Chapter 5

5. A CRITICAL STUDY ON IMPLEMENTATION OF ANTI-TERROISM LAWS AND ROLE OF JUDICIARY IN INDIA

5.1 TERRORISM AND HUMAN RIGHTS

The primary objectives of an effective counter-terrorism effort are to safeguard human rights, strengthen democracy and uphold the Rule of Law. The response to terrorism can neither be selective nor lead to unleashing a wave of unbridled repression, which would, as a consequence, enormously infringe upon the rights of the citizens. Thus, it is critical to strike a just balance between ensuring the security and integrity of the country and safeguarding the human rights of the people.

Indeed, there cannot be any compromise in the effort to root-out terrorism from the country. The state is expected to, and should, take all possible legal, security, social and economic measures to neutralize terrorist groups. However, needs to be kept in mind is that in India, the largest democracy of the world, human rights of citizens, which are non-alienable and are guaranteed by the Constitution, cannot be allowed to be sacrificed. Importantly, Article 21 (Protection of life and personal liberty, or right to life), Article 20 (Protection in respect of conviction for offences, or Protection against Testimonial Compulsion) of the Constitution cannot be suspended even during an Emergency.

Therefore, counter-terrorism efforts of the State should, under any circumstances, uphold the Rule of Law, observe human rights and follow “due processes”. Failure on the part of the State to do so would only alienate large sections of the population and unwittingly help the terrorists. It is equally important to bear in mind that it is the terrorists and terrorists groups which are, without any doubt, always guilty of gross human rights abuses, and not the
security forces (barring exceptional cases) which are often maligned by the
gullible media and motivated activists. The violations by the terrorist, however
receive little attention especially because of the mortal fear of violent retribution
and victimization. As a former US Senator, Henry Jackson, wrote… “It is disgrace
that democracies would allow the treasured word ‘freedom’ to be associated with
acts of terrorists”.

5.1.1 State Violations

Human rights violations by the State and its agencies occur in various
settings: during cordon and search operations, during encounters – sometimes
genuine and at other times fake – or opening fire in crowded areas, during
detention and interrogation. A number of factors are responsible for such
violations. These include: lack of transparency and accountability, inadequate
training and education among security personnel in observing human rights, lack
of scientific investigation skills and tools among the police, deficient information
to, and investigation by the police, high level of stress factor caused by extended
tour of duty in conflict theaters under treacherous and taxing conditions, and a
moribund judicial system.

In this agenda-driven cacophony of trading charges by the ‘right groups’
and the security forces, the perceptions, saner voices and aspirations of the
unbiased sections of the civil society, as well as those who have fallen victim to
human rights violations are either lost, or are ignored. It might not be incorrect to
state that the unbiased civil society does not object to the killing of perpetrators of
terrorist acts, but gets enormously disturbed and concerned when
innocent persons fall victim to either terrorist acts or excess by the security forces.

On many occasions, concerned citizens from different walks of life have
disapproved, and unequivocally condemned, the agencies of the state employing
‘terrorism as a tool’. In this context, the Supreme Court of India noted in *D. K.*
Basu vs. State of West Bengal\textsuperscript{101} that “State terrorism is no answer to combat terrorism: that would only be bad for the state, the community and above all the Rule of Law. The State must, therefore, ensure that the various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto them.”

A significant contributing factor for such an avoidable state of affairs is a lack of preventive intelligence, thus, resulting in ‘ruthless post-event investigation’ by the police. In considerable measure, intelligence does not come forth easily and naturally form the people or the community because of a crisis of confidence in the agencies of the State and for the fear of being victimized.

Therefore, it is of vital importance for the State to carry along the affected communities with it and make them a partner, rather than stay in isolation or detachment from them, in the fight against terrorism. The terrorists would not be able to operate for long without support from the people. The State, therefore, can ‘wean away’ or ‘win over’ the people through a proactive, concerned effort, isolate the latter and defeat the comprehensively.

In this effort by the State, the intelligentsia, media – especially the electronic media – and non-government organisations can play a significant and useful role. They could not only infuse confidence among the people against terrorism but also act as a bridge between the community and the State in effectively terrorism. It is extremely important to train and educate the security forces – police, Para-military and the army – about the silence, non-violability and importance of observing the human rights of people. The training and education should focus especially on the lower rung of the security forces, which, in large numbers, comes into contact with the community.

\textsuperscript{101} AIR 1997 SC 610
Unfortunately, for a long time after Independence, the security forces, especially the police, have operated almost largely as a force of the colonial past. The army, increasingly getting involved in civilian conflicts, is trained to fight ‘enemy soldiers’ and not deal with its fellow countrymen and women. In the process, there have been many occasions of allegations of human rights violations by the army. Therefore, it would be in the interest of the country, the people and the professional interest of the army itself, that the army is deployed in the role for which it has been created, than to perform internal security duties.

5.1.2 The Constitution of India and Terrorism

At the time of framing of the Constitution, there was a lot of discussion on the present Article 22 of the Constitution dealing with the safeguards available to the arrested persons and the detenus detained under the preventive detention laws. While supporting the necessity to pass preventive detention laws, G. Durgabai Deshmukh observed:

“……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, yield the first place to the State….The new Article 15-A\textsuperscript{102} ....is a very happy compromise.”\textsuperscript{103}

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

\textsuperscript{102} At present Article 22 of Constitution is dealing with safeguards to arrested persons and exception thereto.
\textsuperscript{103} Constituent Assembly Debates, vol. IX, at 1543
which not only this country but also other countries in the world are passing through, some special measures for the security of the State are necessary…”

However, certain other members like Mahavir Tyagi had opposed the law of preventive detention on the ground that “life liberty and pursuit of happiness are the three fundamental rights. The State come into being not because it has any inherent rights of its own, but because the individual, who has inherent rights of life, liberty, foregoes a part of his own rights and deposit’s it with the State…The State is thus organized and constituted not by depriving the people of their inherent rights…the introduction here of a detention clause changes the chapter of fundamental rights into a penal Code worse than the Defence Rules of India of old Government….it is not the business of the Constituent Assembly to vest in the hands of the future Governments power to detain people…”\(^{104}\)

Dr. B. R. Ambedkar supported the preventive detention laws totally by overruling the objection of members like Mahavir Tyagi. Thus, the Constituent Assembly took cognizance of the extreme situations like terrorism and provided certain measures to curb the same.\(^{105}\)

### 5.2 VARIOUS REPORTS ON IMPLEMENTATION OF DRACONIAN LAWS VIS-À-VIS VIOLATION OF HUMAN RIGHTS

#### 5.2.1 Law Commission 173\(^{rd}\) Report

The Law Commission of India, an advisory headed by a former Judge of the Supreme Court, recommended in April 2000 the adoption of a law designed to deal firmly and effectively with suspected terrorists and their activities, thus departing from the liberal investigation and trial procedures normally in use.

\(^{104}\) Constituent Assembly Debates, vol. IX, at 154.

The Commission was of the view that the impact of terrorism, both internal and external, over the past few decades in India fully justified the measures envisaged in the proposed legislation. When the very existence of a liberal society is at stake, they opined, 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 by itself subdue terrorism. It may, however, arm the State to fight terrorism more effectively. There is a good amount of substance in the submission that the Indian Penal Code (IPC) was not designed to fight or to check organized crime of or gangs trained, inspired and supported by fundamentalists and 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 afraid of containing the Police authorities about any information they have about terrorist activities much less to cooperate with the Police in dealing with terrorists. It is difficult to get any witnesses because people are afraid of their own safety and safety of their families. It is well known that during the worst days in Punjab, even the Judges and prosecutors were gripped with such fear and terror that they were not prepared to try or prosecute the cases against the terrorists. That is also Combating Terrorism Stated 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 situation. An

106 http://lawcommissionofindia.nic.in/tada.htm
107 Law Commission 173rd Report
extraordinary situation calls for an extraordinary 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 such an Act at all.

The Government of India in the Ministry of Home Affairs requested the Law Commission to undertake a fresh examination of the issue of a suitable legislation for combating terrorism and other anti-national activities in view of the fact that security environment has changed drastically since 1972 when the Law Commission had sent its 43rd Report on Offences against the National Security. The Government emphasized that the subject was of utmost urgency in view of the fact that while the erstwhile Terrorists and Disruptive Activities (Prevention) Act, 1987 had lapsed.

5.2.2 Amnesty International Reports on India

Since 1972-1973, Amnesty International has been publishing a volume entitled Annual Report every year. Each Annual Report contains information about the violation of human rights the entire world over. It has been active in espousing the cause of human rights in India. Since 1985 it has been showing great concern about the violation of human rights in Punjab.

In its Annual Report of 1972 and 1973, Amnesty International has drawn the attention of Indian Government towards the detention of 17,000 people under preventive detention in West Bengal and it approached the Indian to get them released against whom no criminal charges could be brought.108

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In its 1973-1974 Report it has drawn attention of Indian Government towards the release of Pakistani National, who fled from East Bengal during and after the war to Nepal and Pakistan and still are in jails in Bihar and West Bengal. In a letter to the West Bengal Chief Ministry in February 1974, Martin Ennals expressed great concern about the situation and urged that the prisoners be brought to trials as soon as possible, or in the absence of criminal evidence, they be released immediately.

Amnesty International Secretary General Martin Ennals wrote on Jun 14, 1974 to Prime Minister Mrs. Gandhi of India and the Chief Minister of West Bengal, S.S. Ray, to present a report on the treatment and detention conditions of political prisoners in the State. It has also drawn the attention of Indian Government towards the detention of 15,000 and 20,000 prisoners commonly known as ‘Nexalites’ who are detained under MISA and Defence of India.  

The large scale arrest of members of all opposition parties in India (except the Communist Party), in the wake of the imposition of national State of emergency on June 20, 1975, was perhaps the most significant event of the year in term of human rights violation in Asia. The Amnesty International on 27 June, 1975 made a public appeal to the Prime Minister Mrs. Indira Gandhi to free all political prisoners arrested under the MISA.  

In August, in an interview with Socialist India, Prime Minister Mrs. Gandhi charged that the Amnesty International was ‘very active in the hate India campaign’. Deputy Secretary General Hans Ehrenstrale, in a letter of 15 August, replied that Amnesty International was concerned about the detention of political prisoners in all countries, irrespective of political, ideological or geographical

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110 Amnesty International Report, 1975
considerations. “Any suggestion that we all are engaged in a hate campaign against any country is totally unfounded”.

As Amnesty International is a voluntary organisation and its objective is to work for the release of persons imprisoned or otherwise detained by reason of their political, religious or other conscientiously held beliefs, it fulfills its objective without bothering about the reaction of the respective states. The huge curtailment of the fundamental freedoms of Indian citizens during the Emergency, the suspension of constitutionally guaranteed fundamental rights and the right of Habeas Corpus and large scale arbitrary imprisonment of peaceful government opponents has been described in Amnesty International Report.\textsuperscript{111}

The release programme of Political detainees started when, on 20 January, 1977, the Government announced that general elections which were postponed indefinitely on 30 October 1976 were to be held in two months and that emergency regulations were being relaxed. On 27 January 1977, Amnesty International wrote to Indira Gandhi ‘welcoming the Government’s decision to release political prisoners and asked her to spread up its release programme.

It also urged the Government to consider revoking the MISA and Defence of India Rules in the near future, and to review the cases of political prisoners still detained under the emergency provisions. It urged the Government to publish numbers and names of prisoners it released.\textsuperscript{112}

On March 25, 1977 Amnesty International sent a cable to Prime Minister Desai, congratulating him on assuming office and wishing the Government all success for implementing the act concerning the restoration of fundamental rights of Indian Citizens. On April 10, 1977, the General Secretary of the Communist

\textsuperscript{111} Amnesty International Report, 1976
\textsuperscript{112} Amnesty International Report, 1977
Party of India, Satyanarayan Singh, claimed that there were as many as 12,000 ‘Naxalite’ detained all over India, 6,000 of whom held under MISA.

The other 6,000 were held on specific charges (such as the Defence of India Rules, the Arms Act and the Indian Penal Code). And on May 15, 1977, the Communist Party of India (Marxist) submitted a list of 293 of its imprisoned member, including people sentenced and people detained without trial. On April 7, 1977, Amnesty International released a public appeal to the Government urging it “to release promptly all prisoners who are not to be tried. The others should be given prompt trials, with the possibility of being released before trials.\textsuperscript{113}

Throughout the period 1977 to 1978, the Indian Government took important steps to restore the rule of law in the country. Amnesty International welcomed the release of nearly all the thousands of prisoners of conscience arrested during the emergency era of 1975 to 1977 under the provisions of the Maintenance of Internal Security Act. In Kerla and West Bengal, Amnesty International delegates interviewed seven victims of torture (administered between 1970 and 1977), two of whom had been disabled as a result of what they had undergone during their detention.\textsuperscript{114}

The Amnesty International delegates, after making enquires during their visits to Tihar Jail, New Delhi, Presidency Jail Calcutta and Hyderabad Central Jail submitted memorandum to the Indian Government. It made a number of recommendations in line with the Standard Minimum Rules for the treatment of prisoners, including the establishment of independent visitors Board to visit prisoners at any time and the abolition of the use of iron fetters on political prisoners.\textsuperscript{115}

\textsuperscript{113} Ibid.
\textsuperscript{114} Amnesty International Report, 1978
\textsuperscript{115} Ibid
On April 10, 1979, the Indian Government ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. India is the second Asian country after Japan to ratify the two Covenants. On April 20, 1979, Amnesty International Cabled the Foreign Minister, Mr. A.B. Vajpayee, welcoming the government’s decision to ratify the Covenants and said that this was an “important step towards ensuring the long-term protection of fundamental rights in India.\textsuperscript{116}

It may be noted that Amnesty International (in its report to the government of India) has urged immediate deletion of preventive detention from the Constitution and also demanded repeal of preventive detention laws in force in the States of Andhra Pradesh, Rajasthan, Uttar Pradesh, Madhya Pradesh and Jammu and Kashmir. Whenever there is extreme torture and gross violation of the right to life the Amnesty International has gone to the extent of making enquiries in the individual case. It happened in the case Archana Guha, a school teacher from Calcutta.

