Chapter 4

4. INDIAN PERSPECTIVE OF HUMAN RIGHTS AND ANTI-TERRORISM LAW

4.1. CONSTITUTIONAL MANDATE OF BASIC RIGHTS

The Constitution of India was adopted on November 26, 1949 but did not come into force immediately on that day. According to Article 394 of the Constitution, the whole of the Constitution except Articles 5, 6, 7, 8, 9, 60, 366, 367, 380, 388, 392 and 393 (which came into force at once), came into force on January 26, 1950 which day is referred as the commencement of the Constitution. It is rather surprising that although before the adoption of Indian Constitution U.N. Charter had been adopted at San Francisco on June 25, 1945 and came into force on October 24, 1945, India being a country that signed and ratified the Charter.

United Nations Assembly On 10 December, 1948; the U.N. Commission on Human Rights had been established by the Economic and Social Council in February 1946 as the “nearest approach to permanent on achieving for the supervision of the problem of protection of human rights”\(^1\) of human right and the Commission had been directed to prepare, *inter alia*, recommendation and reports on an International Bill of Human Rights yet in the whole Constitution of India the term “human rights” does not find mention even once.

Preamble- however one may argue that what is in the name of the term. What is really material is whether Indian Constitution was recognized and given

\(^1\) Ian Brownline, Principles of Public International Law, Second Edition (1973), p. 554
effect, to human rights? The answer is not only in affirmative and positive but it may be added that Indian Constitution is credited with not only giving effect to human rights but has also made them enforceable long before the adoption of International Convention for the Protection of Human Rights and Fundamental Freedoms (1950) which came into force on September 3, 1953. According to the Preamble of Indian Constitution, India is a “Sovereign, Socialist, Secular and Democratic Republic”.²

Speaking about the said words of the preamble of Indian Constitution, Bhagwati, J., while delivering the judgment in Dr. Pradeep Jain v. Union of India,³ observed that they embody the hopes and aspirations of the people. It is significant to note that the preamble emphasizes that the people who have given to themselves the glorious document are the people of India and it gives expression to resolve the people to constitute India into a sovereign, socialist, secular, democratic republic, and to promote to among all its citizens fraternity assuring the dignity of all the individuals and unity and integrity of the nation.

The idea of sovereignty involves freedom from all foreign control or domination, whereas the idea of democracy, involves freedom from all internal control or domination. The idea or republic connotes the representative character of the sovereign democracy that is sought to be established. It means the absolute power vested in the people of India under the Constitution is to be exercised by them through their duly elected representatives in Union as well as State Legislatures.⁴

In exercise of their sovereign will in the Preamble, people of India have adopted the democratic model. Following the American model, while they have

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² The words ‘socialist’ and ‘secular’ were inserted by The (Forty-Second Amendment) Act, 1976, Sec. 2 (w.e.f. 3.1.1977)
³ AIR 1984 SC 1420, 1424
⁴ Ram Nandan v. State, AIR 1959 All 101, 118: ILR (1959) 2 All 84 (FB), per N.U. Beg. J.
delegated to the Legislature, Executive and the Judiciary their respective powers, they reserved for themselves certain fundamental rights.\(^5\)

Through the Preamble, the people of India have constituted India into a Sovereign, Socialist, Secular, and Democratic Republic. The term ‘Sovereign Democratic Republic’, (The words ‘Socialist’ and ‘secular’ were added later on) is of utmost importance, rather sacrosanct for it forms the ‘basic structure’ of the Constitution. This cannot be destroyed by any form of amendment of the Constitution.\(^6\)

It has been aptly stated by R. M. Sahai, J. in *Mohan Lal Tripathy v. District Magistrate, Rae Bareilly*,\(^7\) “Democracy is a concept of political philosophy, an ideal practiced by many nations” culturally advanced and politically mature by resorting to governance by representations of people elected directly or indirectly.”

As pointed out by Mathew, Js. In *Indira Nehru Gandhi v. Raj Narain*,\(^8\) equality is a multifaceted and multi-coloured concept and several definitions of the terms can be given. The concept of equality has many shades and connotations. The preamble guarantees equality of status and opportunity. These are nebulous concepts and it is not sure whether they are capable of providing a solid foundation to rear a basic structure.

There is no denying the fact that fraternity rests on social and moral values. It is, therefore, difficult to create ‘fraternity’ by law. Law can only seek to promote it. It is also true as pointed out by the Drafting Committee that there was an urgent need to “concord and goodwill” and this ought to be emphasized by special

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6 Keshavananda Bharti v. State of Kerla, AIR 1973 SC 1461, 1535, per Sikri, C.J. at p. 1603, per Shelat and Grover, JJ, at Para 632, per Hegde and Mukherjee, JJ; and at Para 1159, per Jagmohan Reddy, J.
7 AIR 1993 SC 2042, 2045
8 AIR 1975 SC 2299, 2384: (1975) (Supp) SCC 1: (1976) 2 SCR 347
reference in the preamble. That seems to be reason why the preamble has emphasized this objective. It cannot but be remarked that, that was not sufficient. It should have been further developed in certain provisions of the Constitution.

With a view to achieve the above-mentioned aims and objects of the Preamble and to constitute India into a Sovereign, Socialist, Secular, Democratic, Republic, the framers of Indian Constitution have, inter alia, incorporated ‘Fundamental Rights’ and ‘Directive Principles of State Policy’ in Part III and Part IV of the Constitution, respectively.

Thus even though there is no express mention of the term ‘human rights’ in the Constitution, the Constitution of India has incorporated human rights in a big way in the form of Fundamental Rights and Directive Principles of State Policy. While the former incorporates civil and political rights, the latter incorporates the economic, social and cultural rights.

The Indian Constitution bears the impact of the Universal Declaration of Human Rights and this has been recognized by the Supreme Court of India. While referring to the Fundamental Rights contained in Part III of the Constitution, Sikri, C.J., of the Supreme Court. In *Kesavananda Bharti v. State of Kerla*\(^9\) observed: “I am unable to hold these provisions show that rights are not natural or inalienable rights. As a matter of fact, India was a party to the Universal Declaration of Rights.....and that Declaration describes some fundamental rights as inalienable.”

The Supreme Court has also recognized the interpretative value of the Universal Declaration of Human Rights.\(^10\) The Universal Declaration of Human Rights does not define the term ‘human rights’. It refers them as “the equal and alienable rights of all members of the human family”.

\(^9\) AIR 1973 SC 1461, 1536  
\(^10\) *Kishor Chand v. State of H.P.*, 1991 1 SCJ 68, 76
The framers of the Indian Constitution were influenced by the concept of human rights and guaranteed most of human rights in the Universal Declaration. The Universal Declaration of Human Rights contained civil and political as well as economic, social and cultural rights. While Civil and Political rights have been incorporated in Part III of Indian Constitution, economic, social and cultural rights have been incorporated in Part IV of the Constitution. The following chart is being given below to indicate the human rights which have been incorporated in Indian Constitution.

4.2 RELATIONSHIP BETWEEN INTERNATIONAL COVENANTS ON HUMAN RIGHTS AND THE INDIAN LAW

Before the adoption of the Indian Constitution the Indian practice in respect of relation of International law to internal law or municipal Law was similar to the British practice. After the adoption and coming into force of Indian Constitution everything depended upon the provisions of the Constitution. Therefore, in order to know the position of relationship between International Law and Internal law in India, it is necessary to see the relevant provisions of the Constitution.

This is necessary because India ratified the two covenants on Human Rights- (i) International Covenant on Civil and Political Rights (1966) and (ii) International Covenant on Economic, Social and Cultural Rights (1966) on March 27, 1979. Thus internationally India has given its consent to be found by the provisions of the said two International Treaties.

But India has yet not incorporated them into its international law. A pertinent question therefore arises if at all or how far the provisions of the two covenants are applicable in India. The answer to this question depends on the
relevant provisions of the Indian Constitution and the interpretation by the Supreme Court thereof.

