role played by each accused person, the real hardcore terrorists or criminals from others who do not belong to that category and apply the bail provisions strictly in so far as the former class is concerned and liberally in respect of the later class.

(iv) When stringent provisions have been prescribed under an Act such as TADA for grant of bail and a conscious decision has been taken by the legislature to sacrifice to some extent the personal liberty of an under trial for the sake of protecting the country and nation against the terrorist and disruptive activities or other activities harmful to society. It is also necessary that investigation of such crime is done efficiently and adequate number of designated courts are setup to book persons accused of such serious crimes. Thus is the only way in which society can be protected against harmful activities. This would also ensure that persons ultimately found innocent are not unnecessarily kept in jail for long periods.

Constitutional validity of POTA-2002 was challenged in case People’s Union for Civil Liberties v. U.O.I. the SC observed that terrorism affect the security and sovereignty of the nation and it should not be equated with law & order or ‘Public Order’ problem, which is confined to state alone. Court felt the need of collective global action and therefore upheld the competency of the Parliament to enact and enforce this Act. Court went to the extent of saying that mere abuse of “law cannot be a ground to declare a statute unconstitutional”

3.6 LAWS ON TERRORISM RELATING TO ARMED FORCES

Armed Forces (Special Powers) Act - 1958

When Congress was going to launch Quit India movement in 1942, there was
widespread mass upheaval in the country. AFSP Ordinance, 1942 was promulgated on August 15, 1942 and prominent Congress leaders were jailed.\textsuperscript{152}

The Post-Independence India suffered from many secessionist movements and extremist attacks. In order to curb such activities, the Indian Govt. promulgated Armed Forces (Special Powers) Act 1958 which is still in operation in North-East Indian States and J & K. However, where it is necessary to curb the activities of insurgents & the terrorists, it is criticized with widespread protest especially in Manipur. The Armed Forces (Assam & Manipur) special powers Ordinance, 1958 was replaced by AFPSA, 1958 on September 11, 1958. Currently, AFPSA is applicable to the seven states of North East i.e. Assam, Manipur, Mizoram, Arunachal Pradesh, Meghalaya, Nagaland and Tripura. AFSPA empowers the Governor of the state or the Central Govt. to declare any part of the state as a disturbed area, if in its opinion there exists a dangerous situation in the said area which makes it necessary to deploy armed forces in the region. In the backdrop of the growing insurgency in J & K, the Central Govt. issued a similar enactment known as the Armed Forces (Jammu & Kashmir) Special Powers Act 1990. It empowers the Governor or the Central Govt. to declare any part of the state as a disturbed area if in its opinion, the special powers are required to prevent

\begin{itemize}
  \item a) terrorist acts aimed at overthrowing the Government striking terror in the people or affecting the harmony of different sections of society or
  \item b) activities which disrupt the sovereignty of India or cause insult to the National Flag, National Anthem or India’s constitution.
\end{itemize}

Under Section 4 of the AFPSA, under special powers given to the Army officials, an authorized officer in a disturbed area has the powers to open fire at any individual, even if it results in death, the individual violates laws which prohibits (a) the assembly of five or more persons or (b) carrying of weapons. However, the officer has to give a warning before opening fire. The authorized officer has also given powers to arrest against a warrant and (b) seize & search without any warrant any premises in order to make an arrest or recovery of hostages, arms and ammunition. As per Sec 5, individual taken in custody has to be handed over to the nearest police station as soon as possible. Prosecution of an authorized officer requires prior permission of the Central Government as per Sec 6 of the Act. U/s 3 of the AFSPA, disturbed area means where Governor of the State or the Central Govt. (in case of Union Territory) is of the opinion that such a condition in the area exists where use of armed forces in aid of the civil power is necessary.

\textsuperscript{152} Singh, Kavita; \textit{Human Rights and Anti-terrorism Laws in India}, Central Law Publications, 2010 pp. 31-32
Controversy:

1. **Law is a State Subject** — The opponents of AFPSA say that the command and control, supervision & direction of executive power is not vested in the State Executive. But the proponents say that the application of the Act is rare & minimal when any situation so arises. Arrested persons are handed over to the nearest Police Station, who can handle them in his own way.

2. **Declaration of Disturbed Area:** Under section 3 of the Act, as amended by Act 7 of 1972, the opponents feel that Government has been empowered to enforce that Act when situation in the area is a rebellion like. But this seems to be colourable legislation by the Central Govt. in order to bypass Art. 352 of the constitution. The proponents feel that this does not given any special powers to the Central Govt. over the State Govt. It is only to control the situation.

3. **Powers to the Governor not valid:** Opponents of AFPSA feels that the conferment of powers on Governor is invalid since it amounts to delegation of powers of the Central Govt. and the application of mind should be made by the Central Govt, not State Govt as it is the deployment of the Army & other Central forces. Proponents feel that it is in the aid of the civil power and the State alone should be empowered & it is also in tune to federal system in our country.

4. **Provisions under CrPC** — Opponents of AFPSA feel that the provisions are given in Sec 130 to 131 of the CrPC for acquisition of Armed Forces in aid to civil power. The powers given under Sec 4 of the Act are more drastic which are discriminating & unsatisfied. The Proponents feel that the provision under sec 130 to 131 are for tackling the individuals & minor situations whereas provision under AFPSA are for handling insurgency, lawlessness in a wider area and terrorism. Hence the provisions of Sec 130 & 131 of IPC are not enough to deal the situation of widespread lawlessness.

5. **Power to junior officers of Armed Forces** — Opponents feel that power is used by non-commissioned officers, likely to misused & abused. Proponents feel that in order to handle widespread disturbances, the force used is in groups under an experienced non-commissioned officer.

6. **Training & Orientation of Armed Forces** — The Armed forces should be deployed for a short period. They should be trained to face their own hostile people, not the foreign enemy. The employment for a long time has the adverse effect on the morale & discipline of the personnel of the Armed Forces.
Non-State Views: UNHRC questioned the constitutionality of the AFPSA under Indian law and asked how it could be justified in the light of Art 4 of ICCPR. On 23rd March, 2003; UN Commissioner for Human Rights, N. Pillay asked India to repeal the AFPSA. She termed the law as outdated & colonial-era law that breach contemporary International Human Rights Standards. Again on 31st March 2012, UN asked India to revoke AFPSA saying it had no place in Indian Democracy. UN condemned the enforcement of AFPSA in Kashmir as draconian. It clearly violates the International law.

3.7 NON-GOVERNMENTAL ORGANISATIONAL ANALYSIS

A report by the Institute for Defence Studies & Analysis points to the increasing incidents of brutality by the security forces against civilian in Manipur. At the same time, it says that the repeal of the Act will encourage insurgency. Amnesty International & Human Rights Watch (HRW) have condemned the human rights abuses in J & K by the security forces such as extra-judicial execution, disappearances and AFPSA provides impunity for human rights abuses & fuels cycles of violence, Human Rights activists working in J&K for peace including MadhuKishwar, AshimaKaul, Ram Jethmalani, Faisal Khan, Ravi Nitesh, Swami Agnivesh, Dr.SandeepPandey& many others have always projected that APSPA is being misused in J & K. Wikileaks Diplomatic Cables have also condemned the violations of human rights by the security forces in Manipur. The International Committee of the Red Cross (ICRC) has reported to the UN diplomats in Delhi about the grave human rights situation in Kashmir which included the use of electrocution, beatings and sexual humiliation. AFPSA is in force in Kashmir since 1990.

Role of Judiciary- Supreme Court of India upheld the constitutionality of AFPSA (given that law & order is a state subject) in a 1998 judgement. In case Naga People’s Movement of Human Rights v. Union of India\textsuperscript{153} the SC said:

1. A \textit{suo-moto} declaration can be made by the Central Govt., however it is desirable that the State Govt. should be consulted by the Central Govt. before making declaration.
2. AFPSA does not confer arbitrary powers to declare an area as a ‘disturbed area’
3. The declaration has to be for a limited duration and there should be periodic review after every six months have expired.
4. The authorized officer should use the minimal force necessary for effective action.
5. The authorized officer should strictly follow the Do’s and Don’ts issued by the army.