Due to torture by the police, she received extensive medical treatment at Copenhagen that was arranged by the Danish Medical Group of Amnesty International from January 9 until March 30, 1980. As a result of torture and subsequent imprisonment, she was suffering from a lesion of the lower part of the spinal cord and was unable to walk.

After 1980, as police brutality became the order of the day, consequently the Amnesty International showed its deep concern about prisoners who had died in the custody of the police and this world organisation even wrote to the Chief Ministers of the States of Karnataka, Madhya Pradesh, Uttar Pradesh and West Bengal, where such incidents of human right violations were mostly reported.\textsuperscript{117}

\textsuperscript{116} Amnesty International Report, 1979
\textsuperscript{117} Amnesty International Report, 1980
When on September 23, 1980 the President of India imposed the National Security Ordinance, the Amnesty International wrote to the Prime Minister on 4th November 1980 that the proposed statutory detention laws threaten to bypass the long established legal procedures according to which charges are required to be brought in an independent court. The accused persons have the right to engage a lawyer to their defence and the right to appeal against detention. The Amnesty International said that the provisions of the NSO negated the fundamental legal and all safeguards as laid down in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

In its report, Amnesty International (1980) said that the right to life and freedom from torture was not being protected effectively in India. It urged the Government to establish an independent body to investigate complaints of ill-treatment, torture and deaths in police custody; specific legal measures to protect suspects from ill-treatment and torture, full investigations of the record and conduct of responsible police officials etc.

The Amnesty International drew the attention of Indian Government (in its report of 1981) towards the reports that members of the Communist Party of India (Marxist-Leninist), alleged to be Naxalite and their sympathizers had been killed in incidents which the police officially described as ‘encounters’. Relatives of such victims have alleged that they were deliberately shot by the police after arresting them on December 9, 1981. The Amnesty International wrote to the Chief Minister of Tamil Nadu urging for the establishment of judicial enquiries to investigate the reports where 13 alleged Nexalites had died to encounters in the State between August and December 1980.

After 1982, the Amnesty International made the Indian Government aware of this fact that no official statements on the numbers of the people detained under NSA during 1982 were received by the Amnesty International. Rather it was felt
by this body that NSA was being used to detain even non-violent critics of the Government in several Indian States (and especially in Punjab).

The main cause of the increase in detention was the upsurge or Sikh agitation for autonomy for Punjab State in the second half of 1982. Led by the Shiromani Akali Dal party, the number of detention rose to 36,737 during 88 days of the Akali protest movement. Police stated that in all some 2500 Sikhs were arrested under preventive detention (during November and by December 1982) by the Governments of Punjab and Haryana. Besides this, the dozens of the people were arrested and charged with making ‘anti-national’ speeches or of belonging to what Chief Minister Farooq Abdullah of Jammu and Kashmir termed ‘Communal’ and ‘Secessionist’ organisations. All the above detentions were made under the State’s Public Safety Act.  

During February 1983, widespread communal violence broke out in the State of Assam where an estimated, 3500 people, mainly Bengali-speaking immigrants, were killed by Assamese. Demands for political autonomy throughout the year in the Punjab were increasingly marked by violence attributed to Sikh extremist groups. Amnesty International also raised with the government of India five ‘encounter cases’ that reportedly occurred between November 1980 and January 1982 in the States of Tamil Nadu, Andhra Pradesh, Uttar Pradesh and Maharashtra respectively. 

On April 10 and June 27, 1984, Amnesty International wrote to the Prime Minister of India about the two amendments to the National Security Act which could facilitate detention of peaceful opponents of the government. On June 14, 1984 in Amnesty International telexed to the Prime Minister acknowledging that the government had faced serious problems of internal security in Punjab and

119 Amnesty International Report, 1983
asked that the 6,500 people reportedly arrested specific criminal offences either be charged or released. It urged the release of Akali Dal leaders arrested under the NSA during or after the Army Action in the Golden Temple.

On June 27, the Amnesty International welcomed the release of 800 detainees but expressed its concern about two Akali Dal leaders who had been rearrested on June 22 under the amended provisions of the National Security Act.

The Amnesty International showed its concern for the killing of 2,987 Sikhs (an official state figure) as a result of the anti-Sikh riots that spread in Delhi and other parts of India after the assassination of Mrs. Indira Gandhi on October 31, 1984. Although the newly appointed Prime Minister, Rajiv Gandhi, immediately called for a halt to the anti-Sikh violence and ordered the army to be deployed, a number of police officers allegedly failed to stop the killings and even encouraged them. Rather, several members of the Congress Party were allegedly found to be instigating for the violence.\(^{120}\)

The Amnesty International in its recent reports has showed its concern about the human rights violations in India. It has alleged that there is lot of unlawful killings which go uninvestigated and unpunished, the wide spread use of torture by the security forces and the police and arbitrary arrest and prolonged detention resulting from the removal of crucial legal safeguards in security legislation.

The Amnesty International in particular has attacked the amended National Security Act which allows detention without trial. The Terrorist and Disruptive Activities (Prevention) Act of 1985 allowing confessions extracted by police through torture, the admission of testimony of unidentified witnesses in camera

\(^{120}\) *Amnesty International Report, 1985*
trials and shifting of burden of proof to the accused are some of the dangerous provisions.\textsuperscript{121}

The Amnesty International also expressed its unhappiness over the long detention of 376 Sikhs detainees in the Jodhpur Jail (who were arrested from the Golden Temple during Army Action from June 2 to June 6, 1984). All of them now have charged with waging war and are to be tried under circumstances where witnesses’ identities may be kept secret and where they will have to prove their innocence.\textsuperscript{122}

The Amnesty review points out that arbitrary arrest and prolonged detention without trial are encouraged by the array of draconian legislative weapons at the disposal of the Government also that these Acts are often used not simply to keep known terrorists out of circulation, but to lock up people engaged in non-violent political activity. Accusations of human rights violations are not restricted to the Punjab. The legislation, for example, had also been used in Gujarat to curb protests by students against rise in milk prices and to detain trade unionists due to pay dispute at a private textile company.\textsuperscript{123}

The Amnesty International has shown its concern for about ‘extra-judicial executions’ – Unlawful killing by government or government-backed forces. Besides this, it said the political activists were also reported to have been killed in ‘fake encounters’. The most widespread reports of ‘encounter’ killings have emanated from Punjab, one of a number regions in which security forces were said to enjoy immunity from prosecution when exercising ‘Shoot-at-sight’ powers. Furthermore, several young Sikhs were killed by the police in ‘fake encounters’, in Amritsar district in August 1987.

\textsuperscript{121} “Amnesty alleges torture and killing by Security Forces”, \textit{the Times}, August 10, 1988.
\textsuperscript{122} \textit{Amnesty International Report, 1988}
\textsuperscript{123} “Gandhian Armour”, \textit{the Times}, August 10, 1988.
In response to such allegations Amnesty International says that the government has simply issued blanket denials and no investigations appear to have been initiated. Other such killings by the military and police have been reported in Bihar, Andhra Pradesh and Manipur.\textsuperscript{124}

5.2.3 Reports of People’s Union for Civil Liberties

As stated earlier, the PUCL is a fact-finding, voluntary organisation. Wherever there is violation of human rights of the people, the individual members of the team visit that place, interview the victims, the police officers and public in general then it draws its conclusions based on facts and publish its reports to awaken the people, and authorities concerned about the violations of the rights of the Indian people.

Its report entitled ‘\textit{PUCL investigates Police Atrocities in Uttar Pradesh}’ is, in fact, a report of the brutal police repression in Agra. The report indicates that the trouble started when influential colonizer attempted to grab land on which poor people were resettled. Madhu, a women victim of the Chhatra yuva Sangharsh Vahini was detained and then let off after grievous injurious inflicted upon her.\textsuperscript{125} It highlights the attitude of police towards social workers.

In pursuance of alarming reports being received from Assam about the total denial of civil liberties to the people and the large scale bloodshed in the wake of the elections to the State Assembly the PUCL sent in investigations team to the State. The members of the team spent six days in March to April 1982 in Assam, jointly and severally visited victims’ places and met people of various shades of opinion.

\textsuperscript{124} Amnesty International Pulls up India”, \textit{The Times of India}, August 10, 1988
\textsuperscript{125} “PUCL Investigates Police Atrocities in Uttar Pradesh”, \textit{People’s Union for Civil Liberties}. New Delhi. 1982.
They also met Finance Minister Mohammad Idris and Chief Minister, Hiteshwar Saikia, also contacted the representatives of AASU and AAGSP. It received representations form some of the Bengali speaking people. According to them, persons who were critical of the movement were terrorized.

The violence according to them was directed against the workers of CPI, CPI (M) and CPI (ML) who were opposed to the agitation. They furnished lists of persons who were alleged to have been killed by the agitations. The leftist parties were constantly under attack and the violence that erupted on such large scale spread soon after the announcement of elections was pre-planned.126

In its report of “The Black Laws 1984-85”, the PUCL exposed the State for the use of draconian legislation by the police to violate democratic rights of the people. There is widespread apprehension in the country that the powers acquired by the State could be used against dissenters and for narrow political ends by the ruling party.127

A joint report was presented by People’s Union for Civil Liberties and People’s Union for Democratic Rights (both fact-finding organisations) about the causes of riots in Delhi from October 31 to November 10 under the heading “who are the guilty”.

Both these organisations have come to the conclusion that the attacks on members of the Sikh community in Delhi and its suburbs were the outcome of a well-organized plan marked by acts of both deliberated commissions and omissions by important politicians of the Congress (I) at the top with the

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126 “The Situation in Assam”, People’s Union for Civil Liberties, 1982.
127 “The Black Laws 1984-85”, People’s Union For Civil Liberties, New Delhi, 9. In this report it has dealt with the National Security (Second Amendment) Ordinance 1984 and the Terrorist Affected (Special Courts) Ordinance 1984 by which wide powers have been given to the Centre. It has also dealt with the National Security Amendment Ordinance No. 5 and National Security (Second Amendment) Ordinance No. 6 by which more stringent measures have been taken to detain the people and thus to violate their right to life. One of its member V.M. Tarkunde called Terrorist and Disruptive Activities (Prevention) Act, 1985 a “draconian legislation” which is calculated to confer on the police and administrative authorities vast and arbitrary powers to interfere with the legitimate activities of citizens.
connivance of the authorities in the administration. Both these organisations by interviewing the victims of the riots, police officers who were expected to suppress the riots, neighbours of the victims who tried to protect them, etc. revealed that the attack on Sikh followed a common pattern and it master-minded by some powerful organized groups.

5.2.4 Reports of People’s Union for Democratic Rights

This is another voluntary organisation which brings into limelight the violation of human rights. In its report “NTR’s One Year”, People’s Union of Democratic Rights assessed the role of Non-Congress governments for the protection of democratic rights in Andhra Pradesh. On the 9th January, 1983, Shri N.T. Rama Rao was sworn in as the first Non-Congress Chief Minister of Andhra Pradesh.

His party Telgu Desam won an unprecedented 202 seats in an Assembly of 293. Telgu Desam in its election manifesto echoed to protect the interest of the weaker sections and it pledged to provide protection to women from the atrocities of anti-social elements. When it came into power, the PUDR and Andhra Pradesh Civil Liberties Committee maintained that police atrocities upon weaker sections both by landlord and the police continued. Sexual offences during this period against women were reported and the condition of the rural poor remained as degrading as before.\textsuperscript{128}

Contemporary Bihar is a web of social contradictions between the upper castes and the untouchables, workers and the industrialists, often in league with a trade union mafia, tribals and forest officials, the landless and landed elite. PUDR in its report came to the conclusion that the main cause of tension in Bihar is the illegal control of community land by powerful landlords.