4.3 GENERAL LAW ON ANTI-TERRORISM

Apart from the special laws on anti-terrorism we have general laws which cover the anti-social activities, and also cover terrorist activities. The Indian Penal Code, 1860 is the standard piece of legislation which deals with the anti-social activities. The Code covers a vast range of anti-social behaviour in relation to the state of society as it existed more than a hundred years ago. For instance, it provides punishment for offence against state, offences against society etc. It is important here to discuss some of the provisions of Code which deals with the terrorist activities in the territory.

4.3.1 The Indian Penal Code, 1860

4.3.1.1 Criminal Conspiracy

Chapter V-A was inserted in the Penal Code in 1913, at common law, had its origin primarily as a civil wrong, but was lately made punishable as a criminal wrong. Conspiracy was originally used to explain the acts of agreement of those who combined to carry on legal proceedings in a vexatious or improper way.

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11 Section 121A- when two or more persons agree to do, or cause to be done, (1) an illegal act, or (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy.
13 Hawk, Pleas of the Crown, BK 1, C. 72, Sec. .
The Star Chamber gave it a more concrete form\textsuperscript{15} and such an agreement was made a substantive offence even when no act was done in pursuance of it. The gradual evolution of the law of conspiracy, its widened scope and general application can also be traced in close association with the law of principal and accessory\textsuperscript{16}

According to the English law, if two or more persons agree together to do something contrary to law, or wrongful and harmful towards another person, or to use unlawful means in the carrying out of an object not otherwise unlawful, the persons who so agree commit the crime of conspiracy\textsuperscript{17}

\textit{4.3.1.1.a Conspiracy under the code}

Conspiracy under the Penal Code was punishable in two forms viz. a) conspiracy by way of abetment, and b) conspiracy involved in certain offences.\textsuperscript{18} In the former an act or illegal omission must take place in pursuance of conspiracy in order to be punishable while in the latter membership suffice to establish the charges of conspiracy?

In 1870 the law of conspiracy was widened by the insertion of section 121A in the Indian Penal Code.\textsuperscript{19} Under section 121A of the Code, it is an offence to conspire to commit an of the offences punishable by section 121 of the Indian Penal Code, or to conspire (to deprive the Government or any part thereof) to overawe, by means of criminal force, or the show of criminal force, the Government of India, or any local Government.

\textsuperscript{15} In \textit{Poulter’s case} (1611), 9 Co. Rep. 55 the criminal aspect of conspiracy was developed by the Star Chamber. This case forms the source of modern law on conspiracy.
\textsuperscript{17} See \textit{Essays on the Indian Penal Code}, (1962) (N.M. Tripathi Pvt. Ltd.), pp. 87-89; \textit{Halsbury’s Law of England}, 4\textsuperscript{th} Ed., (1973), Vol. 10, pp. 310-11. In \textit{R v. Parnell}, (1881) 14 Cox. C.C. 508 at p. 513, J. Fitzgerald stated: ‘Conspiracy has been aptly described as divisible under three heads; where the end to be attained is in itself a crime, where the object is lawful but the means to be resorted to are unlawful, and where the object is to do injury to a third party or to a class, though if wrong were affected by a single individual it would be wrong but not a crime’
\textsuperscript{19} Act XXVII of 1870.
Under this section is not necessary that any act or illegal omission should take place in pursuance thereof, whereas under section 107 abetment includes the engaging with one or more persons in any conspiracy for the doing of a thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing.

In State (C.B.I./S.I.T) v. Nalini\textsuperscript{20} (Rajiv Gandhi Murder Case) the apex Court held that an agreement between two or more persons to do an illegal act amounts to criminal conspiracy. The illegal act may or may not be done in pursuance of agreement but the very agreement is an offence and is punishable. Everyone of the conspirator need not have taken active part in the commission each and every one of the conspiratorial acts for the offence of conspiracy to be made out.

‘The crime of conspiracy’, remarks Russel, affords support for those who advance the proposition that criminal law is an instrument of Government.\textsuperscript{21} The danger of the effect of such a law has been well recognized by the judiciary from time to time, which conscious of the need to preserve the liberty of the subject.

\textbf{4.3.1.2 Offences against state}\textsuperscript{22}

Every State has the right to self preservation similar to that of its subjects. Accordingly, laws have been enacted to safeguard and preserve states existence since time immemorial. In monarchial forms of government, the right of preservation of the State was exalted into a sacred right, and so the violence against the state was considered a \textit{lese majestice-lese majestic human}, and offence

\textsuperscript{20} (1999) 5 Supreme Court 60
\textsuperscript{21} Ibid p.142
\textsuperscript{22} Section 121- Waging, or attempting to wage war, or abetting waging of war, against the Government of India- whoever, wages war against the Government of India, or attempts to wage such war, or abets the waging of such war, shall be punishable with death, or imprisonment for life and shall also be liable to fine.
against the power, crown, dignity and majesty of the invisible God (*lese majestí divine*) whose throne is in heaven.\(^{23}\)

4.3.1.2. a Waging War

In view of the gravity of the offence contemplated under this section, the act of waging war, attempting to wage war and abetting the waging of war against the Government of India are treated on equal footing and the same punishment of death or imprisonment for life is prescribed in all the cases. In other words, the section deals with three stages of complicity in waging war against the Government of India, *vìz.*, abetment, attempt, and actual war.

The expression ‘waging war’ means waging war in the manner usual in war. Thus to convict a person under this section it must not only be proved that the persons charge have planned to obtain possession of an armoury and have used the rifles and ammunitions so obtained against the State troops, but also the seizure of the armoury was part and parcel of a planned action in resisting the troops of the State until successfully capturing the machinery of the Government, or until those in possession of it yield to the demands of the aggressors.\(^{24}\)

The Supreme Court comprehending the “terrorist act” under Section 1 of the Unlawful Activities (Prevention) Act, 1967 in Md. Ajmal Amir Kasab’s Case held that: “a terrorist act” and an act of “waging war against the Government of India” may have some overlapping features.\(^{25}\)

International Terrorism is a modern form of warfare against legal democracies and goal of these terrorists is to destroy the fabric of democracy and it would be wrong for any democratic state to consider international terrorism to

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\(^{24}\) *Mir Hasan Khan v. State of Bihar*, AIR 1951 Pat 60 (63-64)

\(^{25}\) (2012) 9 SCC 1
be someone else's problem, rather, it is a collective problem and we must unite to condemn and combat it. As USA Senator, Jackson aptly stated.

“The idea that one person's 'terrorist' is another's 'freedom fighter ' cannot be sanctioned. Freedom fighters or revolutionaries don't bows up buses containing non-combatants; as terrorist murderers do. Freedom fighters don't set out to capture and slaughter school children; terrorist murderers do... It is a disgrace that democracies would allow the treasured word freedom ' to be associated with acts of terrorists” 26

4.3.1.2.b Conspiracy to wage war against Government

Section 121 A was inserted in the Penal Code by the Indian Penal Code (Amendment) Act 27 of 1870, section 4, in order to punish conspiracy punishable under section 121 of the Code. Thus the conspiracy to wage war against and overawe by criminal force the Central Government or any State Government is punishable with imprisonment for life, or imprisonment of either description which may extend to 10 years and fine. The section is based on the English law of the Treason Felony Act of 1848, which provides punishment for treasonable combinations. 27

4.3.1.2.c collecting arms to wage war

Section 122 28 makes the very act of preparation to wage war against the government of India punishable owing to the gravity and seriousness of the nature

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26 Prakash Tatia chief justice ,high court of Jharkhand on calcuttahighcourt.nic.in/sesqui/lect2a.pdf
27 Treason which is a capital offence in England is contained in Treason Act, 1975. Sec. 1 provides that it treason for any person to “within the realm or without, compass, image, invent, devise or intend death or destruction or any bodily harm tending to death or destruction maim, mutilate or wounding, imprisonment or restraint, of the person of... the king”
28 Section 122- collecting arms, etc., with intention of waging war against the Government of India- Whoever collects men, arms or ammunition or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against the Government of India, shall be punished with imprisonment for life or imprisonment of either description for a term not exceeding ten years and shall also be liable to fine
or the offence in contemplation to overawe by force the Central or the State Governments established by law.