\textsuperscript{153} AIR 1998 SC 931
unanimous Constitutional Bench of five judges. Sec 3 of the Act empowers the Central Govt. as well as State Govt. to declare the whole or any part of State “to be a disturbed area”. The court ruled, “We are unable to construe Sec 3 as conferring a power to issue a declaration without any time limit. The definition of disturbed area in Sec 2 (b) of the Act talks of an area which is for the time being declared by application u/s 5 to be disturbed area.”

On Sept 9, 1978, Naga Human Rights Organization was set up in the name, “The Naga People’s Movement for Human Rights”. Since then, it is fighting against atrocities committed by the Army in Manipur & Nagaland. It is required that Sec 3 of the Armed Forces (Special Powers) Act 1958 should be reviewed periodically and Govt. accepts this plea. In a writ petition, SC had observed that the Armed Forces (Special Powers) Act 1958 should be limited to only those areas where the situation could not be handled without the assistance of the Army and it should be reviewed periodically whether the Act should continue or not.

Regarding the Sec 4(a) of the Act, the powers under this section can be exercised when:

(a) Prohibition order of the nature specified in that clause is in force on the disturbed area.

(b) The Officer exercising those powers form the opinion that is necessary to take action for maintenance of public order against the person/persons acting in contravention of such prohibitory order.

(c) A due warning as the officer considers necessary is given before taking action.

While exercising the powers, the officer should use minimum force against person contravening the prohibitory order. Hence, it cannot be said that the provision sec 4(a) suffers from the voice of arbitrariness and unreasonableness.

After 10 civilians killed (Malom Massacre) in the Imphal Valley of Manipur on November 2, 2000, by Assam Rifles, Irom Chanu Sharmilla was on hunger strike. Now she has broken the fast & contested Vidhan Sabha Election in 2017 in Manipur, but has been defeated.

Still AFPSA is in operation in J & K and discussions are going on to withdraw AFPSA from certain areas.

Incidents of AFPSA violations:

1. Operation Blue Bird (Oinam, Bishunpur District-Manipur) Operation Blue Bird was launched on 11th July, 1987 at Oinam (Mainpur) where more than 30 Naga villages were covered. Human rights violations were reported at a large scale.

2. Kunan Poshpora (Kupwara District, J & K) – On 23rd Feb, 1991, a search operation was launched in Kunan Poshpora village of Kupwara. Allegation of rape of women were reported.

3. Malom (Imphal District Manipur) – On 2nd November, 2000, at Malon a place near Imphal, Assam Rifles killed 10 persons at a bus stand. It included 60 years old lady & 18 years old boy of Bravery Award Winner. Irom Sharmilla started the fast to repeal the APFSA.

4. Pathribal (Anantnag district, J & K) – 5 civilians were killed on 25th March, 2000 taking as foreigner who had killed chhatisingpura people. CBI turned it to be a cold blooded murder.


6. Mass graves in J & K – In the year 2008-09, mass graves of around 3000 unmarried persons were found in Bandipora, Baramulla, Kupwara & other districts. It was alleged that these mass graves are of the people killed by the security personnel or of disappeared persons.

7. Machil Encounter (Kupwara District J & K) - On 30th April 2010, three civilians from Baramulla were picked up & shot dead by the Army. These were civilians & killed in staged encounter.

There is nothing wrong in AFPSA but Army authorities should adopt the policy of zero tolerance to the misuse of law by its army men. There should be periodic review of the Act & it should be repealed in areas where the situation has improved. PDP in Kashmir is trying to get it repealed in J & K.

The Armed Forces (Assam and Manipur) Special Powers Act, 1958 –This was an Act to enable certain special powers to be conferred upon members of the Armed forces in disturbed areas in the State of Assam and (the then) the Union Territory of Manipur. This has since been repealed.

155Id pp. 86-91
The Armed Forces (Assam and Manipur) Special Powers (Amendment) Act, 1972- This is an Act after amendment of the Armed Forces (Assam and Manipur) Special Powers Act 1958. This Act extended to whole of states of Assam, Manipur, Meghalaya, Nagaland, Tripura, Mizoram & Arunachal Pradesh. This Act qua Tripura has been repealed. Any commissioned or non-commissioned officer of the Army can take adequate and required action against the law breakers in the disturbed areas.

The Armed Forces (Punjab and Chandigarh) Special Powers Act 1983. It has since been repealed.

The Armed Forces (J & K) Special Powers Act, 1990
This is an Act to enable certain special powers to be conferred upon members of The Armed Forces in the disturbed area of J & K. The Armed Forces have been given special powers to act against the mischievous elements.

3.8 TERRORISM AND ORGANIZED CRIME
Organized Crime means a structured group of three or more persons existing for a period of time and acting in concert with the aim of committing serious crime or offences to obtain directly or indirectly for financial or other material benefits. It manifests in many forms. Organized crime can be further classified into two categories.
1. Traditional Organized Crime\textsuperscript{156} – This includes the illicit liquor trade, killings, gambling, kidnapping, extortion, prostitution rackets, robbery, blackmailing, sand mafia, mining mafia, contract killing, pornography etc.
2. Non Traditional Organized Crime – This includes transnational crime like money laundering, pumping fake Indian currency notes, hawala transfer, cybercrime, hacking, human trafficking, arms smuggling, drug trafficking etc.

As per UN Charter, transnational organized crime comprises:-
1. A group of three or more persons that was not randomly formed
2. Existence of such a group for a period of time.
3. Acting in concert with the aim of committing at least one crime punishable by at least four year’s incarceration.
4. In order to obtain directly or indirectly, a financial or other material benefits.

\textsuperscript{156} Kumar Ashok and Vipul; Challenges to Internal Security of India, McGraw Hill Education Pvt. Ltd., New Delhi, 2015 pp. 83-84
3.8.1 LINKAGES BETWEEN ORGANIZED CRIME AND TERRORISM:
The Terrorists engage in organized crime to support themselves and the organization financially. Drug trafficking, money-laundering, FICN, super killing and extortion are the main organized crimes by which the terrorists generate money.

Organized Crime Groups and terrorists often operate on same network structures. Terrorists thrive under the cloak of transnational organized crime groups. Both organized crime groups and terrorist groups operate in areas with little govt. control, weak enforcement of laws and open borders. Both often use similar means of modern technology to communicate.

These groups may provide smuggled arms and explosive to the terrorist group in exchange of drugs or diamonds etc. Terrorist groups make use of smuggling networks established by organized crime operatives to move them around the world. Criminal gangs also provide money laundering services. Terrorist groups controlling the terrain tax drug traffickers in return for protection.

Organized crime and terrorism thrive on ineffective governance, poor checks and balances. They have developed a symbiotic relationship. But neither are all terrorist acts organized crime, nor are all organized criminals acts terrorism. In most developed countries, organized crime thrives with little or no terrorist activities and in most developing countries; terrorism exists along with varying level of organized criminal activity.

The difference between the organized crime and terrorism rests on means and ends. The aim of the terrorists is to overthrow the existing govt. by altering the status quo. Organised crime on the other hand aims to form a parallel government or parallel economy while co-existing with the existing one. Secondly, terrorists generally use violent means whereas perpetrators of organized crime prefer to be non-violent notwithstanding the odd resort to belligerence. Third, the objective of terrorism is purely political despite sometimes resorting to exploitation of regional, national and religious sentiments to achieve their ends. Whereas the economic objectives are the operational determinants of organized crime.

