In today's world protecting a nation's borders has become more challenging than ever – with threats emerging around the world. The acts of terrorism demonstrate the continuing dangers of weapons of mass destruction, terrorist financing, widespread oppression and extreme human rights violations. This poses a significant threat to peace and stability in the world. Governments around the world are deeply concerned about the threat - so that the citizens never again see the horrors of mass terrorism.

A principle characteristic of terrorism, distinguishing it from many other forms of violence, is its ability to strike directly at perceptions of personal security. The potential of nuclear war or cross-border aggression by states may inspire a sense of fear among individuals, but the sense of vulnerability is collective and abstract. There are no clear-cut lines as to who is the enemy. It is not like before where the perpetrator could be pinpointed. However the target is clear – the innocent public. Again terrorism may be indiscriminate or precisely targeted, but in either instance the victims are individuals within the society.

**Concept of Public Safety**

Public Safety is the protection of the general population from all manners of harm, danger, injury or damage. This protection is usually provided by those traditional organisations known as Emergency Services: the police, fire and rescue, and ambulance. The concept of security has developed as a part of public safety. What exactly constitutes the condition of security? Protection against enemies? Protection against neighbours? Suppression of individuals of a particular caste or religion?

States can protect their security by means of armed forces and by employing police. It can also be protected by legal measures which aim to maintain the secrecy of information pertaining to state security and by bringing the criminals to justice. Therefore the legal system of a nation needs to be strong enough to cope with every kind of disturbance.
Security means not only protection from military and political threats from overseas but also internal subversion. States can be just as thoroughly disrupted and destroyed by internal contradictions as they can by external forces. These two environments may function more or less separately, as when an internally coherent state is threatened by aggressive neighbours for example Pakistan vs. India.

What exactly do we mean by security or rather what makes us insecure? The dictionary definition of the term is: "the state or feeling of being free from fear, danger, etc.; safety or a sense of safety." Therefore there are two aspects of security: security as a physical condition, and security as a psychological state.

The traditional view of national security emphasises the physical aspect. From this perspective, the most obvious component of national security is protection of national boundaries from encroachment by other nations. But security is more than the objective physical state of being free from physical threat. It is also psychological: we are free from fear to the extent that we lack a feeling of fear. Different people have contrasting notions about what makes them feel safe or secure. Therefore security is to always some extent subjective.¹

Terrorists are not normal criminals. Their goals, their willingness to sacrifice innocent lives and their willingness to die in their attacks makes them extraordinary criminals, against whom extraordinary measures must be taken if security is to be achieved and maintained. The question always is how much are people willing to sacrifice in order to achieve a greater security from terrorist attacks. For some as long as the attack happens to "somebody else," the sacrifice of rights to prevent terrorism will always seem too high a price. To others, the prevention of terrorism will justify the loss of precious rights and freedoms. Governments, in trying to strike a delicate balance between the need for its citizens to be secure and the need to protect its citizens rights, have an increasingly difficult task.²

Jessica Tuchman Mathews said that the concept of security meant: To secure the state against those objective threats that could undermine its stability and threaten its survival. However today it is no longer that simple. The dawn of the 21st century represents an era marked by various changes to the modern state system. Globalisation and information revolution has fundamentally changed the international security environment.

With the end of the Cold War, liberal democracy and market economics have spread globally in the wake of the collapse of the communist regimes all over the world. But this new wave of globalisation has weakened the importance of territorial boundaries of nation states, and the ongoing information revolution and progress in science and technology have resulted in substantial changes to human life. As a result of globalisation, agents of threat can be states as well as non-state groups or individuals.

Technological developments during the past few decades have increased dramatically the potential targets and weapons available to persons committing terrorist acts. Although the same technology is available to governments, the problem is that they are confronted with a rapidly growing number of targets, which must be secured. Creating an effective security system which protects against a wide range of terrorist attacks while it continues to afford a maximum exercise of democratic freedoms and privileges is a formidable task indeed.

The outcome of globalisation is a change whereby the state is relatively less important in the new security agenda than the previous one. Traditional definitions of security in terms of protection of territory and sovereignty are being replaced by a new concept of security that includes the protection of information, knowledge and technology assets.

The target is to achieve information superiority by affecting adversary information, information systems and computer based networks. Therefore computers and other communications and information systems become

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attractive first targets.\textsuperscript{7} In the age of the internet, information is a powerful weapon with which you can win the war without going to the field. In the recent attacks in Cairo, the terrorist learnt how to make the bomb over the internet. Therefore information needs to be protected and defended as much as physical assets.

Terrorism today encompasses various threats of nuclear, biological or chemical weapons. Our security measures are inadequate to protect us against such weapons of mass destruction. In the wake of the March 1995 sarin attack on the Tokyo subway, as well as other recent high-casualty terrorist incidents, governments and publics alike are viewing with growing concern the potential threat posed by chemical, biological, radiological, or nuclear (CBRN) weapons in the hands of terrorists. How easy would it really be for an individual terrorist or terrorist group to manufacture or otherwise obtain such weapons? Perhaps even more important: How easy would it be for them to deliver such weapons, or disperse such agents, and to what effect?

The terrorists are targeting the most important ingredient of an open society i.e. trust. We are no longer sure that we would not be attacked while boarding the next bus or the next train. There is never going to be enough police to guard every place in an open society. Therefore if we look at it from that point of view, we can never be totally secure. It is a risk that our generation lives with. The concept of security which was present earlier wherein the guilty was identifiable and could be brought to justice is no longer available. After all how do you deter someone whose address you do not know?

A few decades ago, if you wanted to kill 3000 people, you would need to have control of a state. Today a small group of people can do it. This is because today terrorism is not State-sponsored but society sponsored. It is mostly unconnected to states. “Today’s terrorists are harboured in countries like Spain and Germany – entirely unintentionally. They draw support not from States but private individuals – Saudi millionaires, Egyptian radicals,\textsuperscript{7}

Yemenite preachers.  

Individuals and small groups have become more powerful than states and the consequences of this are unprecedented.

Further security costs are escalating like never before. Governments are wrestling with the problems of enforcing and installing security systems. They are trying to reach a balance whereby the finances available are evenly distributed between the security and the development of its citizens. Even so after a point the security measures become futile as the terrorists surpass the technological developments.

Globalisation has given us opportunities through easier access to information, speedier communications, and unimpeded travel. But it also develops new forms of vulnerabilities: a financial crisis that can run from Thailand to Russia via Latin America. Epidemics spread faster and further, be it mad cow's disease or bird flu. Therefore our destiny is no longer shaped within safe frontiers but on an international scale. Given the extent of these changes, we must define our world's new principles of organisation. The urgency is even greater since we are confronted with a multitude of threats.

Public Safety Legislation

Till recently the problem of terrorism in India was not so serious as it is today. Therefore we did not need a special approach to deal with terrorism. It is only recently that the spurt in terrorist activity has crossed all levels. Since independence, the Indian government has used several laws to tackle the problem of terrorism. The concept of public safety was there even during the time of the British.