\textsuperscript{128} “NTR’s One Year”, People’s Union for Democratic Rights, 1983
After the abolition of Zamindari, such land was taken over by the Government and supposed to be allotted to Harijans and other depressed sections. Although the Harijans won the case in mid 1983 even then the landlords with help of police kept their illegal control over this land. A PUDR team which surveyed 30 villages in the Santhal Paraganas in May 1983 found evidence of such informal alienation in 15 villages. Whenever the Harijans and peasants challenged the illegal occupation of the land then they were exterminated by the police. In early January, 1983, Nathuna Singh a small peasant and activist of the Majdoor Kisan Sangharsh Samiti were killed by landlords in Bhavanichak village, Gaya District.\(^{129}\)

In April 1983, two others, a teacher and a peasant associated with the same organisations, were killed by landlords in the same village. The struggle for survival and better conditions of living and work has met with forces of terror and repression nurtured jointly by these vested interests and the government and the State.\(^{130}\)

In other report “Black Laws and the People”, a fact-finding team of PUDR was sent to Punjab to investigate the impact of 1984 laws on ordinary people and also to see whether the laws were effective in terms of their stated objectives. The investigations revealed that not only are the laws are ineffective with regard to their stated purpose, but worse; they are helping to further to cause communal terrorism. This is a consequence of the anti-democratic nature of the laws and the wide scope they provide for their arbitrary and indiscriminate application.\(^{131}\)

\(^{129}\) “Bihar: Behind the Curtain”, People’s Union for Democratic Rights, 1983

\(^{130}\) Ibid.

\(^{131}\) Black laws and the People- An enquiry into the functioning of 1984, Black Law in Punjab”, People’s Union for Democratic Rights, 1985
5.2.5 Reports of Citizens for Democracy

In the late seventies, Andhra Pradesh witnessed systematic representation of ordinary people by the police and administration. The largest numbers of victims who fell to the bullets or succumbed to torture during the emergency were in the State of Andhra Pradesh. According to official reports and statements of those arrested, 77 persons were killed in the State.

In response to the widespread apprehension that a majority of those were murdered by the police in cold blood, Jayaprakash Narayan, as President of Citizens for Democracy, set up a committee in April 1977 headed by V.M. Tarkunde to investigate the death. After extensive investigation two interim reports were published. The first report (release on May, 12, 1977) revealed those then deaths and eight deaths in two encounters were in fact cold blooded liquidations by the police.132

The Citizens for Democracy in its report — ”Oppression in Punjab” also dispatched an investigation team to find out the nature of atrocities that are being perpetrated on the people of Punjab by the Government. When the Citizens for Democracy published its report, the Delhi Police arrested N.D. Pancholi, General Secretary of the Citizens for Democracy on the night of September 10, 1985, and on September 13.

The newspapers reported that case of sedition had been registered against the authors of this report and the Citizens for Democracy. It was also indicated in the reports that Justice V.M. Tarkunde would be arrested with other office bearers of the Citizens for Democracy. This report of the Citizens for Democracy has been divided into 3 parts. In the first,

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It describes the inhuman barbarities to which the people of a particular community in Punjab were subjected. It is a terrible tale, carefully documented, of sadistic torture, ruthless killings, fake encounters, calculated ill-treatment of women and children, and corruption and graft on a large scale. It is also a story of the bravery of a people, particularly of the women folk.

The reports also shows that although the relations between the Hindus and Sikhs in Punjab are not as cordial as before, the basic unity between the two communities has not been disrupted. Despite all the oppression of the Sikh Community, there was no incident of a communal riot even in villages where the Hindus were in a hopeless minority. The report also shows that the Sikhs of Punjab are hardly attracted by the slogan of Khalistan. Such extremism as one finds among the Sikhs is largely the result of the acute dissatisfaction and resentment caused by army and police atrocities.¹³³

The Part II of this report under the title “Operation Blue Star – the untold story”, gives a non-official version of what happened at the Golden Temple before and during the Blue Star Operation i.e. from the 1<sup>st</sup> to 7<sup>th</sup> June 1984. It presents a series of facts, based on dependable evidence, which show that much of what is stated in the Government’s White Paper is far from the truth. Evidence shows that on June 1, 1984 no shots from the Golden Temple were fired at the Police.

It was on the contrary the Central Reserve Police which fired continuously at Harmander Sahib on that day. The 4<sup>th</sup> June, 1984 was wrongly chosen by the army for an attack on the inmates of the Golden Temple because, the 3<sup>rd</sup> June being Guru Purab, a large number of pilgrims, nearly 10,000 in number, had come to stay in the Golden Temple. Many of them appear to have been killed in the army action.

According to this report the number of terrorists flushed out from the Golden Temple as a result of the Blue Star Operation was rather small, a much larger number of alleged terrorists being in offensive pilgrims staying at Golden Temple. The report also shows that a large number of persons subjected to preventive detention or arrested under the anti-terrorist law are clearly innocent of the alleged offences. Part III under the title “The Black-Laws – Charter of Slavery”, gives an account of the various Black Laws prevailing in Punjab and shows how innocent people are constantly being harassed and oppressed by their Operation.\textsuperscript{134}

5.3 NATIONAL LEGISLATIVE POLICY RELATING TO TERROISM

5.3.1 The Armed Forces Special Powers Act, 1958

In October 2006, the human rights community in India was surprised at the disclosure by The Hindu newspaper\textsuperscript{135} in which it reported that it had managed to secure a copy of report \textit{by the Committee to review the Armed Forces (Special Powers) Act, 1958,}\textsuperscript{136} (the Committee). The Committee, established by India’s Central Government in November 2004, and headed by Retired Justice B.P. Jeevan Reddy, presented its report to the Government in June 2005. Since then the human rights community had tirelessly called for its findings to be released. One positive aspect of the Committee’s recommendations is immediately clear: the Committee calls for the repeal of the Armed Forces (Special Powers) Act (AFSPA). Amnesty International has joined local and international human

\textsuperscript{134} Ibid
\textsuperscript{136} Report of the Committee to review the Armed Forces (Special Powers) Act, 1958, Government of India, Ministry of Home Affairs, 2005 (Commission’s report)
rights NGOs in strongly criticizing the AFSPA and calling for its revocation, and can therefore only welcome this aspect of the Committee’s recommendations.

In addition, the Committee recommends that some of the excessive powers granted to the armed forces under AFSPA be abolished – for instance, the authorities to use lethal force against any person contravening law or order “prohibiting the assembly of five or more persons”. The alternative [legislation proposed] by the Committee also includes the list of “Do’s and Don’ts” attached to the AFSPA, and rendered binding law by the Supreme Court, and which impose certain restraints on the behavior and powers of soldiers deployed under the Act.

However, the organisation is deeply concerned that the repeal of the AFSPA in its proposed form would be, in the words of a leading Indian human rights lawyer, a “fake repeal” in that the Committee saw fit to recommend replacing the AFSPA with a new chapter to be added to another ‘special powers’ law, the Unlawful Activities (Prevention) Act, 1967 (UAPA) in order to enable armed forces’ intervention “to quell internal disturbance”.

If adopted, this recommendations would result in many of the special powers granted to the armed forces under the AFSPA being maintained under the proposed amendment, and the strengthening of the UAPA, which itself already

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138 Armed Forces (Special Powers) Act, 1958, sec. 4
140 In its briefing on the AFSPA, AI highlighted how even with the application of this list of “Do’s and Don’ts” the AFSPA still fell short of international standards, including provisions of treaties to which India is a state party. Moreover human rights activists have pointed out that even though these provisions exist, they are often nullified by the effect of other legislative provisions or are not consistently implemented.
grants governments powers that are either inherently violative of human rights law and standards or else widely open to abuse.

Amnesty International is moreover concerned at the assertion by the Committee that, “A major consequence of the proposed course would be to erase the feeling of discrimination and alienation among the people of the North-eastern states that they have been subjected to, what they call, “draconian” enactment made especially for them. The UAP Act applies to entire India including to the North-eastern states. The complaint of discrimination would then no longer be valid.”143

Amnesty International believes that the Committee’s recommendation to reintroduce some of the powers of the forces currently under the AFSPA in the UAPA would simply transfer draconian powers from one piece of legislation to another and will not change the way those living in regions where the AFSPA is currently implemented feel, since it is highly likely that the UAPA will still be applied more heavily in these areas, resulting in the same “feeling of discrimination”.

As one legal expert commented, it appears the Committee has approached the problems associated with AFSPA from the angle of “what the Committee considers an acceptable formula for continuing the powers, and the use of those powers, that have become entrenched in, and because of, the AFSPA,”144 rather than addressing the questions of how the AFSPA facilities human rights violations and fosters impunity.

The UAPA underwent wide-ranging changes in 2004,145 shortly after the infamous Prevention of Terrorism Act (POTA) was repealed.146 This legislation
was criticized at the time by human rights defenders as “The Reincarnation of POTA.” Unfortunately, the Committee in its review seems to have favoured the further concentration of legal provisions for sweeping powers in the hands of the Government under the UAPA, instead of ensuring safeguards and limitations on government powers so that international human rights law and standards are not violated.

Amnesty International’s concerns regarding the Committee’s recommendations are therefore twofold: concerns pertaining to the human rights implications of the proposed additions to UAPA in and of themselves, and pertaining to the implications of granting the armed forces powers under the UAPA.

5.3.1.1 Concerns regarding the human rights implications of granting the armed forces powers under the UAPA.

The UAPA is not the main subject of this briefing, however, as noted, the Committee has recommended amending the UAPA in light of its review of the AFSPA and the former is therefore of relevance to this briefing, particularly as the UAPA also contains and that area of great concern to Amnesty International, Empowering state governments and the Central Government to deploy armed forces under this Act deepens such concerns. For instance:

The UAPA criminalizes, among other things, any act which, including by “words, either spoken or written “ is “intended, or supports any claim, to bring about, on any ground whatsoever… the cesession of a part of the territory of India.

\[146\] The Prevention of Terrorism Act (POTA) was enacted on March 28, 2002. POTA by an ordinance on 27 October 2004
from the Union” or which “causes or is intended to cause disaffection against India.”

This sweeping prohibition violates the right of individuals to peacefully see, receive and impart ideas, as well as creating a vaguely defined crime of causing “disaffection against India,” which does not even have to be intentional, and may include the exposure of human rights violations or corruption.

The UAPA provides for other vaguely-defined offences such as when “a person…is and continues to be a member of “an association declared unlawful, takes parts in its meetings, contributes to it or “in any way assists the operations of such association.” None of these provisions require intention or knowledge of the unlawful status of the association concerned or nature of the acts involved.

In other words, a person may be prosecuted and punished under the UAPA even if, for instance, that person was not aware that an unlawful association still considers that individual to be a member, has unwittingly and unknowingly assisted its operation through acts that are not, in and of themselves, illegal, or has dealt with funds believing them to be the property of a certain person and unaware that the individual was actually posing as a ‘front’ for an unlawful association.

Amnesty International is concerned that a law combining the criminalization of certain forms of behavior, vaguely and broadly defined, with granting powers for the Central Government to quell by military force an undefined “internal disturbance”, may be regarded as legitimizing the use of the military to oppress the peaceful expression of opinions, to act against persons who

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148 UAPA, sec. 2(1) (o). Sec. 2(1) (i) expands the definition of support etc. for “secession” to include “the assertion of any claim to determine whether such part will remain a part of the territory of India”.
149 See for instance Art. 19 of the ICCPR
150 UAPA, sec, 10(a)
151 Draft Ch. VI, sec. 40 A(3)
have unknowingly and unintentionally broken ill-defined laws, or to otherwise violate human rights with impunity within operations against “disturbances.”

5.3.2 Prevention of Terrorism Ordinance

Indian governments have introduced or attempted to introduce legislation to cover offences linked to “terrorist activities”. In 1987 the Terrorist and Disruptive Activities (Prevention) Act (TADA) was enacted. It remained in force until May 1995. During those eight years, thousands of people were arbitrarily arrested, detained and tortured under it. TADA was used to crack down on political opponents and human rights defenders. It was finally allowed to lapse, following widespread allegations of misuse and harsh criticism from national and international human rights organisations, United Nations (UN) human rights mechanisms, the National Human Rights Commission (NHRC), lawyers and even government ministers and officials themselves.

Since then, several attempts have been made by successive governments to introduce new pieces of legislation intended to deal with the “terrorism” threat. In 1999 the Government of India requested the Law Commission of India to “undertake a fresh examination of the issue of a suitable legislation for combating terrorism and other anti-national activities.”

In late 1999 the Law Commission took a stand in favour of new legislation and in April 2000 it produced, as part of its 173rd Report, draft legislation under the name of Prevention of Terrorism Bill, 2000 (POTB). This bill faced stiff opposition from the human right movement, political parties and the NHRC and as a result it was never introduced in parliament.

152 Although TADA lapsed in 1995, hundreds of people remain detained under the Act awaiting trial and despite government statements to the contrary, individuals in Jammu and Kashmir continue to be detained under the Act in connection with cases filed before its lapse.

The Bill has been drafted by the Law Commission of India and replicates section 15(1) of TADA in its section 30(2). Amnesty International has made its concerns about this Bill known to the Government of India in its report\textsuperscript{154} subsequent to the publication of that report, the organisation welcomed the position taken by the NHRC that such a law was not necessary and that if enacted, the Bill would threaten human rights and violate international standards to which India is a party.

In particular, in its opinion on the Bill, the NHRC stated: “The Commission is of the view that this [making confessions before a police officer admissible in evidence] would increase the possibility of coercion and torture in securing confessions and thus be inconsistent with Article 14(3) of ICCPR”.

5.4 INDIA’S ANTI-TERRORISM LAWS AND ROLE OF JUDICIARY

Traditionally, terrorism was considered to be a coercive tactic, sometimes adopted as part of a larger guerrilla strategy, in that actions created threats of worse to come if political demands were not met, and these demands tended to be geared to end foreign occupation or to secure the objectives of a secessionist movement. The rise of modern terrorism, however, has been far more complex, tied to diverse ideological and political goals, and often astounding in the scale of violence and the ambitions of its practitioners.