Different types of organized crime include:

- Narcotics trafficking
- Arms trafficking
- Human Smuggling
- Gold Smuggling
- Fake Currency
- Kidnapping and extortion
- Contract Killing/Supari Killing
- Cyber Crime
- Money Laundering
- Maritime Piracy
- CBRN Smuggling (Chemical, Biological, Radiological and Nuclear Material)
- Trading in human body parts
- Infiltration of illegal business

The first five activities in the above list are more prone to have terrorist linkages\textsuperscript{157}

In Indian context, the groups engaged in terrorism\textsuperscript{158} and organized crime operate together. These relationships have helped the terrorist groups to be less dependent on state sponsors and on their domestic and international supporters. The second half of 1990s, witnessed a number of terrorist groups learning from criminal networks. Operating through the cover of sympathetic organization in Europe and North America, many Asia-pacific terrorist groups generate huge revenue from video and CD piracy, business in phone cards and credit cards scams.

While Organized crime involves many activities, its linkages with terrorism stem from illegal trafficking of drugs, arms and human beings, fake currency and money laundering. Terrorist groups, whether indigenous or sponsored by outside states, need arms and money for their fight against the security forces. Organized crime needs a client and couriers who can smuggle drugs, arms and human beings across countries and regions.

In India, the linkages between the two exist at national and transnational level. At the national level, both terrorist and those involved in organized crime are within India. At the international level, collaboration exists between transnational syndicates and terrorists from inside and outside India.

3.8.2 LINKAGES BETWEEN TERRORISM AND ORGANIZED CRIME IN THE NORTH-EAST

In our North-East of India, almost all militants groups run a parallel government or have their areas of influence and are involved in collecting money directly from the people. Much of the Govt. funds reach the militants indirectly due to mal-governance. Govt. officials in conflict zones are either threatened or bribed to award contracts to individuals patronized by the militant groups. Contracts apart, essential commodities like rice and fuel reach the militants groups directly which are then sold to the public at much higher prices. This

\textsuperscript{157}Id p. 85
\textsuperscript{158}Id pp. 85-86
phenomenon, though unnoticed in other parts of India, is a clear example of the linkages between organized crime and terrorism inside India.

Extortion, kidnapping, contracts and black-marketing still fall short of financing the nefarious activities of the militants. This is where transnational drugs and arms syndicates come in to play. Terrorist organization, especially in the North-East, mobilize funds by becoming couriers of illegal drugs and arms, and at time even human beings, from one point to another within the country. Some of the infamous entry points from South-East Asia include Moreh and the entire Chitagong Hills tracts, especially Cox’s Bazar. Initially, international criminal syndicates had their own network, however with these routes being taken over by various terrorists groups in N-E states, the syndicates have started using them instead of bribing them to let their consignment get through. All the drugs produced in the form of opium & heroin in Golden Triangle (Burma, Thailand & Laos) passes through N-E border.

3.8.3 LINKAGES BETWEEN TERRORISM AND ORGANIZED CRIME IN J & K

In Kashmir, the linkages between terrorists and organized crime exist at a different level. Unlike the North-East, reliance on funds from extortion and other related means is minimal. There is no parallel Govt. in Kashmir and govt. resources do not reach militant hands. However, external funds compensate for inadequate internal mobilization. External funds reach the militant organization fighting in Kashmir through various means. For instance, enormous funds mobilized in Pakistan and other Muslim countries, especially in the Gulf, are channelized through various organizations in Pak to Kashmir. Markaz Dawa WAL Arshad for example mobilizes funds from inside and outside Pakistan to support its militant wing, LeT. Besides external funds are also routed through select organizations and individuals in Kashmir, which finally reach the militants. Money laundering plays a significant role. Hawala transactions take place swiftly and effectively. Besides, it is also believed that ISI uses drug money to fund militant activities in the state. ISI handles the drugs provided in Golden Crescent Countries i.e. Pak, Iran & Afghanistan makes lot of money which is a source of funding to the terrorist organizations.

Another significant relationship between organized crime and terrorism especially in Kashmir is through the spread of counterfeit currency, FICN. Terrorists are the main couriers of Indian Counterfeit currency inside Kashmir, which then made to spread all over India. Even guides for the militants from across the border are paid with fake currency money. In fact, when some of the indigenous militants were also paid with counterfeit money, it resulted in squabbling between them and the so-called guest militants. Fake currency, drugs and arms &
ammunitions is regularly being sent to India through smugglers and militants through the Punjab, Rajasthan and J & K Borders.

### 3.8.4 LINKAGES BETWEEN TERRORISM AND ORGANIZED CRIME IN THE REST OF INDIA

Besides Kashmir and the North-East, sporadic incidents in other parts of India, like the Mumbai blasts & 26/11 killings, have exposed the connection between terrorism and organized crime. This is distinct from the traditional linkages flourishing between organized crime syndicates and local criminals.

**Bombay Blasts:** Bombay blasts in 1993 were a classical example of organized crime cartel’s planning and executing terrorist activities. The 1993 Bombay bombing were a series of 13 bomb explosions that took place in Bombay on Friday, 12th March, 1993. The coordinated attacks were the most destructive bomb explosions in Indian history. The single day attack resulted in over 350 fatalities and 1200 injured.

The attacks were coordinated by Dawood Ibrahim don of Bombay based international organized syndicate named “D” company. Dawood Ibrahim was the mastermind behind these blasts. He is involved in all kinds organized crime cartels like drugs, smuggling, gold smuggling, supari killings, match fixing etc. Linkages between terrorism and organized crime came to limelight first time in India in Bombay blasts. Communal Tension led to terror activities first time in India. First time, the revenge of riots was taken in the form of terror attacks.

**26/11 Attack** 171 persons were killed in terrorist attack by LeT in Mumbai in 2008. This had exposed the need to tighten the maritime security.

**Dawood Ibrahim**

Dawood Ibrahim is the most powerful Mumbai Mafia ‘Don’, with a countrywide network and extensive linkages abroad. He is a classic example of organized crime Mafia. He is one of the most powerful gangsters involved in transnational crimes, including narcotic smuggling, extortion and contract killings. It is believed that he lives in Pakistan and Dubai with the support from ISIS, though ISI denies it. Dawood Ibrahim was believed to control much of the hawala system, which is the commonly used unofficial system for transferring money and remittances outside the view of official agencies. He is currently on the wanted list of Interpol for cheating, criminal conspiracy and organized crime syndicates. He was no. 3 on the Forbes’s World’s Top 10 most dreaded criminals list of 2011, rising from the 4th position in 2008.

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159 Id p. 87
160 Id pp. 87-88
According to the US, Dawood maintained close links with Al Quaida’s Osama Bin Laden. As a consequence, the US declared Dawood Ibrahim a ‘global terrorist’ in 2003 and pursued the matter before the UN in an attempt to freeze his assets around the world and crack down on his operation. The U.S. administration imposed several sanctions on Ibrahim and his associates. Indian and Russian agencies have pointed Ibrahim’s possible involvement in several other terror attacks, including the November 2008 Mumbai attacks.

Currently, the primary activities of this gang are extortion, contract killing, film financing, match fixing, drug trafficking, gold smuggling, smuggling of computer parts and illicit trade in arms and ammunition. The Dawood gang has been supplying arms and ammunition to both to terrorists and criminals.

3.8.5 LINKAGES BETWEEN TERRORISM AND MONEY LAUNDERING

Terrorist groups have begun today a premium on gaining domestic respectability, as also international acceptance, for their goals. Accordingly, such groups have gradually tended to distance themselves from visibly illegitimate businesses and to invest in legitimate business like investment in share market, capital market, IPL spot fixing etc. Specifically with regard to organized crime, terrorist group have taken advantage of existing laws to further their own agenda of establishing a transnational network. Irrespective of who does it, it is not a criminal offence in most countries to generate funds through business and raise funds through charities. A large proportion of ‘dirty money’ can be traced to proliferating narcotics cartels, alien smuggling networks etc. But law enforcement agencies find it more difficult to detect clear-clean money (money which is both generated and transferred legally) as compared to dirty clean money (money generated from criminal operation and ‘laundered’). The former has certain legitimacy and no illegal hooks attached. With Govt. allocating significant resources to combat money laundering, it is becoming difficult for terrorist groups to rely on criminal proceeds. The latest UN Convention on the Supressing of the Financing of Terrorism and Transnational organized crime will make money laundering even harder.