With the outbreak of the World War I, Defence of India Act was passed in 1915. It was intended to provide for special measures to secure the public safety and the defence of British India and for the special trial of certain offences. Rules were framed. Special Commissioners were appointed for trial of offences under the Act and Rules. Against the decision of the Commissioners there was no appeal even against a death sentence. After the war the Act expired.

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By 1919 the movement for independence had gained momentum, various Acts like the Rowlatt Act, 1919 were passed to deal with the situation in an effective and speedy manner. All these Acts excluded the remedy of habeas corpus.

In 1939, after the outbreak of the World War II the Defence of India Act was passed for securing the defence of British India, the public safety, the maintenance of public order for the efficient prosecution of war or the maintenance of supplies and services essential to the life of the community. The Defence of India Act also amended many of the existing statutes and in the process enhanced the punishments. After the War, the Defence of India Act and the Rules ceased to operate.¹⁰

The founders of the constitution dealt with every aspect of the problems relating to India and also included provisions regarding unforeseen situations. We have a plethora of legislation trying to curb crime in the country. But with the rise of the new problem of terrorism, the normal laws to combat crime have proved to be insufficient. Therefore we need special laws for terrorism.

The Indian Penal Code enacted by the British some 140 years back is very comprehensive and takes within its purview all kinds of offences. The Indian Evidence Act, which is again about 130 years old, is recognised among the ideal laws on the subject. The Code of Criminal Procedure has also been there since the 19th century. These laws were based on the laws prevailing in England at that time. However many reforms have taken place in these laws in England, but the same has not been true for India. Thus these old 19th century laws are proving to be inadequate in the face of new adversity. They are not even sufficient to tackle the ordinary crimes. They lack the teeth to deal with terrorism. Therefore there arises a need for specific anti-terror legislation, to deal with terrorism, which has emerged as the monster of the new generation.
Post Independence

The First Act after independence which somewhat dealt with the crime of terrorism was the Unlawful Activities (Prevention) Act, 1967. The National Integration Council appointed a Committee on National Integration and Regionalisation to look into, inter alia, the aspect of putting reasonable restrictions in the interests of the sovereignty and integrity of India. Pursuant to the acceptance of recommendations of the Committee the Constitution (Sixteenth Amendment) Act, 1963 was enacted to impose, by law, reasonable restrictions in the interests of the sovereignty and integrity of India. In order to implement the provisions of the 1963 Act the Unlawful Activities (Prevention) Bill was introduced in the Parliament.

The Statement ofObjects and Reasons of the Unlawful Activities (Prevention) Act, 1967 says that

1. Pursuant to the acceptance by government of a unanimous recommendation of the Committee on National Integration and Regionalism appointed by the National Integration Council, the Constitution (Sixteenth Amendment) Act, 1963, was enacted empowering Parliament to impose, by law, reasonable restrictions in the interests of the sovereignty and integrity of India, on the –

(i) freedom of speech and expression;
(ii) right to assemble peaceably and without arms; and
(iii) right to form associations or unions.

2. The object of this Bill is to make powers available for dealing with activities directed against the integrity and sovereignty of India.

As this was the first act, which remotely dealt with the concept of terrorism, it was not as harsh as the current laws on terrorism. The situation in the country was different and terrorism as we see it now, was not prevalent then. This Act provided for more effective prevention of certain unlawful activities of individuals and associations and for matters connected therewith.

Under the Act, if the Central Government was of the opinion that any association was or had become an unlawful association, it could by

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notification in the Official Gazette, declare such association to be unlawful.\textsuperscript{11} The only pre-condition required was the approval to be granted by the Tribunal established under the Act. This Tribunal was to consist of a person who was a judge of a High Court.\textsuperscript{12} This was merely an eyewash and the power remained with the government to declare a particular individual or association unlawful. The penalty for being a member of an unlawful association or in any way assisting the operations of the unlawful association was punishable with imprisonment up to two years and fine.\textsuperscript{13} Punishment for unlawful activities was imprisonment up to five years, or fine or both.

This old piece of legislation has again been reincorporated into the criminal legal system for the prevention of terrorist activities. The Congress government has come out with the Unlawful Activities Prevention Ordinance, 2004. The government because of the misuse and the abuse of POTA scrapped it. This ordinance in its new avatar contains certain modifications, which have been dealt with later.

The term “preventive detention” implies detention of a person by executive order with a view to preventing him from endangering security of the State, disturbing maintenance of public order or essential supplies and services, or adversely affecting other specified objects of public interest. Such detention is generally without regular trial in a court of law either initially or on appeal although it is subject to the power of the court to issue habeas corpus unless that too is suspended or taken away under law.

The law regarding preventive detention goes back to the time of the East India Company Act 1780, which rendered the Governor General immune from in those cases which involved non-British subjects. Under the East India Company Act 1784 the Governor General was empowered to secure and detain any person or persons suspected of carrying on correspondence or activities prejudicial or dangerous to the peace and safety of the British settlements or possessions in India.

The power of detention and arrest without trial was provided for in various subsequent Acts such as the Bengal Regulation of 1812; the Bengal

\textsuperscript{11} Section 3(1). Unlawful Activities Prevention Act, 1967.
\textsuperscript{12} Id., section 5.
\textsuperscript{13} Id., section 10.
State Prisoners' Regulation of 1818; the Madras State Prisoners' Regulation II of 1819; The Bombay State Prisoners' Regulation XXV of 1827 and the State Prisoners' Act, 1850. A prisoner under these regulations had no right of habeas corpus.\textsuperscript{14} After independence the Acts which dealt with preventive detention were the Maintenance of Internal Security Act, 1971 and the National Security Act, 1980.

Let us first deal with the \textbf{Maintenance of Internal Security Act, 1971}. Activities of espionage and threats to the national security inside the country and across the borders were on the increase. To control such activities and threats urgently it was considered essential to have powers of preventive detention to deal effectively with threats to the defence of India and to the security of India. Since the existing laws available to deal with the situation were not found to be adequate, the Maintenance of Internal Security Ordinance, 1971 was promulgated by the president. To replace the Ordinance with an Act, The Maintenance of internal Security Bill, 1971 was introduced in the Parliament.

Under section 3(1) of MISA the central Government or the State Government may –

(a) if satisfied with respect to any person (including a foreigner) that with a view to preventing him from acting in any manner prejudicial to –

(i) the defence of India, the relations of India with foreign powers, or the security of India, or

(ii) the security of the State or the maintenance of public order, or

(iii) the maintenance of supplies and services essential to the community or

(b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India, it is necessary so to do, make an order directing that such person be detained.

\textsuperscript{14} See Gosh, \textit{supra} 10, pp. 397-398.
Therefore to prevent any unlawful activity, which would threaten the defence of the country, the government could detain a person. To help the government in this matter, Advisory Boards were constituted. They comprised of three persons who were or had been judges of a High Court.

The National Security Act, 1980 (NSA) was a successor to MISA (Maintenance of Internal Security Act). There provisions were practically similar. NSA was introduced with just slight modifications in MISA. Both Acts were aimed at preventive detention. The NSA was important because it was the first act in Indian history to be aimed at organised terrorism.