Thus the act of collecting men, ammunitions or to make other preparation with an intention to wage war against the Government of India or on territories of States at peace with India are punishable under sections 122 and 124, I.P.C. These are exceptions to the general rule that preparation to commit an offence is not punishable in law. The punishment may extend up to imprisonment for life, or imprisonment for life, or imprisonment of either description for a term not exceeding ten years, and fine.

4.3.1.2.d Concealing design to wage war against Government

Section 123 is based on the general principle enunciated in section 118, I.P.C. that concealing the design to commit offence punishable with death or imprisonment for life is an offence. Similarly, Section 39 clause (1) of the Code of Criminal Procedure, 1973 casts a duty on every person, aware of the commission of, or of the intention of any person to commit, any offence specified in the section.

The object of the section is to ensure that the information should not be withheld from the police who are to take proper steps for the suppression of such crimes or to bring the offender to book. However, the liability under this section is not absolute but is subject to the following conditions, viz., (i) there must be a design to wage war against the Government of India, (ii) the accused must have knowledge of such design, (iii) the accused must have concealed the existence of

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29 Section 399, I.P.C. punishes preparation to commit dacoity.
30 Section 123- Concealing with intent to facilitate design to wage war-Whoever, by any act, or by any illegal omission, conceals the existence of a design to wage war against the Government of India, intending by such concealment to facilitate, or knowing it to be likely that such concealment will facilitate, the waging of such war, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine
31 Section 39(1) (i) Code of Criminal Procedure, 1973 states: sections 121 to 126, both inclusive and section 130 (that is to say offences against the State specified in Chapter VI of the Indian Penal Code.”
such design, and (iv) the accused must thereby have intended to facilitate the waging of such war, or knew that it was likely that such concealment would facilitate the same.

4.3.1.2.e Assaulting President, Governor, etc.

Section 124\textsuperscript{33} is an extension of the second clause of section 121A of the Code, which makes conspiracy to overawe by means of criminal force or show of criminal force Government of India or any state Government punishable. It makes assault or wrongful restraint committed on the President of India or Governor of any State, who are the highest executive officers of the Government, as offence.

4.3.1.2.f Sedition

The offence of sedition corresponding to section 124A\textsuperscript{34} was originally section 113 of Macaulay’s Draft Penal Code, 1837, but for some unaccountable reasons it was omitted from the Penal Code. However, the need for such a law was felt shortly after the Penal Code came into operation and in 1870 Sir James Stephen, the then law member of the Government of India, brought an amending bill to include the present section 124A in the Code by the Indian Penal Code (Amendment) Act, 1870\textsuperscript{35}.

4.3.1.2.g Meaning of Sedition

Sedition is nothing but libel (defamation) of the established authority of law, i.e., Government. Hence it is called seditious libel in England. Sedition in the

\textsuperscript{33} Section 124- Assaulting President, Governor, etc., with intent to compel or restraint the exercise of any lawful power. – Whoever, with the intention of inducing or compelling the President of India, or the Governor of any State to exercise or refrain from exercising in any manner any of the lawful powers of such President or Governor

\textsuperscript{34} Section 124 A- Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excited or attempts to excite disaffection towards, the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine

\textsuperscript{35} Act XVII of 1870, sec. 5.
ordinary sense means a stirring up of rebellion against the Government. However, in law it has technical meaning and includes all those acts and practices which have for their object to excite discontent or dissatisfaction towards the Constitution, or the Government, or Parliament to create public discord and disorder.

In other words, sedition is used to designate those activities of a man whether by words, or deeds or writings, which are calculated to disturb the tranquility of the State and lead people to subvert the Government established by law. Thus, sedition is a crime against society nearly allied to that of treason, and it frequently precedes treason by a short interval.

The objects of sedition generally are to induce discounted and insurrection, to stir up opposition to the Government and to bring the administration of justice into contempt, and the very tendency of seditions to incite the people to insurrection and rebellion.

4.3.1.3 Unlawful Assembly

Object of Section 141 of the Code is to prohibit the use of criminal force by five or more persons with a design to do any of the acts set out in the section. It is the cardinal principle of law that the tumultuous assemblage of men shall be discouraged since prevention of offences involving the presence of plurality of

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36 Kedar Nath v. State of Bihar, AIR 1962 SC 955
38 Section 142 of the Indian Penal Code says that, An assembly of five or more persons is designated as ‘unlawful assembly’, if the common object of the persons composing that assembly is, first- to overawe by criminal force, or show of criminal force, the Central of any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servant; or Second- To resist the execution of any law, or of any legal process; or Third- To commit any mischief or criminal trespass, or other offence ; or Fourth- By means of criminal force, or show of criminal force, to any person of the enjoyment of a right of water, or of the use of water or the incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or Fifth- By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.
offenders becomes comparatively a difficult task for the law.\footnote{Kenny's Outlines of Criminal Law, 19th Ed.(1966) p. 412.} Hence in earlier times even the mere assemblage of people was regarded as a menace to the public peace therefore regarded as unlawful. However, with the growth of democratic institutions and civilisations the assembling of men became a necessity and recognized as one of the basic rights of man.\footnote{Constitution of India, article 19(1)(b) states: ‘All citizens shall have the right- (b) to assemble peaceably and without arms.}

### 4.3.2 The Criminal Procedure Code, 1973

The rule for calling out and employing the military in aid of the civil power were first enacted in the Code of 1872, and embodied (according to Sir J. Stephen) the principles laid down in the charge of Jindal C.J to the grand jury of Bristol in 1832, as to duty of soldiers in dispersing rioters. The rules carry the law somewhat further than it has yet been carried in England as they expressly indemnity all persons acting in good faith in compliance with requisition under Sections 129 and 130 and forbid prosecution of Magistrate, soldiers and the police officers except with the sanction of the State of Central Government.\footnote{R Gopal, Sohoni’s Code of Criminal Procedure 1973, Vol. II, 20th Ed. (2003) Lexis Nexis Butterworth’s at 1151-1168}

### 4.3.2.1 Dispersal of unlawful or potentially unlawful assemblies

Chapter X\footnote{Sub-Section (1) of Section 129 reproduced sub Section (1) of Section 127 of the 1898 Code and Sub Section (2) reproduces Section 128 of the same with some minor changes.} of the Criminal Procedure Code deals with dispersal of Unlawful assemblies by the civil and military authorities. The Constitutional Law guarantees only the right ‘to assemble peacefully and without arms.’\footnote{Article 19 (1) (b) of the Constitution of India} Unlawful assembly is defined under Section 141 of the Indian Penal Code, 1860. Failure of an assembly of persons to disperse or even to do so would certainly invite the application of sub-Section (2), but it does not result in the conversion of a lawful
assembly into an unlawful one. The unlawful character of an assembly has to be determined with reference to Section 141 of the Indian Penal Code alone, and the disobedience of a command issued under this Section is not a relevant consideration for that purpose.\(^\text{44}\)

4.3.2.1.a By use of Civil force

Section 129\(^\text{45}\) of The Code of Criminal Procedure Code contemplates two kinds of assemblies (1) an unlawful assembly within the meaning of Section 141 of IPC, (2) an assembly of five or more persons likely to cause disturbance of the public peace. Disobeying the command to disperse the former kind of assembly is punishable under Section 145 of IPC and the latter under Section 151 IPC. The power to issue order under Sub-Section (1) or (2) of Sec. 129 of The Code of Criminal Procedure Code is authorized to (given) an executive Magistrate; an officer-in-charge of a police station; in the absence of such an officer, any other police officer, not below the rank of sub-inspector.

*Chinnappa Shantirappa v. Emperor*\(^\text{46}\), it is the right of the civil authorities to demand, and the duty of the military to furnish all the armed and that may be necessary in the suppression of disorders and breaches of peace. This duty is cast not only upon the military but also upon all loyal citizens and subjects of Crown (now State) actively to aid in the suppression of disorders.

\(^{44}\) *Ibid* note 118.