In order to evade the police dragnet, terrorist groups are consequently developing and maintaining clean money resources. Accordingly, the future scenario is likely to see rag-tag/groups in transition utilizing ‘dirty clean money routes’ and sophisticated groups using ‘clean clear money routes’. Emerging trends in organized crime indicate that most groups with a national reach are involved in illegitimate business e.g. narcotics and alien smuggling.

161 Id pp. 88-89
abduction, extortion etc. At the other end, a majority of the groups with a global reach are involved in legitimate/quasi legitimate business e.g. Manufacturing CD/Video piracy etc.

3.8.6 LINKAGES BETWEEN TERRORISM AND DRUG TRAFFICKING

‘Heroin from the Golden Crescent (Afghanistan, Iran and Pakistan) and Golden Triangle (Myanmar, Laos and Thailand) feeds the Asia-Pacific region with major transit routes to Europe and North America through India\(^{162}\).

The increase in consumption within the region has also contributed to the regional insecurity because of terrorist criminal nexus. While organized crime groups that are often linked to terrorist groups control narcotic distribution. Many terrorist and guerrilla groups control the territories where the narcotics are cultivated or refined. The erstwhile Taliban Regime controlled parts of Afghanistan where heroin is produced and taxed the cultivators as also the transporters of opium. Furthermore, the threat posed by narcotics to health, economic, and law & order sphere in the region is on the increase.

Narcotic trafficking is a major source of revenue for terrorists and organized crime network, particularly groups with trans-state reach. As much as armed ethnic groups in Myanmar control the flow of narcotics from Myanmar and armed Islamic groups tax and control organised crime networks regulating the flow of narcotics from Afghanistan. Organized crime, already prevalent in the Far-East and South-East Asia, has gained a prominent tool hold in the cities of South Asia since the mid 1990s. Organized crime networks in Japan, Hong-Kong and China have also made greater inroads in the West. With South Asia increasingly moving towards a market economy, it is likely that organized crime will take deeper roots.

3.8.7 MAHARASHTRA CONTROL OF ORGANIZED CRIME ACT-1999 (MCOCA)

Maharashtra Control of Organized Crime Act – 1999 (MCOCA) is a law enacted by Maharashtra in 1999 to combat organized crime and terrorism\(^{163}\). The preamble to MCOCA says that the existing legal work i.e. the penal and procedural laws and the adjudicatory system, are focused to be rather inadequate to curb or control the menace of organized crime. Govt. has therefore, decided to enact a special law with stringent and deterrent provisions including in certain circumstances, power to intercept wire, electronic or oral communication to control the menace of organized crime, crime syndicate & gangs. Unlike normal law, the confessions before senior police officers are admissible, not only against the accused giving the confession but also against the other accused in the same case. There is no provision for

\(^{162}\) Id p.89
\(^{163}\) Id p.96
granting anticipatory bail for six months to the accused.

MCOCA puts a bar on soft liberal provisions. Under MCOCA, not bail but jail is the controlling principle. Police can file charge-sheet within 180 days instead of 90 days time limit in normal cases. There are measures in MCOCA which ensure protection of witnesses, like keeping the identity and the address of the witnesses secret and the witnesses need not to be produced in the court.

There is a provision of special courts to try such cases. The property of the gangs can be attached & forfeited. The public servants failing to discharge their duties under this act attract punishment. In order to check the misuse of the Act, there is a review committee under the Chief Secretary, Principal Secretary Home and the Secretary Law.

It extends to whole of Maharashtra. Under this Act, continuing unlawful activity means an activity prohibited by law for the time being in force, which is cognizable having punishment more than three years undertaken either singly or jointly as a member of an organised crime syndicate. Organized crime syndicate means a group of two or more person indulging in organized crime. The State Govt. can constitute the designated courts to try the offences under this Act. The judge should not be less than Session Judge or Additional Session Judge. An officer below the rank of Superintendent of Police cannot submit the application for approval of interception of wireless, electronic or oral communication. A confession before the police officer below the rank of Superintendent of Police is not admissible in the court. On the request of the Public Prosecutor, the proceedings of trial by the court can be held in camera. No information about the commission of an offence of organized crime under this Act shall be recorded by a Police Officer without the prior approval of the Police Officer below the rank of DIG and no investigation of an offence under this Act shall be carried out by a police officer below the rank of Deputy Superintendent of Police.

In *Mohd. Shakil Shafi Jariwala and ors. v. State of MHR*\(^{165}\), the High Court of Bombay held that an accused taken in custody under MCOCA has no right to know the contents of remand application filed by the Public Prosecutor, on which order of remand is passed. Under Section 19 of the MCOCA, it is clear that legislature has intended that certain materials and information are to be kept secret and the court is bound to maintain that secrecy throughout the proceedings.

\(^{164}\)Maharashtra control of Organized Crime Act (1999) Sec. 23.

\(^{165}\)2000 Cr.L.J. 3606
3.8.8. U.N. CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS

UNTOC is the guardian of the United Nations Convention against Transnational Organized Crime (Convention) and the three protocols (Trafficking in Persons, Smuggling of Migrants and Trafficking of Firearms) that supplement it.\(^{166}\)

This is the only International Convention, which deals with crime. It is a landmark achievement, representing the international community’s commitment to combating transnational organised crime and acknowledging the UN’s role in supporting this commitment. The adoption of the Convention at the Fifty-fifth session of the General Assembly of the UN in 2000 and its entry into force in 2003 also marked a historic commitment by the international community to counter organized crime.

The Convention offers the states which are party to the Convention, a framework for preventing and combating organized crime and a platform for cooperating in doing so. These states have committed to establishing the criminal offences of participating in an organized crime group, money laundering, corruption and obstruction of justice in their National Legislation. By becoming parties to the UNTOC, these states also have access to a new framework for mutual legal assistance and extradition, as well as a platform for struggling law enforcement cooperation. States have also committed to promoting training and technical assistance to strengthen the capacity of national authorities to address organized crime.

3.8.9 TERRORISM AND ORGANIZED CRIME – FUTURE PERSPECTIVE

With the loss of State Sponsorship for terrorism, terrorist groups need to pursue different means of financing, mainly through arms and drug trafficking.\(^{167}\) Terrorists dependence on organized crime for financial viability and organizational survival will increase in the near future. Structurally, terrorist groups will increasingly mirror organized crime groups. Terrorist groups will rapidly move in search of new opportunities to generate funds. Dependent on the financial opportunities available, both sources and methods of generating revenue will differ from one another. With the bulk of the terrorist groups to degenerate into pure criminal groups will, nevertheless, increase.