The Statement of Objects and Reasons reads as under:

In the prevailing situation of communal disharmony, social tensions, extremist activities, industrial unrest and increasing tendency on the part of various interested parties to engineer agitation on different issues, it was considered necessary that the law and order situation in the country is tackled in a most determined and effective way. The anti-social and anti-national elements including secessionist, communal and pro-caste elements and also other elements who adversely influence and affect the services essential to the community pose a grave challenge to the lawful authority and sometimes even hold the society to ransom.

Considering the complexity and nature of the problems, particularly in respect of defence, security, public order and services essential to the community, it is the considered view of the Government that the administration would be greatly handicapped in dealing effectively with the same in the absence of powers of preventive detention. The National Security Ordinance, 1980 was, therefore, promulgated by President on September 22, 1980.

Subject to a modification, the Bill sought to replace the aforesaid Ordinance. The modification related to the composition of Advisory Boards, and for providing that the Chairman of an Advisory Board shall be a person who is, or has been, a Judge of a High Court and the other members of the Advisory Board may be persons who are, or have been or are qualified to be appointed as, judges of a High Court.

Therefore the National Security Act, 1980 was an Act to provide for preventive detention in certain cases and for matters connected therewith.
However, it was the amendment of 1984, which was made to address the insurgency in Punjab, which turned it into a serious law. The post 1984 NSA aimed at expanding the scope of preventive detention in order to facilitate the police in combating the militancy in Punjab. It does not define terrorism but it was there during the Indira Gandhi government, when Operation Bluestar took place followed by Mrs. Gandhi’s assassination and the anti-Sikh riots.

The NSA was applicable throughout India, except in the case of Jammu and Kashmir. It allowed both the central and the state governments to put anyone in preventive detention for a year if there was sufficient reason to believe that it was necessary to stop the person from “acting in any manner prejudicial to the defence of India, the relations of India with foreign powers, or to the security of India or acting in any manner prejudicial to the maintenance of public order or to the maintenance of supplies and services essential to the community.”

An Advisory board consisting of three members was set up to hear cases under the NSA. The three members were to be appointed from the judges of the High Courts by the Government. This made the members government nominees and the setting up of the Board was just an eyewash for the public.

The NSA allowed detention without charge or trial for one year, it prohibited the detainee from being legally represented when reviewed by an Advisory Board, and allowed police, immunity from disclosing the reasons for detention on vaguely defined grounds of public interest.

Further when the situation in Punjab worsened, the government moved to amend the NSA. In 1984 there were some changes introduced in the NSA. These made the NSA provisions even harsher in Punjab. The Advisory Board was completely dispensed with and the period of preventive detention was extended up to two years. The power of the courts to release detainees if any on the grounds for their arrest was struck down, was removed.

Like most anti-terrorism legislation this law also lent itself to misuse at the hands of the government. One of the most high profile cases of its abuse was the arrest of 324 people who had been flushed out of the Golden Temple

15 Section 13, NSA, 1980.
premises by security forces after Operation Bluestar. Most of these people were devotees and temple employees who had nothing to do with what led to the siege of the gurdawara. But they were all arrested under the NSA, and held without trial for far more than even the maximum amount of preventive detention allowed under the Act.  

It is the bane of these laws that the government authorities use these laws to override the Law itself. After its misuse for a certain period of time the NSA came under judicial scrutiny. With this the NSA outlived its utility.

In some States in India, the special legislation drafted to counteract terrorism gives the police and paramilitary forces extreme powers to detain and to remove them from prosecution even if they are guilty of abuses.

One such provision is contained in the Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983. The provision removes accountability of the armed forces in cases of human rights violations. The Act provides general immunity to the members of military and air force from all prosecution or legal action. These people are not held accountable for even their wrong acts.

Further the Terrorist Affected Areas (Special Courts) Act, 1984 amends the Indian Evidence Act so that a person is accused of committing an offence simply by being, at a place in such area at a time when firearms or explosives were used or from that place to attack or resist the members of the armed forces or the forces charged with the maintenance of public order acting in the discharge of their duties, it is presumed unless the contrary is shown, that such a person had committed such an offence. This legislation in a way rests the de facto authority with the government or security officials.

Also under the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, section 4(c) permits security personnel to arrest without warrant, any person who has committed a cognisable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognisable offence and may use such force as may be necessary to effect the arrest.

16 id., section 3.
The grim and extraordinary situation in the 1980s led to the enactment of penal laws, which would counter the situation created by the rising terrorism in the country. One such penal measure was the **Terrorist and Disruptive Activities (Prevention) Act, 1985**. This law made a drastic departure from the accepted principles of criminal liability.

TADA came into being in 1985. It had a built in provision of lapse at the end of two years unless extended by parliament. It was extended by amendments in 1987, and again once every two years until 1995 in which year the parliament let it lapse in response to strong public criticism. This Act was to become one of the most controversial legislation in history.

It was not an Act for preventive detention. It was a substantive criminal law that defined certain new offences that arose from disruptive and seditious activities and laid down procedure for regular trial and punishment for such offences.

The statement of objects of TADA, 1987 reads as under:

1. The Terrorists and disruptive Activities (Prevention) Act, 1985 was enacted in May, 1985, in the background of escalation of terrorist activities in many parts of the country at that time. It was expected then that it would be possible to control the menace within a period of two years from the date of its commencement. However, it was subsequently realised that on account of various factors, what were stray incidents in the beginning have now become a continuing menace especially in Punjab. On the basis of experience, it was felt that in order to combat and cope with terrorist and disruptive activities effectively, it is not only necessary to continue the said law but also to strengthen it further. The aforesaid Act of 1985 was due to expire on the 23rd May, 1987. Since both Houses of Parliament were not in session and it was necessary to take immediate action, the President promulgated the Terrorist and Disruptive Activities (Prevention) ordinance, 1987 (2 of 1987) on 23rd May, 1987 which came into force with effect from the 24th May, 1987.

2. The Ordinance included all the provisions of the Act of 1985 except the following main changes, namely:
(a) Punishment for terrorist acts and disruptive activities were made more deterrent;
(b) Central Government has been empowered to constitute designated courts;
(c) The exhaustive enumeration of rule making powers, as contained in section 5 of the 1985 Act, had been dispensed with and the Central Government had been given the power to make rules for carrying out the provisions of the ordinance (Act).

3. Subsequent to the promulgation of the ordinance, it was felt the provisions needed further strengthening in order to cope with the menace of terrorism. It is, therefore, proposed that persons who are in possession of certain arms and ammunition specified in the Arms Rules, 1962 or other explosive substances unauthorisedly in an area to be notified by the State Government, shall be punishable with imprisonment for life ad with fine. It is further proposed to provide that confession made by a person before a police officer not lower in rank than a superintendent of police and recorded by such police officer in writing or on any mechanical device shall be admissible in trial of such person for an offence under the proposed legislation or any rules made thereunder. It is also proposed to provide that the Designated Court shall presume, unless the contrary is proved, that the accused had committed an offence where arms or explosives or any other substances specified in section 3 were recovered from his possession; or where by the evidence of an expert, the finger prints of the accused were found at the site of the offence or where the confession has been made by a co-accused that the accused had committed the offence or where the accused had made a confession of the offence to any other person except a police officer. It also proposed to provide that in the case of a person declared as proclaimed offender in a terrorist case, the evidence regarding his identification by witnesses on the basis of his photograph shall have the same value as the evidence of a test identification parade. Further, the designated courts are also proposed to be empowered to try certain offences in a
summary way in accordance with the procedure prescribed in Code of Criminal Procedure, 1973. The matters in respect of which rules may be made by the Central Government are also proposed to be enumerated. The said amendments included in the Bill have been explained in the memorandum attached to the Bill.