The weapons used in the modern terrorist attacks have grown deadlier and far more accurate than the archaic guns and daggers of the early revolutionary terrorist and as terrorist groups make increasingly persistent efforts to acquire radiological, biological and chemical and weapons of mass destruction, the future outlook becomes more ominous. The situation is compounded further by the

\textsuperscript{154} The Prevention of Terrorism Bill 2000: Past abuses revisited/ (June 2000, AI Index: ASA 20/22/00)
availability of enormous financial resources and new communications equipment that has immensely empowered both the terrorist and his masters.

Terrorism is the affected, use of violence to bring forth fear. Terrorists know what they are doing and their targets are planned in advance. Terrorism may be motivated by political, religious, or ideological ideas. The base of terrorism is to produce fear in someone to make a government change its political attitude.

Although it is relatively new in the mainstream world, extremists have practiced terrorism to generate fear and compel a change in behavior throughout history. Before the nineteenth century, terrorists usually recognized innocents - people not involved in conflict - and made sure not to harm them. But now terrorist don't care who they hurt, they just want to get the point across like the acts of September 11, Mumbai bomb blasts etc.

The ground realities in India are stark and statistics provide a grim reminder of the increasing threat that terrorism constitutes. India has lost over so many lives to terrorism over the last decade in the major irregular and sub-conventional wars that have afflicted the country.

A majority of these fatalities have occurred in J&K and in the Northeast alone as a result of the proxy war in the former, and a range of separatist insurgencies in the latter. A significant number of deaths have also occurred due to Left wing extremism (referred to as Naxalism in India) and retaliatory violence in some areas of the States of Andhra Pradesh, Maharashtra, Madhya Pradesh, Orissa, Chhattisgarh, Jharkhand, Uttar Pradesh, West Bengal and Bihar.\footnote{Siddharth, ‘Anti- Terrorism Laws in India & The Need of POTA’, available at http://www.legalserviceindia.com/articles/html, (Last Viewed on April 20, 2011).}

Supreme Court of India as far back as in 1994 dwelt at length on it and drew a distinction between a merely criminal act and terrorist act in its judgment.
Hitendra Vishnu Thakur v State of Maharashtra\textsuperscript{156} “It may be possible to describe it (Terrorism) as use of violence with a view to disturb even tempo, peace and tranquility of the society and create a sense of fear and insecurity.”

Terrorism has immensely affected India. The reasons for terrorism in India may vary vastly from religious to geographical to caste to history. The Indian Supreme Court took a note of it in Kartar Singh v. State of Punjab\textsuperscript{157}, where it observed that the country has been in the firm grip of spiraling terrorist violence and is caught between deadly pangs of disruptive activities.

Apart from many skirmishes in various parts of the country, there were countless serious and horrendous events engulfing many cities with blood-bath, firing, looting, mad killing even without sparing women and children and reducing those areas into a graveyard, which brutal atrocities have rocked and shocked the whole nation deplorably, determined youths lured by hard-core criminals and underground extremists and attracted by the ideology of terrorism are indulging in committing serious crimes against the humanity.

After attaining Independence, the violence witnessed during Partition forced the Government of Free India to pass the Punjab Disturbed Areas Act, Bihar Maintenance of Public Order Act, Bombay Public Safety Act, and Madras Suppression of Disturbance Act, aimed at curbing forces that were using religion to incite violence. The rise of the Naxalite (Left-wing extremist) movement prompted the West Bengal government to pass the West Bengal (Prevention of Violent Activities) Act of 1970.\textsuperscript{158}

The last three decades have witnessed a number of legislations being enacted to tackle various specific contingencies: Jammu and Kashmir Public

\textsuperscript{156} (1994) 4 SCC 602
\textsuperscript{157} (1994) 3 SCC 569
\textsuperscript{158} Saji Cherian, Terrorism and Legal Policy in India, Vol.15, available at http://www.satp.org/satporqtp/publication/faultiness

Preventive detention legislations, both before and after independence has been in vogue to control crime and criminal activities for public benefit. Various legislations by Indian government were enacted to curb and control nefarious activities viz. Punjab Distributed Areas Act, Bihar Maintenance of Public Order Act, Bombay Public Safety Act and Madras Suppression of Disturbances Act. These Acts conferred wide power to security forces to detain and arrest any person in the name of public order. In 1950 the Prevention Detention Act was passed and in 1958 Armed Forces Separate Powers Act was passed to arrest unrest in North East region.

In 1971 Maintenance of Internal Security Act (MISA) was passed. Although these laws were enacted to meet special situations, most of them were not directed against the larger menace of terrorism. Anti-terrorism laws in India have always been a subject of much controversy. One of the arguments is that these laws stand in the way of fundamental rights of citizens guaranteed by Part III of the Constitution. The anti-terrorist laws have been enacted before by the legislature and upheld by the judiciary though not without reluctance.

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160 Surat Singh (2006), Law Relating to Prevention of Terrorism, New Delhi
5.4.1 Judicial response in matters of terrorism

The authority and legitimacy of modern nation states has come under a severe challenge as a result of rising trends in terrorism. Confronted with one of the most brutal forms of violence, a suitable or adequate response to terrorism is still to be framed, even as a proper context of evaluation and a sufficient understanding of its causation and methodology remain elusive.

The uniqueness of terrorism lies in its complex inner dimensions, its continuous and rapid adaptations, and its wide variations across different theatres. Significantly, the transformation of terrorism over the past twenty years has been startling, with rising anxiety over its burgeoning lethality.

The intention was to enact these statutes and bring them in force till the situation improves. The intention was not to make these drastic measures a permanent feature of law of the land. But because of continuing terrorist activities, the statutes have been reintroduced with requisite modifications. At present, the legislations in force to check terrorism in India are the National Security Act, 1980 and the Unlawful Activities (Prevention) Act, 1967.

There have been other anti-terrorism laws in force in this country at different points in time. Earlier, the following laws had been in force to counter and curb terrorism. 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).\(^1\) 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

\(^1\) Ibid.
intrusion. So, the ambit of the Act was strictly limited to meeting the challenge to the territorial integrity of India.

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 worked holistically as such and is completely within the purview of the central list in the 7th Schedule of the Constitution.

Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) was the second major act came into force on 3 September 1987. This act had much more stringent provisions then the UAPA and it was specifically designed to deal with terrorist activities in India. When TADA was enacted it came to be challenged before the Apex Court of the country as being unconstitutional. The Supreme Court of India upheld its constitutional validity on the assumption that those entrusted with such draconic statutory powers would act in good faith and for the public good.

In the recent past the terrorist acts including the attacks on world Trade Centre, New York (11th September, 2001), attacks on the Indian Parliament (13th December, 2001), Mumbai attack (26th November, 2008), the Malegaon blasts or the Serial Blasts in Delhi, Ahmadabad, Surat, Mumbai Local Trains, Gauahati and many more has come to threaten the very foundation of modern civilization society and these acts assumed new dimensions.

India has been a long time sufferer of terrorism is it in the North east, Punjab or Jammu and Kashmir but now terrorism has dangerously spread to other parts of the country with help of International agencies and groups actively participating in terrorism in increasing proportion.
The Supreme Court, in the landmark judgement of *Kartar Singh vs. State of Punjab*\(^{162}\) dealt with various provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987 and upheld the constitutional validity of the Act, from the very outset, the Court, looked into the matter in a broad perspective.

Acknowledging the fact that the existing situation in the country was peculiar, the Court observed that “the country has been in the firm grip of spiraling terrorist violence and is caught between deadly pangs of disruptive activities. Deplorably, determined youths lured by hardcore criminals and underground extremists and attracted by the ideology of terrorism are indulging in committing serious crimes against humanity.”\(^{163}\)

After *Kartar Singh* validity of TADA was again challenged in *R.M. Tiwari V. State*\(^{164}\) and in spite of close monitoring the use of TADA, 1987, by the court, the Review Committee complained of its gross abuse continued to be raised by various quarters, where under the of the case the court upheld the validity of constitutionality of TADA, 1987.

In spite of the drastic actions taken and intense vigilance activated, the terrorists and the militants do not desist from triggering lawlessness if it suits their purpose.”\(^{165}\) Further, realizing the severity of the situation, the Court noted: "No one can deny these stark facts and naked truth by adopting an ostrich like attitude completely ignoring the impending danger.” However, there were many instances of misuse of power for collateral purposes. The rigorous provisions contained in the statute came to be abused in the hands of law enforcement officials. TADA lapsed in 1995.

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\(^{162}\) (1994) 3 SCC 569

\(^{163}\) Prakash tatia chief justice ,high court of Jharkhand on calcuttahighcourt.nic.in/sesqui/lect2a.pdf

\(^{164}\) [(1996) 2 SCC 610]

\(^{165}\) Ibid.
Other major Anti-terrorist law in India is The Maharashtra Control of Organised Crime Act, 1999 (MCOCA) which was enforced on 24th April 1999.\textsuperscript{166} This law was specifically made to deal with rising organised crime in Maharashtra and especially in Mumbai due to the underworld. This legislation was passed by the Maharashtra Assembly in view of the growing menace of organised crime.

‘Organised Crime’ bears an uncanny resemblance to terrorism: neither phenomenon is confined by international borders; both organised crime and terrorism involve murder, kidnapping, arson, robbery, burglary, extortion, dealing in narcotics or dangerous drugs, intimidation and violence; finally, the support structures and sources of finance are often the same for both. The MCOCA has been an extraordinary success in Maharashtra, with a conviction rate as high as 78 per cent in some years.

\textit{Shaheen Welfare Association v Union of India}\textsuperscript{167}, where the Supreme Court opined that a more independent and objective scrutiny of TADA cases by a Committee headed by a retired Judge is obviously necessary. Such observation shows that the Apex Court has been always eager to preserve the human rights in combating terrorism.

There has been consistent calls for more laws to combat the terrorism, even though there is already a plethora of laws in India including the general and traditional law Indian Penal Code, The Unlawful Activities Prevention Act, 1967; The Criminal Law (Amendment) Act; The National Securities Act, 1980; State enacted laws, like The Maharashtra Control of Organized Crime Act, 1999 etc. The only need is to implement these provisions effectively, humanly and scientifically to condemn the terrorism.

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{166} Surat Singh (2006), \textit{Law Relating to Prevention of Terrorism}, New Delhi
\item\textsuperscript{167} (1996) 2 SCC 616
\end{enumerate}
\end{footnotesize}
In 2002 March session of the Indian parliament the Prevention of Terrorist Activities Act (POTA) was introduced. It was termed as Indian version of U.S Patriot Act. It was nothing more than the reincarnation of TADA with largely cosmetic changes. The Act was considered as a draconian piece of legislation as it curtailed various rights of a citizen which were recognised since long and were contrary to Article 21 of the Constitution. It was repealed in 2004 with Unlawful Activities (Prevention) Amendment Act, 2004.  

The POTA had widespread opposition not even in the Indian parliament but throughout India especially with the human rights organisation because they thought that the act violated most of the fundamental rights provided in the Indian constitution. The protagonists of the Act have, however, hailed the legislation on the ground that it has been effective in ensuring the speedy trial of those accused of indulging in or abetting terrorism. POTA is useful in stemming "state-sponsored cross-border terrorism", as envisaged by the then Home Minister L.K. Advani.

The Prevention of Terrorism Act, 2002 (POTA), was seen as a controversial piece of legislation ever since it was conceived as a weapon against terrorism. For, POTA did not take note of organised crime as such while MCOCA not only mentions that but, what is more, includes 'promotion of insurgency' as a terrorist act. Again, the onus to prove a person guilty under POTA lies on the prosecution while under the Maharashtra law a person is presumed guilty unless he is able to prove his innocence.

MCOCA does not stipulate prosecution of police officers found guilty of its misuse. But POTA did. MCOCA does not stipulate prosecution of police officers found guilty of its misuse. But POTA did. Under POTA a police officer found guilty of malafide action could be jailed for up to two years but MCOCA offers no

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168 Ibid
such protection. Many of the provisions of MCOCA are similar to those under Prevention of Terrorist Activities Act (POTA). \textsuperscript{169} For example, both acts have identical provisions with respect to

i. Procedures and powers of Special Court – Section 9 of MCOCA and Section 29 of POTA;

ii. Authorisation of interception of wire, electronic or oral communication – Sections 14 and 16 of MCOCA and Section 36 to 48 of POTA;

iii. Certain confessions made to police officer to be taken into consideration – Section 18 of MCOCA and Section 32 of POTA;

iv. Protection of witnesses – Section 19 of MCOCA act and Section 30 of POTA;

v. Forfeiture and attachment of property, Section 20 of MCOCA and Sections 6, 7 and 8 of POTA.

There can be no doubt that, if a clear anti-terrorism strategy involving the police, the executive and the judiciary could be formulated and executed on a national scale, the successes of MCOCA could be replicated under POTA.

\textbf{5.4.1.1 Impact of POTA}

It is normally said that terrorism is a low intensity war. But the loss, which our country has suffered in the last two decades due to the rise of terrorist activities, has been on a very large scale. This country has fought four high intensity wars and in those wars we have lost more than 6000 people.