To effectively combat international terrorism, State response will have to factor in the nexus between terrorists and organized crime. Among the principal responses to regulating their existing and emerging threats are as below:-

\(^{166}\) Id pp. 90-91
\(^{167}\) Kumar Ashok and Vipul; *Challenges to Internal Security of India*, McGraw Hill Education Pvt. Ltd., New Delhi, 2015 pp.89-90
• Develop exceptionally good military and intelligence expertise to neutralize terrorist groups. The approach of punishing individuals but permitting groups that have penetrated violence to exist is highly counter-productive.
• Develop arrangements with states to disrupt terrorists support networks and the States should assert by sharing intelligence and exchanging personnel to fight transitional terrorist networks.
• Terrorist groups can be effectively crushed only at an early stage. The failure to fight efficiently, legitimately and ethically, especially against an ethically and religiously empowered groups can lead to indiscriminate violence, which can favour the terrorists. With time, most conflicts can gather momentum generating substantial popular support. In such instances, a political solution over a military solution should be considered.
• Often, developing regional autonomy or power sharing has been the most effective strategy. But it works primarily in the formative phases of a conflict. The process requires close supervision, particularly during the implementation phase.
• A politico military approach should be evolved to politically isolate a group in order to stem support and recruits, and to simultaneously offer political and economic incentives and to militarily pressure it to join the mainstream. Often links with foreign groups, state sponsors, or diaspora-support can provide the confidence to fight on. Transnational networks make such groups more resilient.
• Stringent law like TADA, MCOCA, Gangster Act etc to deal with organized crime.
• While some of these threats can be resolved unilaterally by states, most require bilateral and multilateral arrangements.
• Some of the threats can be regulated at the sub-regional and others at the regional level.
• Some of the threats are new, others are old, but have assumed renewed dimension. Therefore, new institutions capable of delivering multipronged responses are essential to regulate extent and emerging threats. On the line of MCOCA, Gujrat Govt. has promulgated GCTOC (Gujarat Control of Terrorism and Organized Crime Act – 2015). Punjab is also thinking of having PCOCA to eliminate the criminal gangs operating in Punjab.
3.9 TERRORISM AND JUDICIAL APPROACH - INTERNATIONAL

Court Cases:

1. *Dennis v. United States*\(^{168}\), Eugene Dennis was a member of American Communist Party between 1945-1948. He was arrested and convicted in New York for advocating the overthrowing of the government in context with the Cold War. The Court held that he was rightly convicted as his speeches were not protected by 1\(^{st}\) and 5\(^{th}\) amendments of the Constitution.

2. *Yates v. United States*\(^{169}\), he was convicted for advocating the overthrowing of the govt. being a member of communist Organization. The court overturned Yates conviction as his speeches do not advocate concrete action against the Govt.

3. *Brandenburg v. Ohio*\(^{170}\) the appellant leader of Ku Klax Klan (KKK) made revengeful & hate speeches against Jews & African Americans & he was convicted under the Ohio Statute; The SC of U.S.A. overturned the conviction that the speeches can be criminalized only if it is likely to produce imminent lawless action. The threats were vague, hence were not criminal

4. *Rankin v. Mepherson*\(^{171}\), Ardith Mepherson was working as a clerk in the Texas Office of Constable Rankin. On the attempt of the life of Ronald Regan, the President of USA, she being black, spoke insulting words and supported the attempt. She was sacked. The SC on appeal reinstated her that the remarks could be called violent, rhetoric rather than an actual threat. It is protected by the first amendment.

5. *US v. Wang Kun Lue and Chan De Yian*\(^{172}\), the dependent challenged the treaty making powers of the state on the basis of international treaties. The Congress had passed the Hostage Taking Act. SC upheld that the state has the power to pass laws in regard to International Treaties. SC said that the state can pass anti-terrorism laws as an overextension of International Treaty.

6. *Reno v. American – Arab Anti-Discrimination Committee*\(^{173}\); in 1987, the Immigration and Nationalization Service (INS) began deportation proceedings against seven Palestinians and one Kenyan for working for the PFLP. SC upheld the action as the first amendment does not give protection to immigrants.

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\(^{168}\)341 US 494 (1951)  
\(^{169}\)354 US 298 (1957)  
\(^{170}\)395 US 44 (1969)  
\(^{171}\)48 US 378 (1987)  
\(^{172}\)US 2 D Circ 96-1314 (1996)  
\(^{173}\)97-1252(1999) (US)
7. **Kiareldeen v. Reno**\(^{174}\), Harry Kiareldeen was working in USA and married a US Citizen Girl. He was detained and was asked to leave that as per secret evidence, he was a member of Palestine Terrorist Group. SC of USA rejected the secret evidence and he was allowed to stay. Whether the benefit of First Amendment is applicable to insurgents and non-US civilian is still an open question.\(^{175}\)

Within weeks after 9/11 attack in New York, the Security Council adopted a resolution 1373 pursuant to its power under chapter VIII of the UN Charter, which authorizes the council to take measures to maintain or restore international peace and security in response to any threat to peace.\(^{176}\) The resolution provides sweeping powers to the Council Resolution 1373 requires preventing the collection of funds for terrorist activities. For the implementation of this resolution 1373 by member states, the council established the Counter terrorist Committee known as a Standing Committee, comprising of all 15 council members. The Member State was to report the action taken within 90 days. The Resolution of the Security Council has played a significant role.

### 3.9.1 TERRORISM AND JUDICIAL APPROACH - NATIONAL

Terrorism is low intensity warfare. The Police and Security Forces are working under great constraints. In order to curb terrorism, harsh measures are required, of course, keeping in view the human rights of the Individuals. An independent judicially system is perhaps better than any other institution to maintain the perfect equilibrium; between the liberty of the individual and the power of the states\(^{177}\). Judiciary exercises its control over the illegal acts and powers of both the legislature and the executive. Judiciary has inherent powers to act independently. The judiciary has played an important role in the enforcement of anti-terrorism laws in India. A few cases of Judicial activism are discussed below:-

**A.K.Gopalan v. State of Madras**\(^{178}\), it was the first case decided by the Supreme Court after independence on the preventive detention or upon the Internal Security of the nation. The Supreme Court held that a Statute cannot be construed merely with a reference to grammar and the intention of the purpose of the legislative must be kept in view. This was a habeas corpus petition filed in the Supreme Court against preventive detention under Art 32 of the constitution. SC rejected the petition saying that the petitioner must see that he enjoyed the rights under part-III of the constitution.

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\(^{174}\)Supp 2 D 402, 419 (DNJ 1999)


\(^{176}\)SC Res 1373 UN Socs/Res/B 73 September 27, 2001 UN Chapter Art 39

\(^{177}\)Jaswal, Paramjit, and Jaswal, Nishita; *Human Rights and Law*, 1996 P 129

\(^{178}\)AIR 1956 SC 27
Naresh Chandra v. State of West Bengal\textsuperscript{179}, in this case, Naresh Chandra, an advocate of Calcutta High Court filed the petition on behalf of his friend, who was the Secretary of West Bengal committee of BJP against his detention under the Preventive Detention Act IV of 1950. It was held that the statements calling for movement against “Nehru – Noon Pact” cannot be said to be wholly unconnected with the maintenance of public order. The petition was rejected.

Ram Manohar Lohia v. State of Bihar &Ors.\textsuperscript{180}, Dr. Lohia had moved the court under Art 32 of the constitution through a writ of habeas corpus directing his release from detention by the order of DM Patna made under Rule 30(1) (b) of the DIR-1962. The ground was that Dr. Lohia being at large is prejudicial to public safety and maintenance of public order. Supreme Court held that the order of detention cannot be sustained and Dr. Lohia’s petition was allowed and he was set at liberty.

In Anil Dey v. State of W.B.\textsuperscript{181}, the petitioner was detained by the order of DM 24 Parganas u/s 3(2) of MISA 1971 as he was notorious stealer of Railway stores operating in Dum Dum Railway Yard and the train security gets disrupted for a considerable time affecting supplies and services. SC rejected the petition, of course, with the remarks that personal satisfaction of the detaining authority is absolutely necessary for the critical safety of the society.

Nabani v. State of W.B.\textsuperscript{182}, the petitioner filed the petition against his detention under MISA-1971. SC held that the detention order is impervious to judicial scrutiny; but it is beyond the powers of the judiciary to determine the sufficiency of the grounds upon which the executive’s objective satisfaction was based.