4. The Bill seeks to replace the aforesaid ordinance and to include therein the aforesaid amendments.

Until 1984, no law had actually defined a terrorist. The first definition of the word terrorist is found in the Terrorist Affected Areas (Special Courts) Act 1984. Under this a terrorist was defined as “any person who indulges in wanton killing of persons or in violence or in the disruption of services or means of communications essential to the community or in damaging property with a view to

(a) putting the public or any section of the public in fear
(b) adversely affecting the harmony between various religious, racial, language or regional groups or castes or communities
(c) coercing or overawing the government established by law
(d) endangering the sovereignty and integrity of India

The definition was kept elastic on purpose, so that it could be narrowed or broadened to suit the political requirements of the government. The Act, in fact, was to wash and mop the filthy leftovers of Operation Bluestar, for it did eliminate the terrorists but left a number of souls scathed and the excesses well exposed. The clever moves fructified and led to the Punjab accord signed between Mr. Rajiv Gandhi and the Akalis in 1985. But that did no good to the lacerated human rights record of India, nor could it reverse the extreme injustices done to the innocents during government’s jugglery of its political interests and the problem of militancy. To put it short and plain, the government attempted to use surging militancy to meet its political ends, and when the policy backfired it had to employ a large amount of force to undo the damage, and this inevitable led to inhuman excesses besides tarnishing the religious sentiments of a community at large.

18 Section 2(l) h, Terrorist Affected Areas (Special Courts) Act.
The definition of a terrorist act in TADA was only a slight modification over the Terrorist Affected areas act. Section 3(1) of TADA defined a terrorist act. It said, “whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies of services essential to the life of the community, or detains any person and threatens to kill or injure such person in order to compel the government or any other person to do or abstain from doing any act, commits a terrorist act.

The definition was basically similar except for the inclusion of an element of ‘motive’ leading to the terrorist act. The earlier laws did not have the concept of motive in them. The change, which took place, was regarding the intent of the offender, which added a new dimension to these laws.

The TADA extended to the whole of India and was applicable to citizens outside India, to persons in service of Government and to persons on ships and aircraft registered in India wherever they may be.20 This act was an extreme measure to be resorted to when the police could not tackle the situation under the ordinary penal law.

One of the points of controversy regarding TADA was the definition of a terrorist, which was wide enough to cover anything that the authority under this Act may choose. It includes within its ambit any act, which strikes terror in the minds of people. But to find out whether the accused is a terrorist, the court is to look at the intention of the accused. However the definition of ‘disruptive activities’ under section 4 of the Act is the part that has been reported to have been misused frequently and recklessly. Punishment for

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terrorist offences is provided under sections 3(2) to 3(6), 4(1), 4(4), 5 and 6(1).

In Sanjay Dutt’s case\(^1\) the Supreme Court observed that the Act was needed in order to cope with the escalating terrorist activities in the country and there were materials and reports to justify the conclusion that foreign agencies were utilising terrorist groups for destabilising the country. Hence the, “needs of the times” required a balance between the interest of the Nation and the rights of a TADA accused. But nevertheless, the unfair misuse of the Act assumed such proportions that it lost its legal credibility. Let us discuss the drawbacks in the Act.

A controversial point under TADA is the breach of the cardinal principle of criminal jurisprudence. In ordinary criminal law, every accused is presumed to be innocent till he is proved guilty which means that the onus is on the prosecution to prove his guilt. Under TADA, the accused is deemed to be guilty and the onus is on him to prove his innocence.\(^2\) Public trial with guaranteed fair procedure is not available in all cases under TADA.\(^2\) The rule of natural justice, a mandate of Article 21 of the Constitution, is violated by keeping secret the names and addresses of the witnesses from the accused, thereby depriving him of his right to question the credibility of such witnesses.\(^2\)

The power of remand is another deviation from the ordinary criminal law. Under the ordinary law of the land a detenue may be held in police custody for a maximum period of 15 days before being transferred to judicial custody. Under TADA police remand can extend up to 60 days and judicial remand up to 180 days. But the designated court can extend this period to one year on the report of public prosecutor indicating reasons for the detention of accused beyond the said period of 180 days.\(^2\) This invests the Magistrates, who are not subject to the control of the High Court, with an unlimited power to grant police remand or remand to judicial custody without filing of a challan for indefinite period from time to time up to a period of one

\(^1\)JT 1994(5) SC 540
\(^2\)Section 21, TADA.
\(^3\)id., section 16(1).
\(^4\)id., section 16(2).
\(^5\)id., section 20(4).
year. This gives the police more time to employ torture and to extract a confession even from innocent persons. It is known that a person will say anything under extreme situations to save his skin, even if it accepting something that he hasn’t done.

In view of the questionable role of the police in extracting a confession supposedly from the guilty party, the legalising of the confession made to police officer\(^{26}\) is a reflection of the denial of justice to the accused. Section 15 completely overrides the Indian Evidence Act. This provision is a breach of the guarantee of a fair trial, which is provided under basic criminal law.

Further provisions relating to bail are unduly stringent which require the court to give a premature judgement as to the guilt or innocence of the accused. Moreover, the court should be satisfied that the accused is not likely to commit any offence while on bail.\(^{27}\) This pre-condition of the judge being satisfied as to his innocence is ludicrous as a judge can only decide about the innocence of the accused after considering the evidence on record and examination of the witnesses. Basically a bail is not granted in cases under TADA. This provision regarding the granting of bail in TADA cases was criticised, when the Constitution bench of the Supreme Court had ruled “complete ban” on bail in TADA cases.

Exclusion of the power to grant anticipatory bail under section 438 of the Code and the power of the High Court to grant bail under section 439 of the Code is totally unjustified.\(^{28}\) This is in contravention of the writ jurisdiction of the High Court under Article 226 and its power of superintendence over all courts under Article 227 of the Constitution besides its inherent power under section 582 of the Code.

Section 5 of TADA makes possession of certain unauthorised arms in specified areas an offence punishable with imprisonment. In effect, section 5 creates a conclusive and irrefutable presumption arising from the mere fact of possession, irrespective of the nature and quantity of arms in possession of the person and irrespective of the intention of that person to use arms and ammunition found in his possession for terrorist acts or disruptive activities.

\(^{26}\) id., section 15.
\(^{27}\) id., section 20(8).
\(^{28}\) id., section 20(7).
The vice of section 5 is that it is wide and indiscriminate in its operation and covers both authorised and legitimate possession of arms and ammunition as also possession of arms and ammunition intended for use for terrorist activities. Section 5, in effect, transforms the presumption of innocence into one of guilt.29

Section 22 of the Act provides for the identification of the accused on the basis of his photograph, which is treated as having the same value as the evidence of a test identification parade. This section transgressed all norms of judicial propriety.