\(^{45}\) (1) Any Executive Magistrate or officer in charge of a police station or, in the absence of such officer in charge, any police officer, not below the rank of a sub-inspector, may command any unlawful assembly, or any assembly of five or more persons likely to cause disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly.

(2) If, upon being so commanded, any such assembly does not disperse, or if, without being so commanded, it conduces itself in such a manner as to show a determination not to disperse, any Executive Magistrate or police officer referred to in sub-section (1), may proceed to disperse such assembly by force, and may require the assistance of any male person, not being an officer or member of the armed forces and acting as such, for the purpose of dispersing such assembly, and if necessary, arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law.

\(^{46}\) AIR 1931 Bombay 57.
The police have not only the right, but also the duty to maintain law and order in given circumstances. If circumstances warrant the use of force, the police have the right to use it. It is the duty of police to use force to use force and that power does not seem from the permission to be granted by any private person or authority. However, the police officer exercising such authority can do so only if he is not less than a sub-inspector of police, and excessive and disproportionate use of force than what the situation demands, may lead the legitimate use of force.

The taking of life can only be justified by the necessity for protecting persons or property against various forms of violent crimes, or by the necessity of dispersing a riotous crowd, which is dangerous unless dispersed.\(^{47}\) In *State of Karnataka v. B. Padmanabha Beliya*\(^{48}\) court took the view that if the death were caused without justification due to unlawful firing of the police, the State would be responsible for such consequences including the payment of compensation to the victims.

Court in *Ram Adhar Yadav v. Ramchandra Mishra*,\(^{49}\) found if a complaint is made against any officer alleging that he while acting or purporting to act u/s. 129, committed the offence complained of, the Court will not entertain the complaint unless it appears that the State Government had sanctioned the prosecution of the officer concerned. But if the allegation in the complaint does not indicate such facts, then the question of sanction will not arise, and the Court cannot refuse to entertain the complaint.\(^{50}\) Indemnity to officers extends not only to prosecution by the State but even to private prosecution. To get the benefit of this Section, the accused has to show\(^{51}\)

\(^{47}\) AIR 1950 SC 27  
\(^{48}\) 1992 Cr. L.J. 634 (Kar)  
\(^{49}\) 1992 Cr. L.J. 2216 (All).  
\(^{50}\) Nagraj v. State of Mysore, AIR 1964 SC 269  
\(^{51}\) *ibid*
I. That there was an unlawful assembly of five or more persons likely to cause a disturbance of public peace;

II. That such an assembly was commanded to disperse;

III. That either the assembly did not disperse on such command or, if no command had been given, his conduct had shown a determination not to disperse; and

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

Whether the bar of this Section applies to the facts of a given case or not is a matter for judicial discretion. That decision does not depend upon the assertions of either party. It is arrived at, as all decisions are, by sifting and weighing the evidence before the Court. For deciding that question, the Court should take into consideration all relevant materials placed before it. The decision can be reached either at the time of the institution of the complaint or at any time during the progress of the case. Whether sanction is necessary or not, the court cannot look to the findings of an inquiry commission set up to go into the circumstances of the dispersal of the unlawful assembly and the use of force.

4.3.2.1.b By use of armed forces

Section 130 leaves entirely to the discretion of the officer in command as to how he will disperse the assembly or arrest and confine the persons forming

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52 Karan Singh v. Hardayal Singh, 1979 Cr. L.J. 1211
53 (I) if any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be disperse, the Executive Magistrate of the highest rank who is present may cause it to be dispersed by armed forces.
(2) Such Magistrate may require any officer in command of any group of persons belonging to the armed forces to disperse the assembly with the help of the armed forces under his command, and to arrest and confine such persons forming part of it as the Magistrate may direct, or as it may be necessary to arrest and confine in order to disperse to assembly or to have been punished according to law.
parts of it. Sub-Section (3) of the same Section makes it imperative to use as little force as it required dispersing the unlawful assembly.

As both males and females can form an unlawful assembly the army authorities acting under this Section can also arrest females. In *Peoples Union for Human Rights v. Union of India*, Gauahati High Court took the view that the provisions from the of arrest under the Armed Forces (Special Powers) Act, 1958 being departure from the provisions of the Code, such procedure is protected by Section 4 of the Code.

In *Naga People’s Movement of Human Rights v. Union of India* Supreme Court held that Section 130 of the Code has limited application and it enables the executive Magistrates to deal with a particular incident involving breach of public security on account of unlawful assembly by use of armed forces. Section 131 of the Code empowers a commissioned officer or gazetted officer of the armed force to deals with an isolated incident involving manifesto breach of public security by an unlawful assembly.

The Supreme Court has further held that the provisions of Sections 130 and 131 of the Code do not deal with a situation requiring continued use of armed forces in aid of civil powers. Under this Section army authorities can arrest a person if the situation so requires, even in the absence of a Magistrate. When the provision of AFSP Act, 1958 are in operation, arrest by armed forced need not be in conformity with the provisions of Code. The provisions of the Armed Forces (Special Powers) Act, 1958 regarding arrests etc being within the protection of

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(3) Every such officer of the armed forces shall obey such requisition in such manner as he thinks fit, but in so doing he shall use as little force, and do as little injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons.

54 1991 Cr. L.J. 1935 (Gau) FB
55 AIR 1998 SC 431
56 Section reproduces Section 131 of the 1898 Code except for minor changes. In the new Code even gazetted officer of the armed forces may disperse the unlawful assembly as produced by the Section earlier only commissioned officer.
Section 4 of the Code, arrest of females may not be as per requirement of the Code.\textsuperscript{57}

\textbf{4.3.3 Legal framework for custodial justice}

The legal framework relating to custodial justice to women comprises of various enactments passed by the Parliament or state legislatures, subordinate legislations, executive instructions, circulars, memoranda and manuals. Besides, there are notable judicial decisions of the Supreme Court in this context.\textsuperscript{58}

The Prisoners Act, 1900, consolidates the law relating to prisoners confined by order of a court and provides for custody of prisoners in presidency towns as well as their removal from one prison to another including discharge of prisoners. The Prisoners (Attendance in Courts) Act, 1955, specifically makes provision for the attendance in court of persons confined in prisons for obtaining their evidence or answering a criminal charge. This special Act supplements the Prisoners Act, 1900, to that extent. The Transfer of Prisoners Act, 1950 is also a special Act enacted by the Parliament to answer the specific exigencies for the removal of prisoners from one state to another. The Identification of Prisoners Act, 1920, also involves many questions of human rights importance.

The Prisons Act, 1894, provides for the regulation of prisons almost throughout India. This Act defines the duties of prison officers including (a) medical officers; (b) admission, removal and discharge of prisoners; (c) discipline of prisoners; (d) food, clothing and bedding and different categories of prisoners

\textsuperscript{57} People\textsuperscript{s} Union for Human Rights v. Union of India, AIR 1992 Gau 23
as well as issues relating to their health and employment. The Act regulates situation in custody as well as treatment of jail inmates.

4.3.4 Judicial guidelines

The effort of the judiciary, in particular the Supreme Court, over the last more than two decades has been to circumscribe the vast discretionary powers vested by law in police by imposing several safeguards and to regulate it by laying down numerous guidelines. The effort throughout has been more in the nature of preventing the abuse and compensating the victims, while leaving it free to use the power genuinely.

In Joginder Kumar v. State of UP,\(^5\) while dealing with the power of arrest and its exercise, the Supreme Court has appropriately made a perceptive observation: “The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, this court has been receiving complaints about violation of human rights because of indiscriminate arrest.

The observation seeks the adoption of a realistic approach in the matter of police powers. The rights, liberties and privileges of an individual vis-à-vis the society are to be properly balanced. This is more significant because in modern times, a nation’s civility is being judged by the methods it uses in the treatment of the offenders who are a part of it.

The Supreme Court in Nandini Satpathy v. P.L. Dani,\(^6\) quoting Lewis Mayers, stated that, “to strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law-enforcement machinery on the other is a perennial problem of

\(^5\) (1994) 4 SCC 260 at 263
\(^6\) AIR 1978 SC 1025 at 1032.
statecraft. The pendulum over the years has swung to the right.” It made clear that there exists a conflict between societal interest in effecting crime detection and constitutional rights, which the accused individuals possess.