In Khudi Ram Das v. State of West Bengal\textsuperscript{183}, this was a petition for writ of habeas corpus under Art 32 of the Constitution, challenging the validity of detention u/s 3(1) & 3(2) of the MISA-1971. SC held that the power of detention is clearly a preventive power and detention is not a punishment. Secondly, the subjective satisfaction of detaining authority is not wholly immune from judicial review ability and the court can always examine the justification of subjective satisfaction of the detaining authority. The detenue is required to be intimated about the basic facts and materials which constitute the grounds of detention and not other particulars, as per Article 22 (5) of the Constitution. Finally, the petition was dismissed.

\textsuperscript{179}AIR 1959, SC 1335
\textsuperscript{180}AIR 1974 SC 740
\textsuperscript{181}AIR 1974 SC 832
\textsuperscript{182}AIR 1974 SC 1706
\textsuperscript{183}AIR 1975 SC 550
In *Sunil Batra v. Delhi Admn. and ors*\(^{184}\), his writ was filed to know whether the petitioners are entitled to all Constitutional rights enshrined in Part-III of the Constitution. The SC ruled that the petitioners are entitled to all the Fundamental Rights subject to the very nature of things indicated in the order of his confinement. Conviction does not reduce a criminal into non-person and the imposition of any major punishment within the prison system is conditional upon the observance of procedural safeguards.

In *Shiv Parsad Bhatnagar v. State of M.P. & ors*\(^{185}\), the SC held that grounds of detention i.e. incidents which are stale by five years and relevance to law & order and to maintenance of public order are not sustainable and detenu was entitled to be released. Grounds of detention must be pertinent and not irrelevant, proximate and not stale, precise and not vague. A single vicious ground is sufficient to initiate an order of detention.

In *Alijan Mian v. District Magistrate, Dhanbad and ors*\(^ {186}\)

The petitioner was an employee of the Eastern Coal Fields Ltd. working at Khudia Colliery as a dumper driver. He was detained to prevent him from acting pre-judicial to the maintenance of public order. The detention order was upheld by SC. The preventive detention is no bar to criminal proceedings and vice-versa. It is for the detaining authority to have the subjective satisfaction to have the sufficient material for the detention.

In *J.R. Gupta v. State of Punjab*\(^ {187}\), the petitioner was detained as the detenu was indulging in manufacturing Vanaspti Ghee by using beef allows as raw material. Huge stock of beef fallow was available with him. SC held that the criminal activity did not attract the provision of Prevention of Black Marketing and hence the detention order under clause 3(2) of the NSA, 1980 was not sustainable.

In *Rajan Lal Sharma v. District Magistrate, Muradabad & ors.*\(^ {188}\), in this case, petitioner was detained for committing a dacoity on National highway on broad day light. SC upheld the detention order that the satisfaction of the detaining authority that criminal was likely to repeat similar activity affecting public order if allowed to remain free was sufficient to sustain the order.

In *Lalit Rajkhowa v. State of Assam & ors.*\(^ {189}\) the petitioner was detained under NSA for preventing him from acting in any manner prejudicial to the maintenance of public order and supplies of the services essential to the country. The ground of detention was not supplied to

\(^{184}\) AIR 1978 SC 1675  
\(^{185}\) AIR 1981 SC 870  
\(^{186}\) AIR 1983 SC 1130  
\(^{187}\) 1984 Cr.L.J. 694  
\(^{188}\) 1984 Cr.L.J. 954  
\(^{189}\) 1984, Cr.L.J. 1869
him. Moreover, the essential services were exempted from the purview of Assam Bundh. The SC held that the non-furnishing of the material of the grounds of detention was violative of Art 22(5) of the Constitution.

In *Usman Bhai Dawoodbhai Menon and .ors. v. State of Gujarat*¹⁹⁰, the petitioner was arrested under TADA 1987. Two questions were to be addressed i.e. power of granting bail under TADA whether under section 439 of CrPC or u/s 482 CrPC and secondly, the nature of restraint placed on the powers of the designated courts to grant bail in view of the limitation placed u/s 20(8) of the said Act. It was held that there is total exclusion of the High Court even to entertain application for bail u/s 439 CrPC or us/ 482 CrPC. The SC further ordered that the designated courts should examine individual case of bail on merit. Where the cases do not fall under the preview of Sec 3 & 4 of TADA, such cases should be transferred to the ordinary courts.

In *Angoori Devi v. Union of India &ors.*¹⁹¹, in this case, an offence was committed by two policemen along with a civilian. The court held that this has no connection to disturb the public order having regard to the circumstances of the case. The S. Court further held that the grounds of preventive detention must have nexus with the purpose for which detention is made. SC observed that the impact on public order & law order depends upon the nature of the act, the place where committed and the motive behind the act. Where the gravity of the act is likely to endanger the public tranquillity, it may fall within the ambit of public order.

In *Narayan Singh Karam Singh Punjabi, Advocate v. Jitendra Bhim Raj Bijjaya & ors.*¹⁹², in this case, two persons formed an unlawful assembly and killed two persons to strike terror in the people or any section of the people. SC held that the Designated Court was fully justified in coming to conclusion that the material placed on record did not prima facie disclose the connection of the offence u/s 3(1) of TADA. This was basically the activity between the two rival groups of gangs to gain supremacy.

In *Kartar Singh v. State of Punjab*, the petitioner challenged the constitutional validity of the terrorist affected areas (special courts) (Act 61 of 1984) and The Terrorist and Disruptive Activities (Prevention) Act, 1987 (No. 28 of 1987). The SC upheld the validity of both the above legislation, but the Designated Courts should be very careful in scrutinizing the cases under TADA so that Govt. Should not become the law breaker.

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¹⁹⁰AIR 1988 SC 922
¹⁹¹1989 (1) SCC 385
¹⁹²(1990) 4 SCC 76
In Hitendra Vishnu Thakur & ors. v. State of MHR & ors.\textsuperscript{193}, the Criminal appeal & special leave petition were filed raising the questions of provisions of the ambit of sec 3(1) of TADA,1987 and scope of sec 20(4) & sec 20(8) of TADA,1987 in the matter of grant of bail to the accused by the Designated Court. The court held that the Intention is the most important in the commission of crime and the crime under TADA must be committed with the intention as contemplated by Sec 3(1) of the Act. It is the duty of the investigating agency to satisfy the Designated Court from the material collected by it.

In Joginder Kumar v. State of U.P.\textsuperscript{194}, where there is the emphasis on effective prosecution of the criminals, it is the duty of the Govt. & the police that the human, legal and constitutional rights of the criminals must be protected. SC further held that the quality of a nation’s civilization can be largely measured by the methods it used in the enforcement of criminal law.

In Sanjay Dutt v. State of MHR\textsuperscript{195}, this is regarding the special leave appeal made in the Division Bench about the grant of bail to the petitioner in Bombay blasts case. As per Sec. 5 of the TADA, the prosecution is required to prove that the accused was in conscious possession unauthorized. No further nexus with any terrorist or disruptive activity need to be proved by the prosecution. The powers of the state Govt. under TADA is to curb the terrorist activities. The SC finally held that that the courts must promote the object of legislation and prevent its possible abuse by the authorities. The court must ensure that the authorities must not rope in the people by stretching the language of law.

In N. Bisheshwar v. State of Manipur and ors\textsuperscript{196}, the petitioner was detained under NSA as he was founding member of political party Paramlen Anuba which has the objective of renaming Manipur as Kargelipak (homeland of the Maoistis). The court released the detenue that it did not threaten the public order. State of West Bengal & ors. v. Mohd Khalid & ors.\textsuperscript{197}, on March 16, 1993, an explosion occurred at Ganguly Street Calcutta where 69 persons died. The accused persons were prosecuted under TADA. The petitioner challenged his arrest under TADA. The High Court had held that the application of TADA in the case is not sustainable. The criminal appeal was filed in the SC against the judgement of the High Court. SC held that the storage & use of bombs do attract the provision of TADA. The SC set aside the impugned judgement of High Court and directed the Designated Court to proceed with the

\textsuperscript{193} AIR 1994 SC 2623  
\textsuperscript{194} AIR 1994 SC 1349  
\textsuperscript{195} 1994 Cr.L.J. 3675  
\textsuperscript{196} AIR 1995 SC W 3893  
\textsuperscript{197} AIR 1995, SC 785
case in accordance with the law with utmost expedition.