We have already lost more than 70000 civilians. In an addition, we have lost more than 9000 security personnel. Almost six lakhs people in this country have become homeless as a result of terrorism. Outside the expenditure on our

\footnote{Awantika Manohar, ‘Terrorism, How to Control it’, Lawz, Vol.VI, (June, 2006)}
armed forces, merely for maintaining the entire set up to fight insurgency, to fight cross-border terrorism, the economic cost itself has been Rs 45000 crore.

Therefore it becomes very necessary in a country like India that if a law regarding terrorism is enacted it should be made so stringent that the culprit be bought to book and does not go scot-free just because of the loopholes and lacunas in the ordinary law because when our neighboring nation Pakistan which is the cause of perpetrating terrorism in India and can have such stringent then India should also have such laws.

In the case of People's Union for Civil Liberties vs. Union of India (UOI)\textsuperscript{170} the constitutional validity of the Prevention of Terrorism Act, 2002 was discussed. The court said that the Parliament possesses power under Article 248 and entry 97 of list I of the Seventh Schedule of the Constitution of India to legislate the Act. Need for the Act is a matter of policy and the court cannot go into the same.

Once legislation is passed, the Govt. has an obligation to exercise all available options to prevent terrorism within the bounds of the constitution. Mere possibility of abuse cannot be a ground for denying the vesting of powers or for declaring a statute unconstitutionally. Court upheld the constitutional validity of the various provisions of the Act.\textsuperscript{171}

In Devender Pal Singh vs. State of N.C.T. of Delhi\textsuperscript{172} In a case where 9 persons had died and several other injured on account of perpetrated acts The court said that such terrorist who have no respect for human life and people are killed due to their mindless killing. So any compassion to such person would frustrate the purpose of enactment of Tada and would amount to misplaced and unwarranted sympathy. Thus they should be given death sentence.

\textsuperscript{170} (2004) 9 SCC 580
\textsuperscript{172} ( 2002) (1) SC (Cr.) 209
Sanjay Dutt vs. State through C.B.I.\textsuperscript{173} The expression possession though that of section 5 of Tada has been stated to mean a conscious possession introducing thereby involvement of a mental element i.e. conscious possession & not mere custody without awareness of nature of such possession and as regards unauthorized means and regards without any authority of law

\textit{T.T. Anthony vs. State of Kerala}\textsuperscript{174} This plenary power of police to investigate a cognizable offence is not unlimited. It is subject to certain limitations such as if no cognizable offence is disclosed & still more if no offence of any kind is disclosed the police would have no authority to undertake an investigation.

\textit{Vaiko v. Union of India}\textsuperscript{175} Case One of the petitions in this regard admitted by the Supreme Court has been filed by Vaiko, the general secretary of the (MDMK), a constituent of the ruling National Democratic Alliance at the Centre. Vaiko had defended POTA in Parliament during the debate on it. Therefore his petition challenging the validity of Section 21 of the Act assumes particular significance. Under this Section, a person commits an offence if he invites support for a terrorist organisation, and even if the support is not confined to the provision of money or other property. He is guilty if he arranges or addresses a meeting which he knows is meant to support a terrorist organisation or to further its activities.

Vaiko was arrested under this Section on the basis of certain remarks saying that "I was a supporter of LTTE once. I was a supporter of LTTE yesterday; I am a supporter of LTTE today and I will be a supporter of LTTE tomorrow." Then, he asked his audience whether the LTTE had engaged in terrorism for the sake of violence or had taken up arms to suppress a culture.

\textsuperscript{173} (1994) SCC 410  
\textsuperscript{174} (2001) Cri LJ 3329  
\textsuperscript{175} 2004 indiankanoon.org/doc/643469
Mr. Vaiko, was in detention for 17 months, did not choose to seek bail on a matter of principle. When we looked at various chapters internationally, it was found that as far as membership of a terrorist group is concerned, the British law has an exclusive chapter on banning terrorist organisations. After banning a terrorist organisation, membership of a terrorist organisation, ipso facto, becomes a punishable act.

_S. Srinivasa Vs. M/s Deccan Petroleum Ltd_\(^{176}\). The court said where the order of refusal to issue summons for production of document was prejudicial to accused then such order is not sustainable. The most important part of the section says that the power to take samples is not given to the police authorities but when a police officer investigating a case requests a Chief Metropolitan Magistrate to obtain samples of any accused person reasonably suspected to be involved in the commission of this act and then if only the Chief Metropolitan Magistrate gives the order to obtain such samples its only then he can force the accused to give such samples. If any accused person refuses to give such samples the court shall only then draw adverse inference against the accused.

### 5.4.1.2 AFSPA ruled in North-East

One can question AFSPA even from the security point of view. It was enacted in 1958 on an experimental basis for six months as a measure against “terrorist” groups in the North East. It was applied first in Nagaland, in 1980 in Manipur, later in Jammu and Kashmir and over the decades in more areas of the North East.

What was enacted for six months has remained for more than five decades. In 1958 there was one “terrorist” group in the North East. Manipur had two groups when the State was brought under the Act. Today, Manipur has more than twenty

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\(^{176}\) (2001) _Cri LJ_ 65
such groups, Assam has not less than fifteen, Meghalaya has five of them and 
other States have more groups. How does the army explain this proliferation of 
militant groups in spite of the Act? Has it served its purpose?

One is also told that the armed forces will not be able to remain in the 
North East or Jammu and Kashmir if the law is repealed. That is a lie. The army is 
deployed all over India without such a law. Those who demand its repeal do not 
ask the army to leave any region. They only want the armed forces to serve the 
country under the Constitution without a law that allows abuses with impunity.

There is no reason why a rapist or murderer should have a separate law 
only because he belongs to the armed forces. Take for granted for a moment that 
all the women whom they rape are terrorists. Why should they be raped? Why can 
they not be dealt with under the law of the land? These actions do not add to the 
honour of the armed forces or to the security of India. They only violate people’s 
right to a life with dignity and cannot be justified in a democratic country.

The AFSPA was passed in 1958. Originally enacted for a limited period, 
the act still stands. It allows the government to define, at its discretion and without 
judicial review, an area as ‘disturbed’ and empowers the military to shoot to kill. 
The act is criticised for its lack of accountability. AFSPA is applicable in the states 
of the North-East, which also have autonomous movements such as the Naga 
movement. According to the South Asia Human Rights Documentation Centre, 
India freely exploits the resources of the North-East.

They write, “Assam produces one-fourth of all the petroleum for India, yet 
it is processed outside of Assam so the state does not receive the revenues.” There 
are various autonomy movements in the North-East that only strengthen their case 
by highlighting the unaccountability of the Indian military under the AFSPA. The
AFSPA violates the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

However, despite human rights violations, acts like the AFSPA and UAPA are here to stay. Various underground organisations operating in the areas of North-East and Jammu Kashmir make it difficult for the government to repeal these draconian acts, despite pressure from activists, academicians and non-governmental organisations. As many proponents of such legislation argue, the threats over Kashmir from Pakistan and the support from China extended to Pakistan makes it difficult for India to operate in unstable regions without such legislation.

Civilians have been elected to rule the country. They have a duty to ensure that the security forces work under the Constitution. The problems in the North East and in Kashmir should be solved through a political process and not through a law that violates people’s right to life and dignity with impunity. They need confidence building measures in order to move towards peace with justice.

5.4.1.3 Khalistanis Movement in Punjab

After the partition was announced, the majority of the Sikhs migrated from the Pakistani province of Punjab to the Indian province of Punjab, which then included the parts of the present-day Haryana and Himachal Pradesh. Following India’s independence in 1947, The Punjabi Suba Movement led by the Akali Dal aimed at creation of Punjabi-majority state (Suba) in the Punjab region of India in the 1950s. Concerned that creating a Punjabi majority state would effectively mean creating a Sikh-majority state, the Indian government initially rejected the demand.

After a series of protests, violent clampdowns on the Sikhs, and the Indo-Pak war of 1965 the Government finally agreed to partition in the state, creating a new Sikh-majority Punjab state and splitting the rest of the region to the states of
Himachal Pradesh, the new state and Haryana. Subsequently, the Sikh leaders started demanding more autonomy for the states, alleging that the Central government was discriminating against Punjab. Although the Akali Dal explicitly opposed the demand for an independent Sikh country, the raised by it were used as a premise for the creation of a separate country by the proponents of Khalistanis.

In 1971, the Khalistan proponent Jagjit Singh Chauhan travelled to the United States. He placed an advertisement in The New York Times proclaiming the formation of Khalistan and was able to collect millions of dollars from the Sikh Diaspora. On 12 April 1980, he held a meeting with the Indian Prime Minister Indira Gandhi before declaring the formation of "National Council of Khalistan", at Anandpur Sahib.

He declared himself as the President of the Council and Balbir Singh Sandhu as its Secretary General. In May 1980, Jagjit Singh Chauhan travelled to London and announced the formation of Khalistan. A similar announcement was made by Balbir Singh Sandhu, in Amritsar, who released stamps and currency of Khalistan. The inaction of the authorities in Amritsar and elsewhere was decried by Akali Dal headed by the Sikh leader Harchand Singh Longowal as a political stunt by the Congress (I) party of Indira Gandhi.

The Khalistan movement reached its zenith in the 1970s and 1980s, flourishing in the Indian State of Punjab which has a Sikh-majority population and has been the traditional homeland of the Sikh religion. Various pro-Khalistan outfits have been involved in a separatist movement against the Government of India ever since. There are claims of funding from Sikhs outside India to attract young people into these pro-Khalistan militant groups.
5.4.1.3 a  Operation Blue Star and Assassination of Prime Minister Indira Gandhi

In the 1980s, some of the Khalistan proponents turned to militancy, resulting in counter-militancy operations by the Indian security forces. In one such operation, Operation Blue Star (June 1984), the Indian Army led by the Sikh General Kuldip Singh Brar forcibly entered the Harmandir Sahib (the Golden Temple) to overpower the armed militants and the religious leader Jarnail Singh Bhindranwale.

In 1984 the violence on both the police and the militants’ side reached such levels that the Indian Army was deployed and the Armed Forces (Punjab and Chandigarh) Special Powers Act was introduced in designated “disturbed areas” of Punjab. In these areas the army was granted powers to shoot to kill, to enter and search any premises, and to arrest any person without warrant and with immunity from prosecution.

Operation Blue Star was an Indian military operation which occurred between 3–8 June 1984, ordered by Prime Minister Indira Gandhi in order to establish control over the Harmandir Sahib Complex in Amritsar Punjab, and remove Jarnail Singh Bhindranwale and his armed followers from the complex buildings. Bhindranwale had earlier taken residence in Harmandir Sahib and made it his headquarters in April 1980.

The operation had two components—Operation Metal, confined to the Harmandir Sahib complex, and Operation Shop, which raided the Punjabi countryside to capture any suspects. Following it, Operation Woodrose was launched in the Punjab countryside where devout Sikhs, specifically those carrying a kirpan or wearing a saffron turban, were now targeted.

The operation was carried out by Indian Army troops with tanks, artillery, helicopters, and armored vehicles, and chemical weapons Casualty figures of Operation Blue Star given by Kuldip Singh Brar put the number of deaths among the Indian army at 83 and injuries at 220. According to the official estimate presented by the Indian government, 492 civilians were killed, though some independent claims run to 5,000 or higher.

In addition, the CBI is considered responsible for seizing historical artifacts and manuscripts in the Sikh Reference Library, before burning it down. The military action led to an uproar amongst Sikhs worldwide and the increased tension following the action led to assaults on members of the Sikh community within India. Many Sikh soldiers in the Indian army mutinied, many Sikhs resigned from armed and civil administrative office and several returned awards and honours they had received from the Indian government.

Four months after the operation, on 31 October 1984, Indira Gandhi was assassinated by Satwant Singh and Beant Singh, two of her Sikh bodyguards, in what is viewed as an act of vengeance. Subsequently, more than 3,000 Sikhs were killed in the ensuing anti-Sikh riots. Within the Sikh community itself, Operation Blue Star has taken on considerable historical significance and is often compared to what Sikhs call "the great massacre" by the Afghan invader Ahmad Shah Durrani, the Sikh holocaust of 1762.

In January 1986, the Golden Temple was occupied by militants belonging to All India Sikh Students Federation and Damdami Taksal. On 26 January 1986, the gathering passed a resolution (gurmattā) favouring the creation of Khalistan. Subsequently, a number of rebel militant groups in favour of Khalistan waged a major insurgency against the government of India.
Indian security forces suppressed the insurgency in the early 1990s, but Sikh political groups such as the Khalsa Raj Party and Shiromani Akali Dal (A) continued to pursue an independent Khalistan through non-violent means. Pro-Khalistan organisations such as Dal Khalsa (international) are also active outside India, supported by a section of the Sikh diaspora.

The handling of the operation, damage to the Akhal Takht (which is one of the five seats of temporal physical religious authority of the Sikhs) and loss of life on both sides, led to widespread criticism of the Indian Government. Many Sikhs strongly maintain that the attack resulted in the desecration of the holiest Sikh shrine. The Indian Prime Minister Indira Gandhi was assassinated by her two Sikh bodyguards in retaliation. Following her death, thousands of Sikhs were massacred in the 1984 anti-Sikh riots, termed as genocide by the Sikh groups.