In *D.K. Basu v. State of West Bengal*, the Supreme Court issued some directions to be followed as preventive measures in all cases of arrest or detention, till legal provisions are made in that behalf. The directions are as follows:

1. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogations of the arrestee must be recorded in a register.

2. That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and contain the time and date of arrest.

3. A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

4. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend of relative of the arrestee lives outside the district or town through the legal-aid organization in the district and the police

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station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

5. The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

6. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

7. The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any, present on his/her body, must be recorded at that time. The “Inspection Memo” must be signed both by the arrestee and the police officer affecting the arrest and its copy provided to the arrestee.

8. The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by director, health services of the concerned state or union territory. Director, health services should prepare such a panel for all tehsils and districts as well.

9. Copies of all the documents including the memo of arrest, referred to above, should be sent to the ilaqa magistrate for his record.

10. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

11. A police control room should be provided at all district and state headquarters where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12
hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

To ensure the compliance of these directions, the court held that the failure to comply with these requirements shall apart from rendering the concerned official liable for departmental action, would also render him liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of the country having territorial jurisdiction over the matter.

The court emphasized that these directions flow from the right to life and personal liberty enshrined in articles 21 and 22 (1) of the Constitution and need to be strictly followed. These would apply with equal force to all other governmental agencies and are in addition to the other constitutional and statutory safeguards and do not detract from various other directions given by the courts from time to time in connection with the safeguarding of the rights and dignity of the arrestee.

The court further directed that these requirements should be forwarded to the director general of police and the home secretary of every state/union territory to circulate the same to every police station under their charge and get the same notified at every police station at a conspicuous place.

**4.4 SPECIAL LAW ON TERRORISM**

**4.4.1 PREVENTIVE DETENTION ACT, 1950**

The Preventive Detention Act, 1950 was originally passed for one year but was extended periodically up to 1969. During this period the Act was challenged in Supreme Court for its validity and Parliament continued to amend it. Again in 1971, need was felt to frame another Preventive Detention Act with the object to “maintain internal security”. And this was the infamous Maintenance of Internal Security Act (Maintenance of Internal Security Act, 1971), which was later
grossly misused to settle all political opposition during emergency (1975-1977). The Act gave extraordinary powers to the executive, the misuse of which was observed by the Supreme Court:

“It turned into an engine of oppression posing threat to democratic way of life.”


Though Maintenance of Internal Security Act was gone, yet the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 along with Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act. 1980 continued. Soon the need was felt to frame another Preventive Detention Act, to tackle communalism and extremist activities.

The National Security Act (NSA) was formulated in 1980 with the object to cope with situations of communal disharmony, social tension, extremist activities, industrial unrest and increasing tendency on the part of various interested parties to engineer agitations on different issues.

The framers of our Constitution were of the view that in free India, when there will be democratic and representative Government, the need for framing such preventive detention laws will rarely arise and shall be sparingly and cautiously used. But it was right that in 1950 that the Parliament passed the Preventive Detention Act to curb the “violent and terrorist” activities of the communities in Hyderabad, West Bengal and Madras States.

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The constitutional validity of the Act was upheld by the Supreme Court in terms of the Parliament’s power to enact such a law but Chief Justice Kania and Justice Mahajan and Mukherjee, observed in, *A. K. Gopalan v. State of Madras*, that preventive detention laws were repugnant to democratic constitutions and did not exist in democratic countries, Gopalan in the petition under Article 32 (1) of the Constitution of India for a writ of habeas corpus against his detention in the Madras Jail and he has given various dates showing how he has been under detention since December, 1947.

Under the ordinary Criminal Law he was sentenced to terms of imprisonment but those convictions were set aside. While he was thus under detention under one of the orders of the Madras State Government, on the 1st of March, 1950, he was served with an order made under Section 3(1) of the Preventive Detention Act, IV of 1950. He challenges the legality of the order as it is contended that Act IV of 1950 contravenes the provisions of articles 13, 19 and 21 and the provisions of that Act were not in accordance with article 22 of the Constitution.

He has also challenged the validity of the order on the ground that it is issued mala fide. The burden of proving that allegation is on the applicant. Because of the penal provisions of Section 14 of the impugned Act the applicant has not disclosed the grounds, supplied to him, for his detention and the question of mala fides of the order therefore cannot be gone into under this petition.

The question of the validity of Act IV of 1950 was argued before Supreme Court at great length. This is the first case in which the different Articles of the Constitution of India contained in the Chapter on Fundamental Rights had come for discussion before Supreme Court. In another case the Chief Justice of the

63 AIR 1950 SC 27
Supreme Court, Patanjali Shastri in *Ram Krishnan Bhardwaj v. State of Delhi*\(^{64}\), Stated:

> “Preventive Detention is a serious invasion of personal liberty and such meager safeguards as the Constitution has provided against improper exercise of the power must be zealously watched and safeguarded by the Supreme Court.”

This was a petition under Article 32 of the Constitution for the issue of a writ in the nature of habeas corpus directing the release of the petitioner Dr. Ram Krishan Bhardwaj who is a medical practitioner Delhi and was said to be under unlawful detention.\(^{65}\)

### 4.4.2 THE ARMED FORCES SPECIAL POWERS ACT, 1958

On September 11, 1958, the Armed Forces (Special Powers) Act, 1958 came into being by which certain ‘special powers’ were to be conferred upon members of the Armed Forces in disturbed areas\(^{66}\) in the States of Assam, Manipur, Meghalaya, Nagaland and Tripura and the Union Territories of Arunachal Pradesh and Mizoram.

### 4.4.3 THE UNLAWFUL ACTIVITIES (PREVENTION) ACT, 1967

The Unlawful Activities Prevention Act, 1967 was designed to deal with associations and activities that questioned the territorial integrity of India. When the Bill was debated in Parliament, leaders, cutting across party affiliation, insisted that its ambit be so limited that the right to association remained unaffected and that the executive did not expose political parties to intrusion. So, the ambit of the Act was strictly limited to meeting the challenge to the territorial integrity of India.

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\(^{64}\) AIR 1953 SC 318

\(^{65}\) The petitioner was arrested on the 10\(^{th}\) March, 1953, under an order of the District Magistrate of Delhi made under Section 3 of the Preventive Detention Act as amended. The grounds of detention were communicated to the petitioner on the 15\(^{th}\) March, 1953.

\(^{66}\) Substituted by the Amendment Act, of 1972 for the words “in the State of Assam and Union Territory of Manipur”.

187
The Act was a self-contained Code of provisions for declaring secessionist associations as unlawful, adjudication by a tribunal, control of funds and places of work of unlawful associations, penalties for their members etc. The Act has all along been working holistically such and is completely within the purview of the Central list in the 7th Schedule of the Constitution.

4.4.4 THE MAINTENANCE OF INTERNAL SECURITY ACT, 1971

On December 3, 1971, the President issued a proclamation of emergency under Article 352 of the Constitution. On December 4, 1971, Parliament enacted the Defence of India Act, 42 of 1971. The Act was passed in view of the grave emergency, which then existed as proclaimed by the President, and to provide for special measures to ensure public safety and interest, the defence of India and civil defence, for trial of certain offences and for matters connected therewith.

Section 2(3) of the Act would remain in force using the period of operation of the proclamation of emergency and for six months thereafter. By Section 6, the Act introduced amendments in several Acts, one amongst them being the Maintenance of Internal Security Act, 1971. Clause (d) of sub-section (6) of Section 6 amended Section 13 of the Act by adding after the words therein “from the date of detention”, the words and figures “or until the expiry of the Defence of India Act, 1971, whichever is later”. By clause (e) of sub-Section (6) of Section 6, a new Section, and Section 17-A was inserted in the Act.