In *State of MHR v. Som Nath Thapa*\(^{198}\), Som Nath Thapa was Deputy Commissioner Custom Bombay, who was arrested in smuggling case of weapons & explosives used in Bombay blasts, 1993. Thapa was granted bail by the Designated Court & upheld by the High Court. SC while perusing the evidence said that designated court should re-examine the matter on the basis of material placed by the prosecution. So far as per the material placed on record, prosecution has failed to connect Thapa with Tiger Menon etc.

In *State of Punjab v. Gian Singh*\(^{199}\), this case is a case of Sant Longowal assassination, who was assassinated in a Gurudwara in Longowal village in Sangrur District on 20.08.1985. Gian Singh, the main accused was sentenced to death as no other punishment was prescribed under TADA. In an appeal to the Supreme Court by the accused, SC converted the capital punishment to life imprisonment in view of long period of 13 years. The court also ruled that the Designated Court can pass the punishment like imprisonment for the offence u/s 3(1) of TADA 1985.

In *Sathenthiraraja v. State*\(^{200}\), this is a case of assassination of Sh. Rajiv Gandhi, there were four review petitions in the SC, who were sentenced to imprisonment of life. SC held that the accused did not commit any offence u/s 3 of TADA and accordingly, review petition were dismissed.

In *State v. Nalini*\(^{201}\), the SC held that TADA was not applicable to Rajiv Gandhi assassination case as it was neither a terrorist act u/s 3(1) of TADA, nor were the activities of perpetrators disruptive u/s 4 of the TADA Act.

In *State of Rajasthan v. UOI*\(^{202}\), the SC observed that merely because powers may sometimes be abused, it is not good for denying the existence of power.

In *Kesavananda Bharti v. State of Kerala*\(^{203}\), in exercising the power of judicial review, the courts cannot be oblivious of the practical needs of the govt. Opportunities must be allowed for indicating reasonable belief by experience.

In *Teja Ram v. State of Rajasthan and ors*\(^{204}\), it was held that the detention was not illegal as the grounds of detentions were formulated prior to the order of detention. The court further held that the powers of High Court under Art 226 are not absolute. No doubt the subjective

\(^{198}\) 1996 Cr.L.J. 2448
\(^{199}\) AIR 1999, SC 3450
\(^{200}\) AIR 1999, SC 3700
\(^{201}\) 1999 (5) SCC 253
\(^{202}\) (1978) 1 SCR P-1
\(^{203}\) (1973) Supp SC P 755
\(^{204}\) (2000) Cr.L.J. 244 (SC)
satisfaction of detention by the detaining authority is immune from the power of judicial review, but the court can always examine whether the authority arriving at requisite satisfaction acted fairly and justly with care and caution.

In *Simranjit Singh Mann v. U.O.I.*\(^{205}\) case, (he was an ex IPS officer), he questioned the Constitutional validity of POTA-2002, as it infringed the right to life and liberty enshrined in Art. 21 of the Constitution. He, also, challenged some provisions of POTA-2002. The Court held that the security of the state is of paramount importance. The sovereignty and integrity of the nation have to be preserved at all costs. The individual’s rights are subservient to the longer interests of the society & the state. Of course, law depriving a person of his liberty, irrespective of the fact that it provides for punitive or preventive detention, has to satisfy the test of reasonableness. This matter has been duly considered before POTA was promulgated. The enactment of the impugned Act was a national imperative. Liberty does not mean a licence to create a terror and commit terrorist activities. A terrorist causes a terrible trauma to the people and his actions disentitle him to claim party of treatment with the ordinary criminal. The challenges based on the guarantee of equality in Art. 14 cannot be sustained. The punishment provided under the Act has a clear rationale. The state needed to arm itself with adequate authority to protect the liberty of the law abiding. The existing laws were not enough to fulfil the desired objectives. Thus, the impugned Act was made by permitting the confession recorded by an officer of the rank of S.P., to be used against the accused. It is a process to protect the witnesses as no body dares to come as a witness in terrorist crime. The cases are to be tried by the designated courts & the appeal lies before the division bench of the High Court. Thus the constitutional validity of the provision of POTA have been upheld and the petition was dismissed.

In *Bhai Narendra Kumar v. State of A.P.*,\(^{206}\) the case is that the petitioner provided medical assistance to K. Mallaiah Sudheer, a committee member of East Sub Zonal Commander of PWG & thus he committed an offence u/s 21 (1)(a)(b) of POTA-2002. The Supreme Court held that there is a professional obligation of the doctor to everyone, may be a terrorist or an ordinary man. If a doctor visits the camp of terrorist & help in maintaining fitness, then provision of sec 21 (1)(a)(b) are attracted. This is not the case of prosecution. The petitioner was entitled to bail.

\(^{205}\) (2002) Cr.L.J. 3368 (SC)  
\(^{206}\) 2003 Cr.L.J. 288
PARLIMENT HOUSE ATTACK

Special POTA Court, on Dec 18, 2002, awarded the death sentence to three of the four accused persons involved in Parliament House attack i.e. SAR Geelani, Shaukat Hussain Guru and Mohd. Afzal Shaukat Hussain’s wife Afshana Guru was sentenced to five years rigorous imprisonment for conspiracy. Special Court said that they deserve no leniency. On appeal in SC SAR Gellani was acquitted. The death sentence of Shaukat Hussain Guru was commuted to 10 years rigorous imprisonment. Capital punishment of Afzal Guru was upheld and he was hanged, which was questioned by many quarters. Afshan Guru was acquitted.

Devinder Pal Singh Bhullar v. NCT of Delhi\(^\text{207}\)

Where nine persons were killed in a terrorist attack in Delhi and Mr. Bitta, the then President of All India Youth Congress had a narrow escape, the court said that any compassion to such persons who have no respect for human life would frustrate the purpose of enactment of TADA. Thus, the capital punishment of Bhullar was upheld. However, in later appeals and review petitions, the capital punishment of Bhullar was committed to life imprisonment on medical grounds, long delay in hanging and acquitted by one Judge.

26/11 Mumbai Attack

LeT and JeM activists attacked the Nariman Centre, Oberai Hotel, Taj Hotel and Railway station where 183 people were killed and many injured, on 26\(^\text{th}\) November, 2008. After a long trial, Kasab, who was caught on the spot was given capital punishment which was upheld by the SC. Kasab was hanged in Yerwada Jail, Pune.

BOMBAY BLAST CASE

Dawood Ibrahim, Yakub Menon and others caused 13 bomb blasts in Bombay on 12\(^{\text{th}}\) March, 1993 and killed 257 and injured around 1200 persons. Yakub Menon has been hanged and many others were convicted for capital punishment and life imprisonment.

Dawood Ibrahim – D Company is beyond the approach of the security forces.

INDIRA GANDHI ASSASSINATION CASE \(^\text{208}\)

Smt. Indira Gandhi was shot dead by her own gunmen Beant Singh and Satwant Singh. Beant Singh was killed on the spot and Satwant Singh was arrested. The special court gave capital punishment to Satwant Singh and Kehar Singh. Balbir Singh was given life imprisonment. SC acquitted Balbir Singh and upheld the capital punishment of Kehar Singh and Satwant Singh.

\(^{207}\)(2002) (1) SCC 209
\(^{208}\)AIR 1988, SC 1883
POSSESSION OF CERTAIN UNAUTHORISED ARMS

Where any person is in authorised possession of any bombs, dynamite or hazardous explosive substance or other lethal weapons capable of mass destruction or biological or chemical substances of warfare in any area whether notified or not, attracts POTA provisions.