5.4.1.4 Liberation Tigers of Tamil Eelam

The Liberation Tigers of Tamil Eelam commonly known as the LTTE or the Tamil Tigers) is a now defunct organisation that was based in northern Sri Lanka. Founded in May 1976 by Velupillai Prabhakaran, it waged a secessionist nationalist campaign to create an independent state in the north and east of Sri Lanka for Tamil people.¹⁷⁹ This campaign evolved into the Sri Lankan Civil War, which ran from 1983 until 2009, when the LTTE was decisively defeated by the Sri Lankan Military under the leadership of President Mahinda Rajapaksa.¹⁸⁰

At the height of its power, the LTTE possessed a well-developed militia and carried out many high-profile attacks, including the assassinations of several high-ranking Sri Lankan and Indian politicians. The LTTE was the only militant

group to assassinate two world leaders: former Indian Prime Minister Rajiv Gandhi in 1991 and Sri Lankan President Ranasinghe Premadasa in 1993. The LTTE invented suicide belts and pioneered the use of women in suicide attacks.

It was the first militant group to acquire air power and used light aircraft in some of its attacks. It is currently prescribed as a terrorist organisation by 32 countries, including India, but has support amongst Tamils in Tamil Nadu in India. Velupillai Prabhakaran headed the organisation from its inception until his death in 2009.

Historical inter ethnic imbalances between majority Sinhalese and minority Tamil populations created the background for the origin of the LTTE. Post independent Sri Lankan governments attempted to rectify the disproportionate favoring and empowerment of Tamil minority by the colonial rulers led to exclusivist ethnic policies including the “Sinhala only act” and gave rise to separatist ideologies among many Tamil leaders.

By the 1970s, initial non violent political struggle for an independent mono ethnic Tamil state, gave away to a violent secessionist campaign led by the LTTE. Over the course of the conflict, the Tamil Tigers frequently exchanged control of territory in north-east Sri Lanka with the Sri Lankan military, with the two sides engaging in fierce military confrontations. It was involved in four unsuccessful

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rounds of peace talks with the Sri Lankan government over the course of the conflict. At its peak in 2000, the LTTE was in control of 76% of the landmass in the Northern and Eastern provinces of Sri Lanka.\textsuperscript{188}

At the start of the final round of peace talks in 2002, the Tamil Tigers, with control of 15,000 km\textsuperscript{2} area, ran a virtual mini-state. After the breakdown of the peace process in 2006, the Sri Lankan military launched a major offensive against the Tigers, defeating the LTTE militarily and bringing the entire country under its control.

Victory over the Tigers was declared by Sri Lankan President Mahindra Rajapaksa on 16 May 2009\textsuperscript{189} and the LTTE admitted defeat on 17 May 2009.\textsuperscript{190} Prabhakaran was killed by government forces on 19 May 2009 and Selvarasa Pathmanathan succeeded Prabhakaran as leader of the LTTE, who was later arrested in Malaysia and handed over to the Sri Lankan government in August 2009.\textsuperscript{191}

5.4.1.5 LTTE and assassination of Rajiv Gandhi

Rajiv Gandhi was campaigning for the upcoming elections. On 21 May, after successfully campaigning in Visakhapatnam, his next stop was Sriperumbudur Tamil Nadu. About two hours after arriving in Madras (now Chennai), Rajiv Gandhi was driven by motorcade in a white Ambassador car to Sriperumbudur, stopping along the way at a few other election campaigning

\textsuperscript{189} “President to announce end of war” \textit{Times Online}. 17 May 2009. Retrieved 16 May 2009
\textsuperscript{190} “President to announce end of war”. \textit{Times Online}. 17 May 2009. Retrieved 16 May 2009
\textsuperscript{191} D.B.S. Jeyaraj (9 August 2009).”Operation KP”: the dramatic capture and after”. Chennai, India: The Hindu
When he reached a campaign rally in Sriperumbudur, he got out of his car and began to walk towards the dais where he would deliver a speech. Along the way, he was garlanded by many well-wishers, Congress party workers and school children.

At 22:21 the assassin, Dhanu, approached and greeted him. She then bent down to touch his feet and detonated an RDX explosive-laden belt tucked below her dress. Gandhi, his assassin and 14 others were killed in the explosion that followed.

The assassination was caught on film by a local photographer, whose camera and film was found at the site though the photographer himself died in the blast. As per the Supreme Court of India judgment, by Judge Thomas, the killing was carried out due to personal animosity of the LTTE chief Prabhakaran towards Rajiv Gandhi. Additionally, the Rajiv Gandhi administration had antagonised other Tamil militant organisations like PLOTE for reversing the military coup in Maldives back in 1988.

The judgement further cites the death of Thileepan in a hunger strike and the suicide by 12 LTTE cadres in a vessel in October 1987. The judgment while convicting the accused, four of them to death and others to various jail terms, states that absolutely no evidence existed that any one of the conspirators ever desired the death of any Indian other than Rajiv Gandhi, though several people were killed.

Judge Wadhwa further states there is nothing on record to show that the intention to kill Rajiv Gandhi was to overawe the Government. Hence it was held

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that it was not a terrorist act under TADA (Act) Judge Thomas further states that conspiracy was hatched in stages commencing from 1987 and that it spanned several years. The Special Investigation team of India's premier special investigation agency CBI was not able to pinpoint when the decision to kill Rajiv Gandhi was taken.

The trial was conducted under the Terrorist and Disruptive Activities Act (TADA). On January 28, 1998, the designated TADA court in Chennai gave death sentences to all the 26 accused. This created a storm in India. Legal experts were stunned. Human rights groups protested as the trial did not meet the standards of a free trial. The trial was held behind closed doors, in camera courts, and the non-disclosure of identity of witnesses was maintained. Ms A. Athirai, an accused, was only 17 years old when she was arrested.

Under TADA an accused can appeal only to the Supreme Court. Appeal to the High Court is not allowed as in normal law. Confessions given by the accused to the Superintendent of Police are taken as evidence against the accused under TADA. Under TADA the accused could be convicted on the basis of evidence that would have been insufficient for conviction by an ordinary court under normal Indian law. In the Rajiv Gandhi case, confessions by the accused formed a major part of the evidence in the judgement against them which they later claimed was taken under duress.

On appeal to the Supreme Court, only four of the accused were sentenced to death and the others to various jail terms. S Nalini Sriharan is the lone surviving member of the five-member squad behind the assassination of Rajiv Gandhi and is serving life imprisonment. Arrested on June 14, 1991, she was sentenced to death, along with the other 25 accused.
5.4.1.6 Insurgency in Kashmir

Contrary to the popular view that the insurgents picked up their guns in response to an undemocratic political system in no way was the movement fighting for greater democratic rights. In fact, as already shown, they had already picked up their guns prior to the election. Their cause was religiously and ideologically fuelled.

In many ways, the ruling National Conference party had encouraged this atmosphere through a range of propaganda campaigns. Even as far back as the 1984 election, Farooq Abdullah and the National Conference deliberately tried to create revulsion against India, for their own political ends. These Propaganda ads (see Appendix I) tried to demonstrate that India’s iron fist was bleeding Kashmir.

There is little evidence of Indian repression in this period, and it seems likely that the National Conference was trying to use this as a way to hide the poor and corrupt performance of the State Government. Indeed, perhaps if India had done more to intervene in State affairs, it could have abated the insurgency that followed.

5.4.1.6.a The Role of Pakistan

Having failed to take Kashmir by force, and unable to win the hearts of the Kashmiris by offering them a democracy when they themselves had a military dictatorship, Pakistan had to woo the Kashmiris by its ideology of communalism. Before the insurgency in Kashmir began, there was an insurgency movement in neighboring Punjab, which had also been split between India and Pakistan in 1947.

That died out by the late 1980s, when the Sikhs that had taken up arms against India had realized they were being used by their Pakistani sponsors and gave up arms. And so Pakistan's attention turned to Kashmir. One major reason

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Pakistan needed to sponsor insurgency in India was to gain intelligence on India, and its army.

After suffering three consecutive defeats, each time after attacking India unprovoked and by surprise, Pakistan was fearful India would be tempted to launch a pre-emptive strike against Pakistan to destroy its army to ensure Pakistan never again attempted to invade India.\textsuperscript{194}

The Pakistani view is that they are providing moral support to the Kashmiri People in their fight for freedom against the brutal Indian Army who commit excessive human’s rights abuses on the oppressed Muslims living in India, a non-Muslim country.

The Indian perspective is that they are dealing with a proxy war by Pakistan who has never accepted the Kashmiri’s democratic reaffirmation of their accession to India. The Kashmiris themselves are split between supporting Pakistan, India and independence. But while the Pakistanis and Indians live in relative peace, it is the Kashmiri who suffers the most while the issue remains unresolved.

The insurgency in Jammu and Kashmir or the Kashmiri Insurgency is an internal conflict between Kashmiri insurgents, sometimes known as "ultras" (extremists) and the Government of India. Some of the ultras favor Kashmiri accession to Pakistan, while others seek Kashmir's complete independence.

Since 2002, skirmishes with the local insurgents have constituted the main conflict in the Kashmir region the conflict in Jammu and Kashmir has strong Islamist elements among the insurgents, with many of the "ultras" identifying with Jihadist movements and supported by such.

\textsuperscript{194} Bodansky, Yossef, \textit{Pakistan’s Kashmir Strategy}, Freeman Center for Strategic Studies, Houston, Texas, January 1998
The roots of the conflict between the Kashmiri insurgents and the Indian Government are tied to a dispute over local autonomy. Democratic development was limited in Kashmir until the late 1970s and by 1988 many of the democratic reforms provided by the Indian Government had been reversed and non-violent channels for expressing discontent were limited and caused a dramatic increase in support for insurgents advocating violent secession from India.

In 1987, a disputed State election created a catalyst for the insurgency when it resulted in some of the state's legislative assembly members forming armed insurgent groups. In July 1988 a series of demonstrations, strikes and attacks on the Indian Government began the Kashmir Insurgency which during the 1990s escalated into the most important internal security issue in India.

Thousands of people have died during fighting between insurgents and the government as well as thousands of civilians who have died as a result of being targeted by the various armed groups.

The Inter-Services Intelligence of Pakistan has been accused by India of supporting and training mujahidin. To fight in Jammu and Kashmir According to official figures released in Jammu and Kashmir assembly, there were 3,400 disappearance cases and the conflict has left more than 47,000 people dead as of July 2009. However, the number of insurgency-related deaths in the state has fallen sharply since the start of a slow-moving peace process between India and Pakistan.

5.4.1.6 b Human rights violations by militants

Perhaps the most significant event was the insurgents successful kidnapping of India’s Home Minister. In December 1989, there was a change in the Federal Government in India, with Rajiv Gandhi losing to VP Singh’s
Government. Singh’s deputy, the Home Minister, was Mufti Mohammed Sayeed, the current Chief Minister of Jammu & Kashmir.

Just weeks after being sworn in, his daughter was kidnapped near Srinagar by insurgents who demanded the release of their colleagues from prison. Mufti, holding the third highest office in India behind the President and Prime Minister, broke India’s policy of non-negotiation with terrorists and released the captured insurgents and his daughter was released.

The whole episode has subsequently been referred to by insurgents as a key moment when they were able to show their Kashmiri people that India could be brought to its knees. These incidents gave the Kashmiris fighting for independence a great deal of confidence, unlike the early years when dreams of independence were always viewed as a practical impossibility.

Many Kashmiris felt that independence was imminent after the fall of the communist era, and some locals remarked that they thought the reality of independence was only a matter of weeks away. January 20, 1990 was to be Kashmiri Independence Day.

This date was chosen a few weeks prior as the day the masses would take to the streets and take power from India, effectively their army, for the Kashmiri people (and they would subsequently become a Republic and/or join Pakistan). Most Kashmiris were convinced that this would occur, and in fact the largest exodus of Kashmiri Pandits occurred on January 19.

Islamic militants are accused of violence against the Kashmir populace. They continue serious human rights violations: summary executions, rape, and torture. In the effort to curb support for pro-independence militants, Indian security forces have resorted to arbitrary arrest and collective punishments of
entire neighborhoods, tactics which have only led to further disaffection from India.

The militants have kidnapped and killed civil servants and suspected informers. Human Rights Watch alleged that thousands of civilian Kashmiri Hindus have been killed over the past 10 years by Islamic militants organisations or Muslim mobs, war rape has occurred by the militants during the 1980s. Tens of thousands of Kashmiri Pandits have emigrated as a result of the violence. An estimate of the displaced varies from 170,000 to 700,000. Thousands of Pandits have to move to Jammu because of militancy.

5.4.1.7 Consequences of 26/11 attack

In the aftermath of the 2008 Mumbai attacks, there were multiple and far-ranging events that were observed. Besides the immediate impact on the victims and their families, the attacks caused widespread anger among the Indian public, and condemnations from countries throughout the world.

The immediate impact was felt on Mumbai and Maharashtra state, and throughout urban India. There were also after-effects on the Indian government, centre-state relations within India, Indo-Pakistan relations, domestic impact within Pakistan, the United State’s relationships with both countries, the US-led NATO war in Afghanistan, and on the Global War on Terror. There was also impact on the region of Kashmir and this also led to the 2010 Kashmir Unrest.