The validity of TADA was challenged before the Supreme Court in Usmanbhai Dawood Bhai V. State of Gujarat30 and Niranjan Singh Karam Singh Punjabi V. Jitendra Bhimraj Bijja31, in which it was held

"The Act is a penal Statute. Its provisions are drastic in that they provide minimum punishments and in certain cases enhanced punishments also, made confessional statement before a police officer not below the rank of a Superintendent of Police admissible in evidence and mandates raising of a rebuttable presumption on proof of facts stated in clauses (a) to (d) of subsection (1) of section 21. Provision is also made in regard to the identification of an accused who is not traced, through photographs. These are some of the special principles introduced in the Act with a view to controlling the menace of terrorism. These provisions are a departure from the ordinary law since the said law was found to be inadequate and not sufficiently effective to deal with the special class of offenders indulging in terrorist and disruptive activities.

There can therefore, be no doubt that the Legislature considered such crimes to be of aggravated nature which could not be checked or controlled under the ordinary law and enacted to combat the same. The special provisions in certain respects be said to be harsh, created a special forum for the speedy disposal of such cases, provided for raising a presumption of guilt, placed extra restrictions in regard to the

30 AIR 1988 SC 22
31
release of the offender on bail, and made suitable changes in the procedure with a view to achieving its objectives."

This shows the judiciary's compliance with this law. It is not that the provisions of the law are wrong but it is that they have been misused. Tough times do require tough measures and the ordinary law of the land cannot be applicable to such a situation. To counter the problem of terrorism, we need provisions which make the task of the police force easier in nabbing the terrorists. The problem lies in the misuse of the law at the hands of the enforcement agencies. In Gujarat, the state that detained the largest number of people under TADA (approximately 20,000), the people who found themselves languishing behind the bars under TADA were, among others, the bootleggers, people campaigning against a power price hike and the students protesting the rise in the cost of milk. The convictions under TADA could be secured in not more than a meagre 3% of the cases.32

We cannot deny the fact that some provisions are harsh. One of them is section 19 of the Act, which provides for a single and final appeal to the Supreme Court against the judgement of the designated court. This snatching away of the right of appeal from the High Court does not meet any justification. A question of fact is not generally disputed in the Supreme Court. This takes away the chance available to the accused at the level of the High court, which is in a better position to do this job. The intention of the legislature to take away the jurisdiction and power of the High Court is against the principle of fair trial. Moreover the appeal is to be filed within 30 days instead of the normal 60 days. It is difficult for most people to file the appeal in time and to arrange a good lawyer. Also filing an appeal in the Supreme Court involves considerable expenditure, which is quite often beyond the pocket of the offender.

Although TADA was used somewhat effectively to combat terrorism in Punjab and elsewhere, for example in the gang warfares in the Bombay City and the mafia in Bihar. It helped the Tamil Nadu Police to combat the activities of LTTE. But nevertheless, it is a fact that TADA was misused by the

31 AIR 1990 SC 1962
32 See Surat Singh, supra 19, p. 4.
law enforcers in some States to harass the citizens and to deal with petty criminals.33

After a lot of public criticism and the exposure by the courts of TADA's inadequacy in fighting terrorism, the government ultimately realised that it was doing more harm than good. The past record of the Act, proved its non-viability through its weaknesses, which could not withstand the test of just, fair and reasonable procedure guaranteed under Article 21 of the Constitution. The Act had inherent defects, which included the giving of wide powers to the police, which in turn led to rampant misuse of the law.

It was only when the judiciary pointed out the lacunas in the law that it was decided to end it. Consequently after having enacted TADA in 1987 and extending it thrice for two years each time in 1989, 1991 and 1993, it did not extend it in 1995 and let it rest. No Indian legislation has earned so much notoriety in India and abroad as TADA. Its repeal led to a lot of relief amongst the members of the public.

In 1993, the Code of Criminal Procedure (Amendment) Act was enacted providing therein an agreement signed between the Government of India, Government of United Kingdom and Northern Ireland extending assistance in the investigation and prosecution of crime and attachment and forfeiture of properties obtained or derived from the commission of terrorist acts.34

The **SAARC Convention (Suppression of Terrorism) Act, 1993** was passed providing for mutual co-operation between members of SAARC to prevent and eliminate terrorism in the region. This was an Act to give effect to the South Asian Association for Regional Co-operation on Suppression of Terrorism and for matters connected therewith or incidental thereto. The provisions of the SAARC Convention have been discussed in Chapter IV.

After these laws the government was looking at a law to combat terrorism. In 2001 the government again felt the need once again to enact a law on terrorism. However plans to create an omnibus anti-terrorism law only came into focus after the hijacking of Indian Airlines flight IC 814. TADA had

lapsed in 1995 and there was an urgent need for a law on this front. After the IC 814 hijacking, there was a possibility of quick approval for a tough law.

India's response to perceived threats of terrorism had intensified in the wake of an attack by militants on the national parliament on December 2001. On March 26, 2002, the long debated Prevention of Terrorism Act (POTA) was enacted. Like its predecessor, the much misused and lapsed Terrorists and Disruptive Activities (Prevention) Act (TADA) of 1985 (amended 1987), POTA has already been used by the Indian government to target minorities and political opponents.

The controversy over POTA is on the same lines as the controversy over MISA and TADA. There is one thing common in all these anti-terror laws. The ruling parties have always emphasised the need for a special law while the opposition parties always contend that ordinary laws are sufficient. When the Congress party was in power it felt the need to enact TADA, while the BJP opposed it tooth and nail. When the BJP came to power they wanted to enact a revised edition of the law through POTA, which was again opposed by Congress. Now that the Congress is in power they want to enact another anti-terror law based on the lines of the previous Unlawful Activities Prevention Act of 1967.

The Prevention of Terrorism Bill was first introduced in the Lok Sabha, where after a prolonged heated debate, amongst the members of the Parliament, it was passed. However the Bill was defeated in the Rajya Sabha.

Therefore the President of India was pleased to convene a joint session of both the Houses of parliament, on 26th March, 2002, where a well attended House finally passed the Bill.

The Statement of Objects and Reasons of the Prevention of Terrorism Act, 2002 says

1. The country faces multifarious challenges in the management of its internal security. There is an upsurge of terrorist activities, intensification of cross-border terrorist activities and insurgent groups in different parts of the country. Very often, organised crime and terrorist activities are closely inter-linked. Terrorism has now acquired global dimensions and has become a challenge for the
entire world. The reach and methods adopted by terrorist groups and organisations take advantage of modern means of communication and technology using high-tech facilities available in the form of communication systems, transport, sophisticated arms and various other means. This has enabled them to strike and create terror among people at will. The existing criminal justice system is not designed to deal with the types of heinous crimes with which the proposed law deals with.