The new section, Section 17-A\(^67\) effectuates three main changes: (1) by its non-obstante clause overrides the other provisions of the Act, (2) a person may be

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\(^{67}\) Section 17 A (1) of MISA, “17-A (1) Notwithstanding anything contained in the foregoing provisions of this Act, during the period of operation of the Proclamation of Emergency issued on the 3rd day of December, 1971, any person (including a foreigner) in respect of whom an order of detention has been made under this Act, may be detained without obtaining the opinion of the Advisory Board for a period longer than three months, but not exceeding two years from the date of his detention in any of the following classes of cases or under any of the following circumstances, namely- Where such person had been detained with a view to preventing him from acting in any manner prejudicial to the defence of India, relations of India with foreign powers or the security of India; or Where such person had been detained
detained in a class or classes of cases or under the circumstances set out in sub-classes (a) and (b) of its sub-Section, (1) without obtaining the opinion of an advisory board for a period longer than three months, but not exceeding two years from the date of detention, that is to say, no opinion of an advisory board need now be obtained for 21 months from the date of detention, the first three months of the detention being permissible without such opinion even before the insertion of Section 17-A; and (3) the maximum period of detention of such a person can be three years or until the expiry of the Defence of India Act, 1971 whichever is later.

These changes have been brought about by Parliament exercising power contained in clause (4) (b) read with clause 7 (a) and (b) of Article 22. The power is exercised in respect of classes of cases and circumstances relating to all the heads under Entries 9 and 3 of Lists I and III of the Seventh Schedule, except one, viz..., maintenance of essential and services, in respect of which Parliament has the power to pass preventive detention laws.

4.4.5 THE TERRORIST AFFECTED AREAS (SPECIAL COURTS) ACT, 1984

The above Act 61 of 1984, applicable to the whole of India except the State of Jammu and Kashmir received the assent of the President on August 31, 1984 replacing Ordinance No. 9 of 1984 promulgated on July 14, 1984, the object of which is to provide for the speedy trial of certain offences in terrorist affected areas and for matters connected therewith.

with a view to preventing him acting in any manner prejudicial to the security of the State or the maintenance of the public order. (2) In the case of any person to whom sub-Section (1) applies, Sections 10 to 13 shall have effect subject to the following modifications, namely,(a) in Section 10, for the words 'shall, within thirty days', the words 'may, at any time prior to but in no case later than three months before the expiration of two years' shall be substituted: (b) in Section 11,- (i) in sub-Section (1) for the words 'from the date of detention', the words 'from the date on which reference is made to it' shall be substituted; (ii) in sub-Section (2), for the words 'the detention of the person concerned', the words 'the continued detention of the person concerned' shall be substituted; (c)in Section 12, for the words 'for the detention', in both the places where they occur, the words 'for the continued detention' shall be substituted; (d) in Section 13, for the words 'twelve months', the words 'three years' shall be substituted.”
4.4.6 THE TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT, 1985

This Act was published in the Gazette of India, which received the assent of the President of May 23, 1985 and Extra. Part II, Section I, dated May 23, 1985, came into force on May 24, 1985 in whole of India for a period of two years. Originally the proviso to sub-Section (2) to Section 1 was added and it reads: “Provided so much of this Act as relates to terrorist acts shall not apply to the State of Jammu and Kashmir”. However, this proviso was omitted by Act 46 of 1985 and the provisions of this Act were made applicable to the State of Jammu and Kashmir w.e.f. June 5, 1985. 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 and for matter connected therewith or incidental thereto”.

4.4.7 THE TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT, 1987

Act 28 of 1987 was enacted as Act 31 of 1985 was due to expire on May 23, 1987 and as it was felt that in order to combat and cope with terrorist and disruptive activities effectively, it was not only necessary to continue the said law but also to strengthen it further. Since both the Houses of Parliament were not in session and it was necessary to take immediate action, the President promulgated the Terrorist and Disruptive Activities (Prevention) Ordinance, 1987 (2 of 1987) on May 23, 1987, which came into force w.e.f. May 24, 1987.

However, this Act repealing the Ordinance received the assent of the President of India on September 3, 1987 and was published in the Gazette of India, Extra. Part III, Section 1, dated September 3, 1987. The scheme of Act 31 of 1985 and Act 28 of 1987 as reflected from their preambles is the same. The schemes of the special provisions of these two Acts were/are “for the prevention of and for
coping with, terrorist and disruptive activities and for matters connected therewith or incidental thereto”,

**4.4.8 THE TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT, 1993**

This Act was enacted as Act 31 of 1985 was to expire on May 23, 1987 and as it was felt that in order to combat and cope with terrorist and disruptive activities effectively, it was not only necessary to continue the said law but also to strengthen it further. Since both the Houses of Parliament were not in session and it was necessary to take immediate action, the President promulgated the Terrorist and Disruptive Activities (Prevention) Ordinance, 1987 (2 of 1987) on May 23, 1987 which came into force w.e.f May 24, 1987. However, this Act repealing the Ordinance received the assent of the President of India on September 3, 1987 and was published in the Gazette of India, Extra. Part II Section 1, dated September 3, 1987. The Scheme of Act 31 of 1985 and Act 28 of 1987 as reflected from their preambles is the same. The Scheme of the special provisions of these two Acts was “for the prevention of and for coping with, terrorist and disruptive activities and for matters connected there with or incidental thereto”.

**4.4.9 THE CHEMICALS WEAPONS CONVENTION ACT, 2000**

In order to give to the Convention on the prohibition of development, production, stockpiling and use of chemical weapons and their destruction the Chemical Weapons Convention Act, 2000 has been enacted. In view of the fact that the statute has been enacted in fulfillment of the country’s international commitments the Act extends to the whole of India.

It also applies to citizens of the country outside India and associates, breaches or subsidiaries outside India of companies or bodies corporate registered

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68 Act 28 of 1987
69 Act No. 34 of Gazette of India 29.8.2000 Part II S. I (Extra) SI. 42
or incorporated in India. To underscore the primacy according to international commitments of the country, Section 3 of Act unequivocally lays down that notwithstanding anything to the contrary contained in any other law the provisions of the Convention set out in the Schedule to this Act shall have the force of the law in India.

4.4.10 THE PREVENTION OF TERRORISM ACT, 2002

Taking into account the terrorist activities of various group in several parts of the country and the fact that some of these groups sponsored by foreign elements, the Government came to the conclusion that alternative law to effectively deal with terrorism is necessary. Pursuant to this, the Government enacted another Act namely, the Prevention of Terrorism Act (POTA).

4.4.11 Unlawful Activities (Prevention) Amendment Act, 2004

The Act does not define the word terrorist in its definition clause but defines a terrorist act. The word terrorist is to be construed according the definition of the terrorist act. Terrorist act is defined in the Act as “Whoever, with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people in India or in any foreign country, does any act by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community in India or in any foreign country or causes damage or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any
other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government in India or the Government of a foreign country or any other person to do or abstain from doing any act, commits a terrorist act” (Section 15). The above definition did not

4.4.12 UNLAWFUL ACTIVITIES (PREVENTION) AMENDMENT ACT, 2008

The first law made in independent India to deal with terrorism and terrorist activities that came into force on 30 Dec 1967 was The Unlawful Activities (Prevention) Act 1967 (UAPA). The UAPA was designed to deal with associations and activities that questioned the territorial integrity of India. When the Bill was debated in Parliament, leaders, and cutting across party affiliation, insisted that its ambit be so limited that the right to association remained unaffected and that the executive did not expose political parties to intrusion. So, the ambit of the Act was strictly limited to meeting the challenge to the territorial integrity of India. The Unlawful Activities (Prevention) Amended Act 2008 has amended certain provisions of the Unlawful Activities (Prevention) Act, 1976 with a view to strengthening the law for dealing with terrorism.

4.4.13 THE NATIONAL INVESTIGATION AGENCY ACT, 2008

The object of the National Investigation Agency Act, 2008 is to constitute an investigation agency at the national level to investigate and prosecute offences affecting the sovereignty, security, and integrity of India, Security of State, friendly relations with foreign States and offences under Acts enacted to implement international treaties, agreements, Conventions and resolutions of the United Nations, its agencies and other international organisations and for matters connected therewith or incidental thereto.