Prime Minister Dr. Manmohan Singh, on an all party conference, declared that legal framework will be strengthened in the battle against terrorism and a federal anti-terrorist intelligence and investigation agency, like the FBI, will soon be set up to co-ordinate actions against terrorism. On 17 December, the Lok Sabha approved two new anti-terror bills, which are expected to pass the upper house
(Rajya Sabha) on the 19th. One sets up a National Investigation Agency, similar to the FBI, with sweeping powers of investigation. The second strengthens existing anti-terror laws, to allow suspects to be detained without bail for up to six months, on the orders of a judge.

The *National Investigation Agency Bill, 2008*, sets up a central agency for investigating terrorism related crimes. However, law and order is a state subject in the Constitution of India, which had made such a law difficult to pass in the past.

Union Home Minister P Chidambaram assured parliament that the National Investigation Agency (NIA) did not usurp the States' right in any manner. The central government would make use of its power only under "extraordinary" circumstances, and depending on the gravity of the situation, he said.

"The agency will also have the powers to return the investigations to the State, if it so thinks. We have struck a balance between the right of the States and duties of the Centre to investigate.”

5.4.1.7 *a Release of Lakhvi*

As a court on Friday ordered the release of Zaki-ur-Rehman Lakhvi, the man accused of plotting the 26/11 Mumbai attacks, India said it is Pakistan's responsibility to take all legal measures to ensure that he doesn't come out of jail. The Islamabad High Court has ruled that Lakhvi's detention is illegal. "The overwhelming evidence against Lakhvi has not been presented properly before court

India said it was "extremely upset" over the verdict of a court in Islamabad ordering release of Lashkar terrorist Zakiur Rehman Lakhvi and has lodged a strong protest with the Pakistan government. The ministry of external affairs also summoned Pakistani high commissioner Abdul Basit to lodge a protest, Times Now reported.
India reacted that it is the responsibility of Pakistan to keep him behind bars as there is overwhelming evidence of his role in the 2008 Mumbai attacks. "It is the responsibility of the Pakistan government to take all legal measures to ensure that Lakhvi does not come out of jail. Pakistan should realise that there are no good terrorists and bad terrorists, a fact which has been globally accepted,"

As a court the release of Zaki-ur-Rehman Lakhvi, the man accused of plotting the 26/11 Mumbai attacks, India said it is Pakistan's responsibility to take all legal measures to ensure that he doesn't come out of jail. The Islamabad High Court has ruled that Lakhvi's detention is illegal.

"The overwhelming evidence against Lakhvi has not been presented properly before court by Pakistani agencies," the Minister of State for Home Affairs Kiren Rijiju said, adding that Pakistan must realise "there are no good terrorists or bad terrorists."

Lakhvi, a top commander of the banned terror outfit Lashkar-e-Taiba, has been in jail since 2009 over the attacks in Mumbai a year before, in which 166 people were killed. India was furious and several countries were critical when Lakhvi was granted bail by an anti-terror court in December, just two days after a terror attack on a school in Peshawar in which over 140 people, mostly students, were killed.

The anti-terror court had said that it did not have evidence to prove his involvement in the worst-ever terror attack in India. India summoned Pakistan High Commissioner Abdul Basit to register its protest against the order that would have allowed the terror mastermind to walk free.

The strong reaction came within hours of the Islamabad high court (IHC) declaring as void the detention order of the LeT operations commander Lakhvi, who was also the 2008 Mumbai terror attack mastermind. Justice Noorul Haq
accepted 55-year-old Lakhvi’s appeal filed against his third time detention orders and ordered his immediate release.

5.5 NECESSITY OF A NATIONAL INVESTIGATION AGENCY ACT 2008

In the aftermath of the Mumbai terror attacks the Lok Sabha has done 3 significant things:

1. Amended the Unlawful Activities (Prevention) Act, 1967;
2. Created Special Courts for the trial of Scheduled Offences; and
3. Created the National Investigation Agency

These three initiatives are intertwined and hold significant import for civil liberties. However, this brief will only address the issues raised by the creation of the National Investigation Agency and does not include an analysis of the Special Courts or the recent amendments to the Unlawful Activities (Prevention) Act, which are themselves extremely problematic.

With certain crimes often having an interstate or international dimension, it is incredibly difficult for a law enforcement body to prevent or investigate such offences if it has limited jurisdiction. A national body that can coordinate and oversee the investigation and enforcement of criminal activities that have national or cross-border repercussions is essential.

In addition, in order to prevent such offences from occurring in the first place, substantial information sharing and comprehensive intelligence gathering across many jurisdictions has to take place.

As pointed out in an earlier Ministry of Home Affairs proposal on this issue, with the creation of a central law enforcement agency “the inter-State linkages of the conspiracies and activities of organized crime syndicates and of terrorist groups can be better traced and their ramifications tackled in their entirely
for effectively neutralizing the threats that they pose to national security.” State law enforcement agencies, with the limited jurisdictions, cannot do this alone. In the absence of a national mechanism prevention and investigation of all-India crime will remain uncertain and ad hoc.

The creation of a national agency has been in the minds of many for a long time. In Prakash Singh the Supreme Court received materials from the National Human Rights Commission, the Soli Sorabji Committee, the Bureau of Police Research & Development and the Second Administrative Reforms Commission on the need and scope of national investigation agency. For instance, the Bureau stated:

The rapidity and relative ease of the adoption of new technologies and innovative methods of planning, coordinating and execution of cross-border crimes by the organized crime-terrorist nexus has out spaced the speed with which the Law Enforcement Agencies at the State level have been able to afford to “modernize” themselves in terms of the resource base, expertise level, adoption and assimilation of new technologies of crime detection and prevention, adequately trained manpower to take on the new age tech-savvy terrorist organized crime nexus.

Thus, it can be safely asserted that we don’t have a pressing need to declare certain offences having inter-state and international ramifications as “federal offences” to be investigated by a designated Federal Agency having the required level of expertise.

Although the Court reserved judgment on this particular, the materials submitted generally agree that (a) a national investigation agency is needed; and

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195 See paragraph 8 of the Soli Sorabji Committee’s submission to the Supreme Court in the matter of Prakash Singh & Others v. Union of India & Others regarding investigation of cases of terrorism and organized crimes.
(b) that a national investigation agency should have *suo moto* jurisdiction over an offence that:

- Has international/interstate ramifications: or
- Relates to the security of the nation; or
- Relates to the activities of the Central government; or
- Relates to corruption in All India Services; or
- Relates to government currency and cross-border offences and have the potential to threaten the security and integrity of the nation.

5.5.1 Important provisions under the Act

An Act 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. This Act also fails to define the ‘terrorism’, but some other important definitions are defined in the Act.

5.5.1.1 Constitution of National Investigation Agency

Section 3 of the Act provides (1) notwithstanding anything in the Police Act, 1861, the Central Government may constitute a special agency to be called the National Investigation Agency for investigation and prosecution of offences under the Acts specified in the Schedule.

(2) Subject to any orders which the Central Government may make in this behalf, officers of the Agency shall have throughout India in relation to the investigation of Scheduled Offences and arrest of persons concerned in such
offences, all the powers, duties, privileges and liabilities which police officers have in connection with the investigation of offences committed therein.

(3) Any officer of the Agency of, or above, the rank of Sub-Inspector may, subject to any orders which the Central Government may make in this behalf, exercise throughout India, any of the powers of the officer-in-charge of a police station in the area in which he is present for the time being and when so exercising such powers shall, subject to any such orders as aforesaid, be deemed to be an officer-in-charge of a police station discharging the functions of such an officer within the limits of his station.

5.5.1.2 Superintendence of National Investigation Agency

Section 4 of the Act provides (1) the superintendence of the Agency shall vest in the Central Government. (2) The administration of the Agency shall vest in an officer designated as the Director-General appointed in this behalf by the Central Government who shall exercise in respect of the Agency such of the powers exercisable by a Director-General of Police in respect of the police force in a State, as the Central Government may specify in this behalf.

5.5.1.3 Investigation of National Investigation Agency

5.5.1.3.a Investigation of Scheduled Offences.

Section 3 (1) On receipt of information and recording thereof under section 154\textsuperscript{196} of the Code of Criminal Procedure relating to any Scheduled Offence the

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\textsuperscript{196} Section 154 of The Code of Criminal Procedure Code, 1973 deals with (1) Every information relating to the commission of cognizable offence, if given orally or to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. (2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant. (3) Any person aggrieved by a refusal on the part of an officer in charge of police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner
officer-in-charge of the police station shall forward the report to the State Government forthwith.

(2) On receipt of the report under sub-section (1), the State Government shall forward the report to the Central Government as expeditiously as possible.

(3) On receipt of report from the State Government, the Central Government shall determine on the basis of information made available by the State Government or received from other sources, within fifteen days from the date of receipt of the report, whether the offence is a Scheduled Offence or not and also whether, having regard to the gravity of the offence and other relevant factors, it is a fit case to be investigated by the Agency.

(4) Where the Central Government is of the opinion that the offence is a Scheduled Offence and it is a fit case to be investigated by the Agency, it shall direct the Agency to investigate the said offence.

(5) Notwithstanding anything contained in this section, if the Central Government is of the opinion that a Scheduled Offence has been committed which is required to be investigated under this Act, it may, suo moto, direct the Agency to investigate the said offence.

(6) Where any direction has been given under sub-section (4) or sub-section (5), the State Government and any police officer of the State Government investigating the offence shall not proceed with the investigation and shall forthwith transmit the relevant documents and records to the Agency.

(7) For the removal of doubts, it is hereby declared that till the Agency takes up the investigation of the case, it shall be the duty of the officer-in-charge of the police station to continue the investigation.

provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.
5.5.1.4 Power to transfer investigation to State Government

Section 7 provides, while investigating any offence under this Act, the Agency, having regard to the gravity of the offence and other relevant factors, may-

(a) If it is expedient to do so, request the State Government to associate itself with the investigation; or

(b) With the previous approval of the Central Government, transfer the case to the State Government for investigation and trial of the offence.

5.5.1.5 Special Courts

Section 11 provides, (1) The Central Government shall, by notification in the Official Gazette, for the trial of Scheduled Offences, constitute one or more Special Courts for such area or areas, or for such case or class or group of cases, as may be specified in the notification.

(2) Where any question arises as to the jurisdiction of any Special Court, it shall be referred to the Central Government whose decision in the matter shall be final.

(3) A Special Court shall be presided over by a judge to be appointed by the Central Government on the recommendation of the Chief Justice of the High Court.

(4) The Agency may make an application to the Chief Justice of the High Court for appointment of a Judge to preside over the Special Court.

(5) On receipt of an application under sub-section (4), the Chief Justice shall, as soon as possible and not later than seven days, recommend the name of a judge for being appointed to preside over the Special Court.
(6) The Central Government may, if required, appoint an additional judge or additional judges to the Special Court, on the recommendation of the Chief Justice of the High Court.

(7) A person shall not be qualified for appointment as a judge or an additional judge of a Special Court unless he is, immediately before such appointment, a Sessions Judge or an Additional Sessions Judge in any State.

(8) For the removal of doubts, it is hereby provided that the attainment, by a person appointed as a judge or an additional judge of a Special Court, of the age of superannuation under the rules applicable to him in the service to which he belongs shall not affect his continuance as such judge or additional judge and the Central Government may by order direct that he shall continue as judge until a specified date or until completion of the trial of the case or cases before him as may be specified in that order.

(9) Where any additional judge or additional judges is or are appointed in a Special Court, the judge of the Special Court may, from time to time, by general or special order, in writing, provide for the distribution of business of the Special Court among all judges including himself and the additional judge or additional judges and also for the disposal of urgent business in the event of his absence or the absence of any additional judge.

5.5.1.6 Procedure and powers of Special Courts.

Section 16 provides. (1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts that constitute such offence or upon a police report of such facts.

(2) Where an offence triable by a Special Court is punishable with imprisonment for a term not exceeding three years or with fine or with both, the
Special Court may, notwithstanding anything contained in sub-section (1) of section 260\(^{197}\) or section 262\(^{198}\) of the Code, try the offence in a summary way in accordance with the procedure prescribed in the Code and the provisions of sections 263\(^{199}\), 264 and 265 of the Code shall, so far as may be, apply to such trial: Provided that when, in the course of a summary trial under this sub-section, it appears to the Special Court that the nature of the case is such that it is not desirable to try it in a summary way, the Special Court shall recall any witnesses who may have been examined and proceed to re-hear the case in the manner provided by the provisions of the Code for the trial of such offence and the said provisions shall apply to, and in relation to, a Special Court as they apply to and in relation to a Magistrate: Provided further that in the case of any conviction in a summary trial under this section, it shall be lawful for a Special Court to pass a sentence of imprisonment for a term not exceeding one year and with fine which may extend to five lakhs rupees.

(3) Subject to the other provisions of this Act, a Special Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall

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\(^{197}\) Section 260 of the Code of Criminal Procedure, 1973 deals with Power to try summarily (1) notwithstanding anything contained in this Code- (a) any Chief Judicial Magistrate; (b) any Metropolitan Magistrate; (c) any Magistrate of the first class specially empowered in this behalf by the High Court, may, if he thinks fit, try in a summary way all or any of the following offences-(i) offences not punishable with death, imprisonment for life or imprisonment for a term exceeding two years.