2. In view of the situation, as stated above, it was felt necessary to enact a legislation for the prevention of, and for dealing with, terrorist’s activities. However, sufficient safeguards are sought to be provided in the proposed law to prevent the possibility of its misuse. Parliament was not in session and the circumstances existed which rendered it necessary for the President to promulgate the Prevention of Terrorism Ordinance, 2001 on 24th October, 2001. During the Winter Session of the Parliament in December 2001 steps were taken for the introduction of the Prevention of Terrorism Bill, 2001 in the Lok Sabha. However, the Bill could not be introduced and considered in the Lok Sabha as Parliament adjourned sine die on 19th December, 2001. The terrorist attack on parliament House on 13th December, 2001 and the prevailing circumstances rendered it necessary for the President to promulgate the Prevention of Terrorism (Second) Ordinance, 2001 on 30th December, 2001 with a view to give continuity to the Prevention of Terrorism Ordinance, 2001 promulgated on 24th October, 2001.


The Law Commission of India recommended in April 2000 the adoption of a law designed to deal firmly and effectively with terrorists and their activities. POTA is nothing more than a reincarnation of TADA with largely cosmetic changes. It was again an act to make provisions for the prevention of, and for dealing with, terrorist activities and for matters connected therewith.
The law lists a total of 25 militant outfits that have been banned including the Students Islamic Movement of India (SIMI), Jaish-e-Toiba (LeT), Deendar Anjuman, Harkat-ul-Mujahideen (HuM)/Harket-ul-Ansar (HuA), Jammu and Kashmir Islamic (HuJI), Hizbul Mujahideen (HM), and al-Umar-Mujahideen.

The definition of the term terrorism as laid down in the controversial Prevention of Terrorism Act, 2002 is:

Section 3(1) Whoever, -

(a) with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community or causes damage or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act;

(b) is or continues to be a member of an association declared unlawful under the Unlawful Activities (Prevention) Act, 1967, or voluntarily does an act aiding or promoting in any manner the objects of such association and in either case is in possession of any unlicensed firearms, ammunition, explosive or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of human life or grievous injury to any person or causes significant damage to any property, commits a terrorist act.
Under POTA the definition of terrorism has been expanded from an 'act' to 'an act of association' with a terrorist group. This has been done with a view to include harbourers of terrorist groups. This particular provision is quite similar to the British Law which draws up a list of 'proscribed organisations' to which membership, funding or open support within the territory of the UK is banned. This has been discussed in Chapter V. Harbouring of terrorists is punishable with minimum period of three years that may extend to imprisonment for life and shall be liable to fine. This means that people, who have been compelled to give protection to terrorists under force, will be punished although they were actually coerced into doing so.

One of the important and relevant features of the Act is that POTA is the first law to make phone and e-mail intercepts admissible as evidence. Though the police have always had the option of tapping phones under the Indian Telegraph Act 1885 to aid their investigation, they could not produce any intercepted communication in the court till POTA made it admissible.

Another new provision of this Act deals with the presumption of a person to be linked to terrorist acts, who is found to be in unauthorised possession of arms and ammunition in a 'notified area'.

POTA replaces the second POTO, which had been diluted by the Centre after criticism from the media and other sections. Following the criticism, Clause 3(8) relating to persons having possession of information relevant in preventing any crime has been deleted. The clause had stated that anyone who fails to disclose information available to him/her relating to the commission of any crime or helpful in securing the arrest of any terrorist could be sentenced to punishment of up to one year imprisonment and fine or both. Under POTA failure to furnish information or deliberate furnishing of false information shall be punishable with imprisonment up to three years, or with fine, or both. This section provides a safeguard that an officer can demand the information who is not less than the rank of a Superintendent of Police.

The Central or State Government may by notification constitute one or more Special Courts to which cases relating to the area of its jurisdiction

35 Section 3(4), POTA.
36 id., section 4.
37 id., section 14(2).
would stand transferred. In a similar manner, the Governments may also nominate public prosecutors for such cases. The Special Courts may also give directions for protection of witnesses whose lives are believed to be in danger.

Under section 7 of POTA, Special Courts and Designated Authority have been given the authority to conform or revoke the order of attachment of immovable property by an investigating officer.38

Section 27 has a provision wherein a police officer investigating a case can request a court in writing for obtaining samples of handwriting, fingerprints, foot-prints, photographs, blood saliva, semen, hair of any accused person who is reasonably suspected to be involved in the commission of an offence under the Act. If the accused person refuses to give such samples, the Court shall draw adverse inference against the accused. This is a statutory provision, keeping in view of the technological advances in forensic sciences and the desirability of promoting scientific investigation of cases.

Some of the provisions in POTA are quite similar to that of TADA. The onus of proving innocence still remains on the accused. The accused is presumed to be guilty and he has to prove his innocence. Also the confession made to a police officer is admissible as evidence.39 These two provisions of POTA are as in the case of TADA and have been criticised as a violation of the basic principles of criminal jurisprudence. It is said that they have upset the entire criminal law at one go. Confessions recorded by a police officer have, even under the British, been barred as inadmissible on the ground that torture by the police is routine.

However this is factually not true. They are certain safeguards provided under the Act itself, in respect of this provision. Firstly only an officer who is not below the rank of a Superintendent of Police can record the confession. Then it has to be recorded in writing or on any mechanical or electronic device like cassette, tape or sound track. Before recording the confession, the accused has to be warned. The police officer has to explain to the person in writing that "he is not bound to make a confession and that if he does so it

38 id., section 30(1).

237
may be used against him.” The accused cannot be compelled to make any confession. The confession has to be recorded in a atmosphere free from threat or inducement and it has to be in the same language in which the person makes it. Another safeguard provided is that the person making the confession has to be produced before the court of a Chief Metropolitan Magistrate or the Court of a Chief Judicial Magistrate along with the original statement of confession within 48 hours. Further in case of complaint of torture, the person has to be produced for medical examination before a Medical Officer not lower in rank than an Assistant Civil Surgeon.

Also under section 49(5) of the POTA, it is provided that section 438 of the Criminal Procedure Code would not be available to those on whom this law was applied, which means that a person cannot even apply for anticipatory bail as was with TADA also. This provision is there keeping in view the intensity of the crime. If such hardened criminals are allowed to go scot free then there would never be law and order in the society.

It is also said that the provisions of section 30 whereby the identity of the witness can be kept a secret is against the basic principles of natural justice. A perusal of the provision shows that the Special Court can for reasons to be recorded in writing, order that the proceedings be held in camera. Under clause 2, a witness or the Public Prosecutor can make a application or the court can proceed suo motu. If the court finds “for reasons to be recorded in writing that the life of such witness is in danger then it can take such measures as it deemed fit for keeping the identity and address of such witness secret.” Therefore the intention of this provision is to provide sense of security to the witness and not to deny an opportunity to the accused.

POTA has diluted many provisions of TADA. Police remand has been reduced from 60 days under TADA to 30 days and the period of judicial custody has been halved from a year under TADA to six months under POTA. Under TADA, the person could appeal against the order of the trial court only to the Supreme Court. Under POTA an appeal also lies to the High Court. Therefore the accused gets another channel to address his grievance. Also

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39 id., section 32.
unlike TADA, the lawyer can meet the accused during interrogation. These provisions were introduced after the bitter experience of misuse of provisions of TADA.