70 Ibid.
It is applicable to whole of India even to citizens of India residing outside India. Government service holders and to person on ship, aircrafts registered in India.\textsuperscript{71} The Agency has been empowered to investigate offences laid down under the schedule\textsuperscript{72} as schedule offence.\textsuperscript{73}

\section*{4.5 PERSONAL LIBERTY AND PREVENTIVE DETENTION IN INDIA, UNITED STATES AND UNITED KINGDOM}

India shares Israel’s inheritance of emergency detention from British colonial rule. The country also has experienced intensive terrorism attacks by separatist groups since its inception,\textsuperscript{74} such that “the threat of terrorism is … seen as a threat to the very core of the Indian identity.”\textsuperscript{75} India’s periodic reliance on preventive detention likewise has resulted in widespread human rights violations.\textsuperscript{76}

\section*{4.6 PREVENTIVE DETENTION LAWS IN INDIA}

India has had a long and complex history of administrative detention, and there are three detention regimes currently place in India.\textsuperscript{77} First under the Armed

\textsuperscript{71} Section 1(2) of National Investigation Agency Act, 2008 hereinafter known as NIA, \textit{It extends to the whole of India and it applies also- to citizens of India outside India; to persons in the service of the Government wherever they may be; and to persons on ships and aircrafts registered in India wherever they may be.}\textsuperscript{72} Section 2(1) (f) of NIA, ‘Schedule’ means schedule to this Act.\textsuperscript{73} Section 2(1) (g) of NIA, ‘Schedule Offences’ means offences specified in the schedule.\textsuperscript{74} India grounds its preventive detention authority in a constitutional provision passed in the immediate aftermath of the assassination of Mahatma Gandhi. Chris Gangne, Note, \textit{POTA: Lessons Learned from India’s Anti-Terror Act}, 25 B.C. THIRD WORLD L.J. 261, 266 (2005); Derek P. Jinks, \textit{The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India}, 22 MICH. J. INT’L L. 311, 324-25 (2001).\textsuperscript{75} See also Anil Kalhan et al., \textit{Colonial Continuities: Human Rights, Terrorism, and Security laws in India}, 20 COLUM.J. ASIAN L. 93,99-100 (2006)\textsuperscript{76} India signed the ICCPR, but only upon reservation as to security detentions. The Committee expressed regret as to widespread preventive detention but Human Rights Comm., Concluding Observations: India, 24, U.N. Doc. CCPR/C/79/Add. 81 (Aug. 4, 1997).\textsuperscript{77} See also Anil Kalhan et al., \textit{Colonial Continuities: Human Rights, Terrorism, and Security laws in India}, 20 COLUM.J. ASIAN L. 265-266 (2006). The Indian Constitution grants the federal and state governments the power to enact detention laws in the interest of national or state security. See India Const., Sched. 7, List I, Entry 9 (Central Government Powers); id. List III, Entry 3 (Concurrent Powers). The constitution permits the denial of core procedural rights for such detentions, but requires administrative or judicial
Forces (Special Powers) Act (‘‘AFSPA’’), the military may make warrantless arrests leading to preventive detention up to two years in officially declared “disturbed areas.” Those arrests- which occur essentially outside judicial review- have led to widespread reports of torture and extrajudicial killings.

Second, the National Security Act (“NSA”) permits state and federal officers to detain any individual up to twelve months “with a view to preventing him from acting in any manner prejudicial to” various state interests, including national security and public order. Those arrests include administrative review and offer modest procedural protections, but have been employed in practice to suppress dissent and to target minority groups.

Review and a fixed maximum period of detention, Id. Art. 22(7)(a) (requiring Parliament to specify the maximum period of detention).

Since 1958, the Armed Forces (Special Powers) Act has endowed the military with extraordinary powers- including administrative detention – in “disturbed areas.” The law was initially enacted as a one-year measure to bring security to a limited region, but its use has extended for five decades and to widespread areas of the Northeast Territories, Punjab, Jammu & Kashmir. AFSPA applies to a region following a declaration that the area subject to the Act has been declared “disturbed” by the central or state government. This declaration is not subject to judicial review. Human Rights Watch, Getting Away with Murder: 50 Years of the Armed Forces (Special Powers) Act (2008), http://www.hrw.org/legacy/backgrounder/2008/india0808/ Section 4© of the AFSPA permits soldiers to arrest solely on suspicion that a “cognizable offence” has already taken place or is likely to take place in future. The AFSPA provides no specific time limit for handling arrested persons to the nearest police station, but merely advises that those arrested be transferred to police custody “with the least possible delay.” AFSPA, S.5. Detention may last up to one year in most affected provinces and up to two years in Jammu & Kashmir, Assam Preventive Detention Act, 1980 (Six months); Jammu & Kashimar Public Safety Act, 1978 (two years).

See U.S. Dep’t of State, Country Reports on Human Rights Practices: India at I (d) (2005), available at http://www.state.gov/g/drl/rls/hrpt/2005/61707.htm; see also infra at n. 136

National Security Act, Act. No. 65 of 1980 (India) (“NSA”) at §§3, 13. Courts have exercised judicial review over executive determinations but the permissible bases for detention remain ill-defined and extremely broad in application. Jinks, supra, at 328-29 (detailing jurisprudence); C. Raj Kumar, Human Rights Implications of National Security Laws in India: Combating Terrorism While Preserving Civil Liberties, 33 DENV. J. INT’L L. & POL’Y 195, 213 (2005). Procedural rights under the NSA are extremely limited. Review is conducted before an Advisory Board, an executive body whose members must be qualified to serve as High Court Judge, and the Chief of the Board must presently serve as High Court Judge. The Board does not conduct a hearing in a traditional sense; evidentiary rules do not apply, the procedure and final report are not public, and the Board does not make formal factual findings. Detainees do not have the right to counsel, compulsory process, or confrontation. Thus while India “guarantees a limited regime of procedural rights”... these guarantees...arguably fall well short of established international human rights standards.”

See Asian Centre for Human Rights, Human Rights Report 2005: Manipur, http://www.achrweb.org/reports/india/AR05/manipur.htm (describing how NSA detentions were used to detain protestors of AFSPA).
The use of prolonged detention without trial under these regimes has fostered human rights violations and enormous social unrest. The continued violations associated with the expanded military power have prompted widespread demonstrations and calls from numerous actors—from the U.N. High Commissioner for Human Rights to local and international NGOs—for the AFSPA’s repeal.82

Third, India has recently experimented with a specific detention regime for terrorism suspect. The Prevention of Terrorism Act (POTA) effectively instituted a modified regime of detention without trial.83 The statute was often used to justify the incarceration without charge or trial of terrorist suspects for up to 180 days.84

Moreover, the statute reversed the burden for bail so that a detainee had to show that there were reasonable grounds to believe that the accused was not guilty and unlikely to commit any other offence while on bail.85 Judicial review was guaranteed, but ex parte evidence could be considered on a finding

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83 A similar pattern can be seen in the Terrorist and Disruptive Activities (Prevention) Act, No. 31 of 1985 (TADA), enacted in 1985 in response to the assassination of Indira Gandhi. Originally expected to expire after two years, the legislature re-enacted TADA in 1987 for another six years. See Terrorist and Disruptive Activities (Prevention) Act, No. 28 of 1987; Mohapatra, Comment, Learning Lessons from India: The Recent History of Anti-Terrorist Legislation on the Subcontinent, 95 J. CRIM. L. & CRIMINOLOGY 315, 329 (2004). TADA criminalized a number of terrorism-related offenses, but it was “predominantly used not prosecute and punish actual terrorists,” but “as a tool that enabled pervasive use of preventive detention and a variety of abused by the police, including extortion and torture.” Id. at 146-147; Mohapatra, Supra, at 331 (“[T]he actual result of [TADA] was widespread abuse as its broad definition of terrorism was used to crack down on political dissidents … and was used in some regions exclusively against religious and ethnic minorities.”) Between 1987 and 1995, TADA was used to “put 77,000 people in prison,” of which only 8,000 eventually were tried for terrorist activities and only two percent ultimately were convicted. See Amnesty International India: Report of the Mallimath Committee on Reforms of the Criminal Justice System: Some Observations 22 (Sept. 19, 2003).