\(^{198}\) Section 262 of the Code of Criminal Procedure, 1973 deals with Procedure for summary trials- (1) In trials under this Chapter, the procedure specified in this Code for the trial of summons-case shall be followed except as hereinafter mentioned. (2) No sentence of imprisonment for a term exceeding three months be passed in the case of any conviction under this Chapter.

\(^{199}\) Section 263 of the Code of Criminal Procedure, 1973 deals with Record in summary trials- In every case tried summarily, the Magistrate shall enter, in such form as the State Government may direct, the following particulars, namely:-

\(a\) The serial number of the case; \(b\) the date of the commission of the offence; \(c\) the date of report or complaint; \(d\) the name of the complainant (if any); \(e\) the name, parentage and residence of the accused; \(f\) the offence complained of and the offence (if any) proved, and in cases coming under clause \((ii)\), clause \((iii)\) or clause \((iv)\) of sub section \((1)\) of section 260, the value of the property in respect of which the offence has been committed; \(g\) the plea of the accused and his examination (if any); \(h\) the finding; \(i\) the sentence or other final order; \(j\) the date on which proceeding terminated.
try such offence as if it were a Court of Session so far as may be in accordance with the procedure prescribed in the Code for the trial before a Court of Session.

(4) Subject to the other provisions of this Act, every case transferred to a Special Court under sub-section (2) of section 13 shall be dealt with as if such case had been transferred under section 406\textsuperscript{200} of the Code to such Special Court.

(5) Notwithstanding anything contained in the Code, but subject to the provisions of section 299\textsuperscript{201} of the Code, a Special Court may, if it thinks fit and for reasons to be recorded by it, proceed with the trial in the absence of the accused or his pleader and record the evidence of any witness, subject to the right of the accused to recall the witness for cross-examination.

5.5.2 Issues Raised by the Creation of the National Investigation Agency

The sudden creation of the National Investigation Agency (hereinafter “NIA”) came in immediate reaction to public clamour after the events in Mumbai, 200

\textsuperscript{200} Section 406 of the Code of Criminal Procedure, 1973 deals with Power of Supreme Court to transfer cases, and appeals— (1) Whenever it is made to appear to the Supreme Court that an order under this section is expedient for the ends of justice, it may direct that any particular case or appeal be transferred from one High Court to another High Court or from a Criminal Court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court. (2) The Supreme Court may act under this section only on the application of the Attorney-General of India or of a party interested, and every such application shall be made by motion, which shall, except when the applicant is the Attorney-General of India or the Advocate-General of the State, be supported by affidavit or affirmation. (3) Where any application for the exercise of the powers conferred by this section is dismissed, the Supreme Court may, it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider appropriate in the circumstances of the case.

\textsuperscript{201} Section 299 of the Code of Criminal Procedure, 1973 deals with Record of evidence in absence of accused—(1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for the trial, such person for the offence complained of may, in his absence, examine the witness if any, produced on behalf of the prosecution, and record their depositions and any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charge, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable. (2) If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court or the Sessions Judge may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence and any depositions to taken may be given, in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of India.
the horrific terrorist attacks. But the complex topic of creating national policing agency has not been the subject of any recent government public white paper.

No comprehensive analysis of the issues was done, no review of existing legislation and capabilities has been conducted, and an invitation was not extended to the States or civil society to suggest possible alternatives. The haste in which Act has been conceived has left unresolved many issues about the NIA’s constitutional validity, functioning, and scope.

5.5.3 Constitutional Validity of the NIA

The constitutional basis for the creation of the NIA remains a matter of debate. The areas of policing and public order lie within the exclusive legislative competence of the States and not with the Centre. States would be extremely chary of accepting or cooperating with any agency that encroached on that power.

Earlier committees, tasked with examining a possible national investigation agency, have repeatedly pointed out that “it should be clearly understood that the aim of creating such an agency, by whatever name called, cannot be to usurp the powers of the State, but on the other hand, it should be an agency meant to assist them in the nation’s fight against terrorism and inter-state or trans-national organized crime which jeopardize national security.

According to the material submitted by the Soli Sorabji Committee to the Supreme Court in Prakash, the Ministry of Law advised by the Ministry of Home Affairs “that ‘police’ is a State subject and its functions cannot by a Parliamentary Law be conferred on an existing or new Central Police Force except under Article 249\footnote{This article permits Parliament to legislate with respect to the State List in the national interest for a period of one year.} or 252\footnote{This article makes it possible for Parliament to make such laws relating to State subjects for those States whose legislatures empower Parliament in this regard by way of resolution.} of the Constitution”.

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Due to the constitutional difficulties posed by creating a Central Law Enforcement Agency, the Law Ministry advised the MHA that the setting up of such an agency should be included in the Terms of Reference of the new Commission on Centre-State Relations.

Some have suggested that Entry 93 of List I, which provides that the Centre the power to legislate on “offences against laws with respect to any of the matters in this List”, provides the legal rationale for the Centre to create a national investigation agency. Others argue that Entry I of List I (the defence of India), read in conjunction with Section 355\textsuperscript{204} of the Constitution, is sufficient to allow the Centre to legislate in this manner.

However, even on this view of the matter, it appears that the Centre may only be able to legislate on matters relating to terrorism and not necessarily create a new national policing agency without amending this Constitution. It would appear that the Law Ministry’s opinion that in the absence of a constitutional amendment the creation of a national investigation agency with enforcement powers must rely on recourse to Article 249 or 252 of the Constitution is correct.

Hitherto, when a national policing agency, like the Central Bureau of Investigation, is required to investigate to cross-judicial crime it can only do so at the request or with the consent of the State concerned. By contrast, the newly created NIA can assume jurisdiction over a Scheduled Offence \textit{suo moto}.

It is in deference to the concerns and sensibilities of State governments that the scope of offences that the NIA can investigate, as listed in the schedule attached to the Act, has been circumscribed. The wording in the Act’s statement of objects and reasons is intended to allay State’s concerns when it states, “the

\textsuperscript{204} It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution.
Government after due consideration and examination of the issues involved, proposes to enact a legislation to make provisions for establishment of a National Investigation Agency in concurrent jurisdiction framework, with provisions for taking up specific cases under specific Acts.

However, given the expanded definition of what constitutes a “terrorist act” in the recently amended Unlawful Activities (Prevention) Act, 1967, the concern remains that the NIA may investigate all kinds of activities that until now have lain in the exclusive jurisdiction of the State. For instance, the statement of objects and reasons for the Act demonstrates the inherently political calculators involved in defining what “terrorism” is when it chooses to highlight “Left Wing Extremism”, without clarifying how Left Wing Extremism is defined and why it is more of a concern than say “Right Wing Extremism”.

These sorts of exclusions and inclusions reflect the inherent problems in having overbroad subjectivity embedded in the operating legislation. Section 6(3) of the Act states that the “Central Government shall determine … within 15 days … whether the offence is a Scheduled Offence or not and also whether, having regard to the gravity of the offence and other relevant factors, it is a fit case to be investigated by the Agency.

The open endedness of phrases such as “other relevant factors” (without explaining what these factors might be) allows in the possibility of political expediency playing a role in the Centre’s determination of whether to direct the Agency to investigate or not. In addition, Section 7 of the Act also permits the consideration of “other relevant factors” when deciding whether to collaborate or transfer an investigation to the State.

While it is perfectly reasonable to the State when it is concurrent jurisdiction over Scheduled Offences, the circumstances for assuming jurisdiction
(or collaborating/transferring investigations) should not be subject to the uncertainty created by broad phrases like “other relevant factors” but be able to be tested for rational against carefully stated criteria.

5.5.4 Functioning of the NIA

5.5.4.1 Powers focus only on investigation, not prevention

Section 3(2) of the Act states that the NIA has the power to investigate throughout India any offences listed in the attached schedule. However, the NIA has not been given the necessary powers to prevent the enumerated offences. In order for any law enforcement agency to property prevents crime. It requires more than simply powers of investigation and enforcement. Provision has to be made for the sharing, collection, collation, analysis and dissemination of intelligence. As pointed out by numerous committees, the falling of the CBI in relation to combating corruption has been that it is strictly an investigation agency.

In order of the NIA to be effective in preventing federal crime\(^\text{205}\), it needs to be able to warehouse, process and coordinate the flow of critical information. By way of example, the U.S. federal Bureau of Investigation was significantly restructured after 9/11 so that it could engage in, and collaborate with other on, counterintelligence activities.

It was accepted that prevention is best served by the information sharing, how information and intelligence is to be obtained, and on the NIA’s relationship to other agencies that presently gather information. In fact, this oversight may

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205 Defined by the Ministry of Home Affairs as “offences that have inter-State and/or international/transnational ramifications and which affect national security through activities aimed of destroying the sovereignty, integrity and unity of India and/or thwarting the economic progress and development of the country.”
severely compromise the NIA’s ability to investigate Scheduled Offences, let alone prevent them.

5.5.4.2 Failure to define “superintendence”

The scheme of the Act is based on the Central government first making a determination that an event on the ground is actually a Scheduled Offence and then secondly, deciding whether it wishes to direct the NIA to investigate it.\footnote{See Section 6(3) of the NIA Act.} These determinations are made by the political executive rather than the professional expert (the Director General who heads up the Agency). For confidence to build in policing bodies, the decision making process needs to be seen as being outside all extraneous political consideration and in the hands of a professional expert who seeks to augment the State’s and Centre’s capacity to deal with issues that impinge on national security.

However, section 4(1) of the Act states that, “the superintendence of the Agency shall vest in the Central Government” without defining what superintendence means. In the past, the failure to define superintendence in police acts at both the State and Central levels has demonstrably led to the politicization of policing with all its attendant ills.

The creation of a brand new law enforcement agency provided an opportunity to remedy this situation by clearly defining the powers and functions of the political executive and the operational responsibilities of the Director General. Decisions on whether an offence warrants NIA involvement ought to reside with the Director General.

Much of the suspicion that arises with the creation of a new law enforcement agency could have been allayed if the potential for illegitimate
political interference had been curtailed rather than enlarged. Instead, section 6(3) increases the likelihood that political considerations will influence investigative decision-making when it states that, “the Central Government shall determine … within 15 days…. Whether the offence is a Scheduled Offence or not.”

As presently constituted, the same difficulties that attend the politicization of policing throughout India are reflected in the construction of the NIA. A golden opportunity to reform the way this country approaches policing was missed by not ensuring that “superintendence” was carefully defined so that it permitted a professional expert to make key administrative and investigative decisions rather than a political actor. The failure to do so may permit illegitimate political interference to creep into the functioning of the NIA.

5.5.4.3 Delay is institutionalized

Section 6 (2) of the Act states that once the State government receives a report on a Scheduled Offence, it shall forward the report to the Central government as expeditiously as possible. It is unclear what that means precisely. In addition, section 6(3) permits the Central Government to take 15 days before making a decision on whether the offence in question is truly a Scheduled Offence and whether the NIA should investigate it.

Given the desperate need for quick responses to crisis situations, and in this age of electronic communication, it is unclear why the Act does not compel the State government to forward the report within 24 hours and to provide the Central government with a much shorter window of time within which to make their determination.
5.5.4.4 Scope of the NIA

The scope of the NIA will investigate is paradoxically insufficient and potentially too broad. With respect to the former, the table at Appendix A summaries what categories of offences other countries give their federal agencies *suo moto* jurisdiction over, how India currently handles the issue, and the suggestions from various committees and governmental bodies on what offences an Indian national investigative agency should have *suo moto* jurisdiction over.

As shown in the table, the NIA is not empowered to investigate a number of interstate and trans-national crimes that require a national response. For example, human trafficking, drug trafficking, cyber crime and organized crime are not included in the Schedule of Offences to the NIA Act.

Whether these crimes have a direct link to terrorism or not, the fact is that the prevention and investigation of these offences are best served by a national response. These crimes, like terrorism, are by their very nature, national or international in scope and design. In addition, they can often have covert links to terrorism. An NIA that is most effective is one that looks at all national crimes and is able to make the necessary linkages.

Ostensibly, the ultimate objective of the NIA is to make Indians more secure by addressing the gaps in our current approach to preventing and investigating offences with a transnational character. However, the NIA can only work if it has the cooperation of State governments, irrespective of their political affiliation, and has the long term confidence of ordinary people.

Unfortunately, there are serious questions about the constitutional validity of the NIA. In addition, the NIA has to overcome the fact that it was created in haste, it repeats the systemic shortcomings of other police agencies in India, it is
potentially open to political interference and it arguably should have jurisdiction over additional offences that have a trans-national character.

The only way to potentially make the NIA different and much more effective is to debate its shortfalls openly and honestly, draw in a variety of voices, and incorporate checks and Balances that will minimise the possibility of failure.

Sections 23 and 24 of the NIA Act, which empower the Central government to remove difficulties and make rules, provide the opportunity to make considerable improvements to the NIA such as clarifying what “other relevant factors” can be considered in directing the Agency to investigate a Scheduled Offence. By mustering the requisite political will at both Centre and State levels, perhaps the NIA can become an exemplar for overall changes in future policing.