The bail provisions are also diluted under POTA. Section 49(6) provides that no person accused of an offence punishable under the Ordinance shall, if in custody, be released on bail or on his own bond unless the court gives the Public Prosecutor an opportunity of being heard. Section 49(7) requires the Magistrate to satisfy himself only regarding the innocence of the accused before granting bail to him. This will apply for the first year of detention after which the normal provisions of bail under the Criminal Procedure Code will apply. The provision under TADA required that the Magistrate had to make a subjective satisfaction regarding both the innocence of the accused and also that he is not likely to commit a similar offence after being released on bail, which made it difficult for him to get bail.

Section 32 provides for the admissibility of confession made to a police officer not lower than the rank of a Superintendent of Police and it has to be further recorded by a Chief Judicial Magistrate within 48 hours. But the confession of an accused shall not be admissible as evidence against a co-accused, as in the case of TADA.

These special laws like TADA and POTA are being opposed on the ground of their possible abuse. For that matter, every law, every State instrumentality, every administrative power, judicial power, is capable of abuse and is from time to time abused. What is required for preventing abuse of power is a strong public opinion. Mere possibility of abuse of power cannot be a good ground for denying the conferment of power whenever required.

It is said sometimes that POTA has been unable to prevent terrorist acts. For that matter, despite the Indian Penal Code, the crimes of murder, dacoity, rape, robbery, kidnapping and so on are not only going on but assuming dangerous proportions. What is required for making a law effective is good governance and proper and strict enforcement of the law. Mere existence of a law cannot prevent any crime.41

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40 id., section 34.
The problem with POTA is that it has been misused to quite an extent by everybody in power. Its close resemblance to TADA foreshadowed a return to widespread and systematic curtailment of civil liberties. Under TADA, tens of thousands of politically motivated detentions, acts of torture, and other human rights violations were committed against Muslims, Sikhs, Dalits (so-called untouchables), trade union activists, and political opponents in the late 1980s and early 1990s. In the face of mounting opposition to the act, India's government acknowledged these abuses and consequently let TADA lapse in 1995.

Indian and international human rights groups, journalists, opposition parties, and minority rights groups have unequivocally condemned POTA. Numerous political parties have alleged the misuse of POTA against political opponents in states such as Uttar Pradesh and Jammu and Kashmir. Since it was first introduced, the government has added some safeguards to protect due process rights but POTA's critics stress that the safeguards do not go far enough and that existing laws are sufficient to deal with the threat of terrorism. India's own National Human Rights Commission has stated that "existing laws are sufficient to deal with any eventuality, including terrorism, and there is no need for a draconian POTA." India has a plethora of security laws, some predating independence. Many lack adequate procedural safeguards and have been similarly abused.

Since its passage, POTA has been used against political opponents, religious minorities, Dalits, tribals and even children. In February 2003 alone, over three hundred people were arrested under the act.

On July 11, 2002, in the state of Tamil Nadu, Vaiko, a leader of the political party Marumalarchi Dravida Munetra Kazhakam (MDMK), was arrested and charged under POTA for making remarks in support of the banned terrorist group, the Liberation Tigers of Tamil Eelam (LTTE). Only two weeks after Vaiko's arrest, P. Nedumaran, a leader of the Tamil Nationalist Movement, was also arrested under POTA for making pro-LTTE remarks at a conference on April 13.

Also in Uttar Pradesh, between April and July 2002, over twenty-five Dalits and tribals were charged under POTA. Tribals in the area, who work for Rs. 20 (U.S.$0.42) a day, claim that POTA has become an instrument to
brand them as Naxalites (members of extreme leftist Maoist-Leninist groups) whenever they challenge the government official-landlord nexus. One villager remarked, "We are thrashed, arrested and called Naxalites. The nexus between the contractors, police, landlords and industry is just growing stronger here.... when we protest we are booked under POTA." In one case from Sonbadhra district, nine out of twelve people arrested were bonded laborers who refused to return to work because of the physical abuse of their employer.

On February 19, 2003 in Jharkhand state almost 200 people were arrested under POTA, among them a twelve-year-old boy and an eighty-one-year-old man. According to the government, the accused are being held for supporting Naxalites. According to press reports most of those arrested were farmers, students, or daily wage earners. When asked how a Naxalite was identified, a senior police official told reporters, "Anyone caught with a copy of the Communist Manifesto or Mao's Red Book becomes a suspicious character. We then watch him and often find clinching evidence." Following widespread criticism against the charges, Deputy Prime Minister Advani directed the state to review the cases. As a result, officials decided to drop the POTA charges against eighty-three of the detainees. Rights groups have charged that POTA is being used indiscriminately against ordinary citizens in the state, including young children. In January 2003, for example, a thirteen-year-old boy was arrested because his father was suspected of involvement with the insurgent Maoist Communist Centre group. The charges were later withdrawn. At this writing, a total of ten children, mostly students, had been arrested under POTA in Jharkhand state.

On February 19, 2003, the Gujarat government charged 131 Muslims under POTA for allegedly attacking Hindus. A year earlier, a Muslim mob set fire to a train carrying Hindu activists in Godhra in the western state of Gujarat. Fifty-eight people were killed. In the days that followed, Hindu nationalist groups and their supporters killed more than 2,000 Muslims throughout the state. Muslims were branded as terrorists while armed gangs set out to systematically destroy Muslim homes, businesses and places of worship. Scores of Muslim women and girls were gang-raped before being mutilated and burnt to death. Investigations revealed that attacks against
Muslims were carried out with extensive state participation and support and planned months in advance of the Godhra attack.\footnote{In the Name of Counter-Terrorism: Human Rights Abuses Worldwide. A Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights, March 25, 2003. On the internet at: http://www.hrw.org/un/chr59/counter-terrorism-bck4.htm} Even after all this none of the Hindus have been charged under POTA.

Again due to the criticism it encountered the government has scrapped POTA. Recently the Government of India has approved ordinances to withdraw the Prevention of Terrorism Act (POTA), 2002 and to amend the Unlawful Activities (Prevention) Act, 1967. The Centre decided to retain some of the important provisions of POTA.

The Unlawful Activities (Prevention) Amendment Ordinance 2004 is a less draconian version of POTA. It has omitted some of POTA’s contentious provisions and retained others. Unfortunately it has dispensed with certain safeguards in the old law.

The amending ordinance does nothing to alter the overly broad definition of what is terrorism. This was a factor which was misused. Provisions which have been retained include punishments for an act of terrorism, punishments for raising funds for a terrorist act and punishment of harbouring terrorists. In addition, the militant outfits, which were banned under POTA will remain so under the Unlawful Activities (Prevention) Act.

Some key provisions of POTA have been significantly diluted. The most important is that it excludes the provisions of POTA, which placed the onus of proving innocence on the accused. Under the new law, the old principle of criminal law that one is innocent till proven guilty will be resorted to. Also the confession made before a police officer is no longer admissible in evidence. This was one of the most controversial features of POTA. Even the colonial British administration banned confessions recorded by police officers as admissible on the grounds that “torture by the police is widespread, routine and uncontrollable.” Therefore on the issue of confessions as evidence, the ordinance replacing POTA is much kinder and gentler.