84 POTA S 49(2)(a)-(b)

that disclosure could jeopardize public safety.\textsuperscript{86} Facing increased criticism and evidence of widespread abuses,\textsuperscript{87} legislators repealed POTA in 2004.\textsuperscript{88} Following the November 2008 terrorist attacks in Mumbai, the Indian Parliament hastily enacted a modified version of POTA that, among other things, again empowers police to detain suspects for up to 180 days without charge.\textsuperscript{89}

Despite their decades-long experimentation with preventive detention, there is no evidence that India and Israel have succeeded in reducing violence. Rather, their history suggests that long-term detention without trial contributes to a cycle of violence and crackdowns resulting in widespread abuse which, in turn, flames unrest and provides recruitment tools for terrorist organisations.\textsuperscript{90} And so on for decades, all without abating violence. It is familiar scenario, evoking the failed British experiments in Northern Ireland and the repressive regime of South Africa.

\textsuperscript{86} The Supreme Court has implied the right to judicial review in preventive detention. \textit{Shalani Soni v. Union of India} (1980) 4 SC 544

\textsuperscript{87} For example, the law was often invoked to justify large-scale sweeps and detentions targeted at religious or political minorities. \textit{See}, e.g., Amnesty International, \textit{Abuse of the Law in Gujarat: Muslims Detained illegally in Ahmadabad}, at 1-2 (Nov. 6, 2003), available at \url{http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Inded/ASA200292003ENGLISH/SFile/ASA2002903.pdf} (discussing illegal detention of Muslim minority groups and disregard for POTA safeguards); Human Rights Watch, In the Name of Counter-terrorism: Human Rights Abuses Worldwide, Briefing Paper for the 59\textsuperscript{th} Session of the United Nations Commission on Human Rights 15 (Mar. 25, 2003), available at \url{http://www.hrw.org/un/chr59/counter-terrorismbck.pdf} (discussing detention of political figures and vulnerable groups such as children and the elderly).

\textsuperscript{88} Nonetheless, administrative (and often abusive) detentions continue under pre-existing security laws National Security Act (applying to Punjab) and the Armed Forces Special Powers Act or the Armed Forces (Jammu & Kashmir) Special Powers Act.


\textsuperscript{90} \textit{See} Hiren Gohain, \textit{Chronicles of Violence and Terror}, 42(12) ECONOMIC AND POLITICAL, WEEKLY 1012 (Mar. 30, 2007); Sanjay Barbora, \textit{Rethinking India’s Counter-Insurgency Campaign in the North-East}, 41(35) ECONOMIC AND POLITICAL, WEEKLY 3805 (Sept. 8, 2006)
4.7 UNITED KINGDOM

The United Kingdom is oft-cited as employing “preventive detention.” That assertion however, vastly exaggerates the limited scope of British detention powers. Moreover, it ignores the British experience with the Irish Republican Army that led it expressly to reject military approaches to counterterrorism. As a British government committee noted in April 2002: “Terrorists are criminal, and therefore ordinary criminal justice and security provisions should, so far as possible, continue to be the preferred way of countering terrorism.”

4.7.1 British Approaches to Counterterrorism

4.7.1.1 Pre-charge detention

The United Kingdom currently only permits pre-charge detention for terrorism suspects for a maximum of 28 days, and then only upon judicial review and in connection with an ongoing criminal investigation. A detainee has the right to judicial review and access to counsel within 48 hours of arrest.

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93 Terrorism Act 2000 amended by Terrorism Act 2006 Anti-Terrorism Crime and Security Act 2001, Part 4, S 21. The United Kingdom first differentiated the length of pre-charge detention for terrorist suspects from the length of pre-charge detention for ‘ordinary’ criminal suspects through the Terrorism Act of 2000. The maximum length of pre-charge detention for ‘ordinary criminal’ or ‘non-terrorist’ suspects is 4 days. The Act provided for an initial window of 48 hours (from the time of the suspect’s arrest) during which the suspect could be detained without warrant or charge. Upon judicial authorization this pre-charge detention could then be extended, via the provision of a warrant, such that it can last a maximum of 7 days from the initial arrest. The Criminal Justice Act 2003 extended the 7-day maximum to 14 days and the Terrorism Act of 2006 further the maximum to 28 days from the initial arrest though the judicial authority can only extend the warrant by 7 days at a time.

94 Terrorism Act, 2000, Section 41, (1) a constable may arrest without a warrant a person whom he reasonably suspects to be a terrorist. (2) Where a person is arrested under this section this provisions of Schedule 8 (detention: treatment, review and extension shall apply). (3) Subject to subsections (4) to (7), a person detained under this section shall (unless detained under any other power) be release not later than the end of the period of 48 hours beginning- (a) with the time of his arrest under this section, or (b) If he was being detained under Schedule 7 when he was arrested under this section, with the time when his
Continued detention may be permitted in seven day increments, totaling no more than 28 days, only upon showing that “there are reasonable grounds for believing that the further detention … is necessary” to bolster the criminal investigation, e.g., wither “to obtain evidence through questioning or otherwise, preserve evidence, or pending the result of examination and analyses of already obtained evidence.”

Additionally, authorities must certify that “the investigation in connection with which the person is detained is being conducted diligently and expeditiously. For the first fourteen days, a designated, magistrate judge reviews the detention application; between days fourteen and twenty-eight, a High Court judge conducts the review. The detainee and defense counsel may be denied access to evidence and barred from proceedings, but only during this 28-day period. Instead, the detainee is represented by special counsel who has been cleared to handle classified information.

The statistics on pre-charge detention suggest that extended detention is subjected to fairly judicial review and is rarely used. According to a report by the Home Office, magistrates have rejected or reduced some detention orders. Between July 26, 2006, when pre-charge detention was increased to 28 days, and October 2007, there were 204 arrests under the Terrorism Act, but only 11

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(4) If on a review of a person’s detention under Part III of Schedule 8 the review officer does not authorize continued detention, the person shall (unless detained in accordance with subsection (5) or (6) under any other power) be released. (5) Where a police officer intends to make an application for a warrant under paragraph 29 of Schedule 8 extending a person’s detention, the person may be detained pending the making of the application. (6) Where an application has been made under paragraph 29 or 36 of Schedule 8 in respect of a person’s detention, he may be detained pending the conclusion of proceedings on the application. (7) Where an application under paragraph 29 or 36 of Schedule 8 is granted in respect of a person’s detention, he may be detained, subject to paragraph 37 of that Schedule, during the period specified in the warrant. (8) The refusal of an application in respect of a person’s detention under paragraph 29 or 36 of Schedule 98 shall not prevent his continued detention in accordance with this section. (9) A person who has the powers of a constable in one Part of the United Kingdom may exercise the power under subsection (I) in any Part of the United Kingdom.

95 Terrorism Act, 2006, c.11, Ss. 19-20 (U.K.). The original maximum was seven days, and was incrementally increased to the current maximum of 28 days.

96 Terrorism Act of 2000, Schedule 8, at 32 (1)
suspects were detained for more than 14 days. (Eight of them were criminally charged and three were released without charge.)

It is notable that Parliament has rejected recent pressures to increase the detention period beyond 28 days. For example, in 2005, following the London bombings, the government pushed for a 90-day detention period. Parliament undertook a comprehensive study of the issue and concluded that the unprecedented increase was not warranted. Efforts in 2007 and 2008 to increase the detention period to 56 days and 42 days, respectively, were similarly defeated. Ongoing and mounting controversy also continues to shroud the British detention regime.

But despite the swirl of controversy, it is essential to note that the despite in the United Kingdom has been over a matter of days prior to criminal charge, not years outside the criminal justice system. The notion of indefinite detention without trial has never been suggested by British Authorities. As Prime Minister Gordon Brown stated during the debates regarding the 2008 extension proposal, “our first principle is that there should always be a maximum limit on pre-charge detention. It is fundamental to our civil liberties that no one should be held arbitrarily for an unspecified period.”

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100 Gordon Brown, 42-Day Detention; A Fair Solution, THE TIMES (June. 2, 2008).