3.9.2 OFFENCE RELATING TO SUPPORT GIVEN TO A TERRORIST ORGANIZATION.

A person commits an offence\textsuperscript{210} if

a) he invites support for a terrorist organization.

b) the support is not, or is not restricted to the provisions of money or other property.

A person commits an offence, if he arranges, manages or assists in managing or arranging a meeting which he knows is

a) to support a terrorists organisation

b) to further the activities of a terrorist organisation and

c) to be addressed by a person who belongs or proposes to belong to a terrorist organisation.

A person commits an offence, if he addresses a meeting for the purpose of arranging support for a terrorist organization or to further its activities. Vaiko had not defended POTA in Parliament during the debate on it. Being supporter of LTTE, Vaiko was arrested under POTA and remained in jail for 17 months.

Fund raising\textsuperscript{211} for a terrorist Organization to be an offence and secondly, whoever funds terrorism is also held guilty. By funding, you are abetting terrorism. The UN passed a Draft Money Laundering Bill and the profits out of such crime must be confiscated.

It will be lawful for CIM/CMM\textsuperscript{212} to give such orders when the police officer investigating a case requests to obtain handwriting, footprints, photographs, blood, saliva, semen, hair, voice of the accused etc. In S. Srinivasa v. Ms Deccan Petroleum Ltd.,\textsuperscript{213} the court said where the order of refusal to issue summon for production of document was prejudicial to accused, then such order is not sustainable. If any accused person refused to give such samples, the court shall draw adverse inference against the accused.

\textsuperscript{209} Sec 4 of POTA 2002
\textsuperscript{210} Sec 21 of POTA
\textsuperscript{211} Sec 22 of POTA
\textsuperscript{212} Sec 27 of POTA
\textsuperscript{213} (2001) Cr.L.J. 659
A confession made by a person before a police officer \(^{214}\) not lower in rank than an SP and recorded by him out of which sound or images could be reproduced shall be admissible trials of such person for the offence under this Act. In case of Devinder Pal Singh Bhullar \(^{215}\), the Court held that it was for the court to decide admissibility or reliability of confession in its judicial wisdom. If the court is satisfied, then the confessional statement will be part of the statement. In case

In *State (NCT of Delhi) v.Navjot Sandhu alias Afshan Guru*, \(^{216}\) the court held that confessional statement of the accused cannot be read against the co-accused as POTA operates independently of Indian Evidence Act & IPC. \(^{217}\)

The cases pertaining to Punjab have been discussed in Chapter-V.

Notwithstanding anything in the code or in any other law for the time being in force, the evidence collected through interception of wire, electronic or oral communication shall be admissible as evidence against the accused in the court during the trial of the case. The basic problem is that nobody will come forward to depose as witness against the terrorists. That is the reason of acceptability of intercepted communication. Regarding bail, no terrorist will be released on bail until & unless, the public prosecutor puts the views of prosecution. Some of the main safeguards so that POTA is not misused are as follows:-

Investigation of an offence under this Act was to be done by an officer not below the rank of Deputy Superintendent of police. No court can take cognizance of an offence under the Act unless sanction of the state. The Act provided safeguards against abuse of the provision relating to admissibility of confession made before a police officer. Intention of the arrest of the accused will have to be provided to a family member immediately after arrest and this fact is to be recorded by the police officer. Provision for prosecution of police officer for malafide action under the Act and compensation to the affected person in such cases exists.

Finally on Sept 17, 2004 the Union Cabinet approved ordinance to repeal the POTA 2002 and amended the Unlawful Activities (Prevention) Act, 1967. All the penal provisions of POTA, initially, were transferred to UAPA. The definition of unlawful association was also included as an offence u/s 153 A IPC. No arrest under POTA would be made after this ordinance. Confession before an SP will not be admissible as evidence. All terrorist organization banned under POTA would continue to remain banned under even UAPA. The

\(^{214}\) Sec 32 A POTA  
\(^{215}\) (2002) 11 SCC 209  
\(^{216}\) (2005) 11SCC 600  
\(^{217}\) Sec 45 of POTA
burden of proof has moved from accused to the prosecution. The acceptability by the courts of the intercepted messages was very dangerous. Under amended UAPA-2004, the ambit of the Act was strictly limited to meet the challenge to the territorial integrity of India.

3.9.3 JUDICIAL CONTROVERSY

NGOs are raising various suspicions about amended UAPA but they must keep in mind that provisions are there in the constitution where reasonable restrictions can be enforced even upon the liberty of the people involved in the increasing terrorist activities. Extraordinary situations required extraordinary remedies. At the same time, we have to ensure that these laws are not misused for party politics and personal ends. At the same time, security and integrity of the country should not be compromised.

The SC reversed the Madras High Court ruling for the bail granted to journalist R.R. Gopal, who was arrested in 2003, for possessing terrorist weapons. SC said that a prima facie case existed against the accused and Madras High Court should not have shown sympathy. However, in UP, 25 dalits were arrested under POTA between April & July 2002. Some were arrested as they had refused to work as a bonded labour. In Jharkhand, almost 200 people were arrested under POTA including twelve years old boy and an eighty one year old man. Gujarat used POTA indiscriminately.

POTA and other Indian anti-terrorism laws have raised a host of human rights issues and such concern included as below:

i. Overly broad and ambiguous definition of terrorism that fail to satisfy the principle of legality.

ii. Pre-trial investigation and detention procedures which infringe upon due process, personal liberty and limits on the length of pre-trial detention.

iii. Special courts and procedural rules that infringe upon judicial independence and the right to fair trial.

iv. Provisions that require courts to draw adverse inferences against the accused in a manner that infringes upon the presumption of innocence.

v. Lack of sufficient oversight of police and prosecutorial decision making to prevent arbitrary, discriminatory and disuniform application.

vi. Broad immunity from prosecution for govt officials which fail to ensure the right to effective remedies. Repeal of POTA was not complete as the repeal does not affect the pending cases.

India’s anti terrorism laws have functioned as preventive measures laws than as
intended to obtain conviction for criminal violations. At times, human rights defenders, who have challenged these violations or have defended individual accused under the anti-terrorism laws, have faced retaliation threats and intimidation. It is felt that Counter-Terrorism Resolution 1373 has not been complied by India in letter & spirit.\(^\text{218}\)

### 3.10 CONCLUSION

The major problem to have the adequate laws to fight terrorism all over the world is that there is no unanimity on the definition of terrorism. Internationally, UN Security Council is taking adequate steps by way of convention and covenants with the direction to be compiled by the states. But because of clash of interests of different nations, effective steps by any one nation are not possible. India has passed many statutory laws and the terrorism to some extent was contained. Situation in Punjab is totally under control. Situation in J&K, N-East and Central Indian States is not that satisfactory, in spite of the fact that the security forces are fighting with dedication. We have lost many Jawans in J&K and Manipur.

ISIS, Talibans, LeT, JeM and HuM are very active in South Asian States. USA, Russia, China and India should put in the joint efforts to curb this menace of terrorism. Terrorism is a cancer and the states should not bring forth their personal interests. In Syria, for fighting IS, USA & Russian interests are clashing. We must first curb terrorism and then the differences should be sorted out.

In India, we have so many anti-terrorism laws like TADA (since repealed, POTA (since repealed) UA(P)A-2008 and AFSPA. It should be emphasized upon the court to dispose of terrorist cases within a year. However, special laws are needed to fight crime under special circumstances.

The Central and State Governments should have will to fight and curb the terrorism. All political parties should support the government in the fight against terrorism. There is a need to win the hearts and minds of the misdirected youth and tough action against the hardcore elements. Indian Judiciary is doing an excellent work in the fight against terrorism.