Also under section 49(7) of POTA, those accused could seek bail only after a year from the date of detention. The amending ordinance brings the entire issue of bail for terrorist offences within the ambit of ordinary criminal
law. Further the agencies will not be able to detain a suspect on mere suspicion. The provisions of Special Courts have also been dispensed.43

On the issue of phone and e-mail interception, the ordinance is much harsher than POTA. POTA was the first law to make phone and e-mail intercepts as admissible as evidence. The police had to abide by elaborate safeguards to justify the encroachment on somebody's privacy. But now there will be no such pre-conditions for producing any intercepts in terrorist cases.

Chapter V under POTA was entirely devoted to ensuring that the police does not invade somebody's privacy needlessly or does not fabricate any evidence under the guise of intercepted communication.

For example under POTA, a superintendent of police was required to submit a detailed application in the prescribed form for permission to tap somebody's telephone or electronic communications. The permission stipulated in the form of a reasoned order, could be granted only by a specially appointed "competent authority" not below the rank of a Joint Secretary to the Union Government or Secretary to the State Government. A further safeguard provided by POTA, is that the competent authority in turn was required to immediately submit his order along with records to a "review committee" headed by a retired high court judge. And if the police officer was found to misuse the power to intercept communications, he was liable to be punished under POTA with imprisonment up to one year.

All these safeguards have been dropped in the new ordinance. The ordinance makes it clear that any interception claimed to have been made by the police in any manner "shall be admissible as evidence against the accused in the court during the trial of a case."44

Concluding Remarks

The defence of India is a very demanding task but nevertheless, it is in our hands to make it free from arbitrariness. The basic job of a government is to provide safety to its public. Whether it is coming out with a law, which has no loopholes or whether the enforcement agencies are told to work in an

honest manner, it is up to the government. Acts like TADA and POTA have been criticised on the ground that they gave extraordinary powers to the enforcement agencies, which were misused.

Some policemen are in fact so bold as to hint that fake encounters are a necessary evil. Take for example the controversial terrorist versus the Delhi Police encounter at the Ansal Plaza Shopping Complex in 2002. There was an unsuccessful attack on the eve of Diwali at the Ansal Plaza Shopping Centre. There arose a controversy after that, that the Delhi Police had staged a fake encounter. We need to check such incidents. Undemocratic practices such as fake encounters (if committed) cannot be promoted or condoned even in the name of fighting cross-border terrorism. Terrorists should be dealt with an iron hand, but it has to be done within the bounds of our democratic values. The police in our country is already known as a criminal force, which has the legitimacy of law. The misuse of such laws like POTA and TADA increase the power of the corrupt to dominate civil society and undermine democratic institutions and processes.

In D. K. Basu v. State of West Bengal45, the Supreme Court has said, “We are conscious of the fact that the police in India have to perform a difficult and delicate task, particularly in view of the deteriorating law and order situation, communal riots, political turmoil, student unrest, terrorist activities, and among others the increasing number of underworld and armed gangs and criminals. . . . . . . it is felt that if we lay too much emphasis on protection of their fundamental rights and human rights, such criminals may go scot-free without exposing any element or iota of criminality, with the result, the crime would go unpunished and in the ultimate analysis the society would suffer. . . . To deal with such a situation, a balanced approach is needed to meet the ends of justice. This is all the more so, in view of the expectation of the society that police must deal with the criminals in an efficient and effective manner and bring to book those who are involved in the crime. The cure cannot, however be worse than the disease itself.”

45 AIR 1997 SC 610 at 622
Justice A.S. Anand, former Chief Justice of India further goes on to say, “There can be no gain saying that freedom of an individual must yield to the security of the State. The right of preventive detention of individuals in the interest of security of the State in various situations prescribed under different statutes has been upheld by the Courts. The right to interrogate the detenues, culprits or arrestees in the interest of the nation, must take precedence over an individual’s right to personal liberty. The latin maxim salus populi est suprema lex (the safety of the people is the supreme law) and salus republicae est suprema lex (safety of the State is the supreme law) co-existand are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State must however be “right, just and fair”. Using any form of torture for extracting any kind of information would neither be ‘right not just nor fair’ and therefore would be impermissible, being offensive to Article 21. such a crime-suspect must be interrogated – indeed subjected to sustained and scientific interrogation – determined in accordance with the provisions of the law…. His Constitutional right cannot be abridged except in the manner permitted by law, though in the very nature of things there would be qualitative difference in the method of interrogation of such a person as compared to an ordinary criminal. Challenge of terrorism must be met with innovative ideas and approach. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to ‘terrorism’.

Therefore we do need laws to combat terrorism, which may be slightly different in their content from the ordinary law of the land. However we need to be vigilant about the use or rather misuse of these laws. It is only the misuse of the laws at the hands of the criminal justice agencies that give these laws a bad name.

Justice Ramaswamy has said, “Killing of democracy by gun and bomb should not be permitted. But in doing so, the State has to be vigilant not to use methods, which may be counter-productive. Care must be taken to distinguish between terrorists and the innocent.”46 It is said that any draconian law lends itself to misuse. The State misuses the power given to it. Absolute
power corrupts absolutely. The State must fight terrorism with all its might, but there is a way of doing it. It is suggested that any law enacted to counter terrorism must meet the challenges of Article 14 and 21 of the Constitution of India. There must be inherent safeguards provided within the law itself, so that they are not abused. Also the enforcement agencies could do with some kind of character building which will help them in not transgressing the laws.

Merely because law can be misused, is no reason to reject them. However in drafting and introducing an anti-terrorist legislation, certain stipulations must be scrupulously adhered to for example:
- Firstly it must be subject to review by Parliament every year on the basis of a report submitted by the Review Committee to the Parliament and State Assemblies concerning the progress on every detainee’s case.
- It should be withdrawn if it manifestly fails to meet its objectives.
- It must contain a limited and specific definition of terrorism, such as that contained in the Prevention of Terrorism Act of the United Kingdom. We require a clear conceptualisation and definition of the complex patterns of crime that constitute ‘terrorism’ and ‘organised crime.’ It is crucial, here, to bear in mind that these are unique categories of criminal behaviour.
- The time frame for detention without charge should be the same as that of other criminal offences under the Criminal Procedure Code.
- Every detainee must be produced before a judicial magistrate within 24 hours of his or her arrest. No exceptions should be admitted to this rule.
- The transfer and use of illegal revenues is the lifeblood of both terrorism and organised crime, and stringent laws must be devised to deprive criminal and subversive groupings of funds. This will require the implementation of harsh penalties on illegal transfers and money laundering, as well as the criminalisation of a range of economic offences, including the use of such resources in legitimate businesses.
- The legislative framework must also provide for the suppression and containment of subversive and extremist activities by religious institutions and organisations. These organisations fuel anti-national sentiments in the garb of religion.

46 Colin Gonsalves, “Draconian assault on citizens’ rights”, The Indian Express, Chandigarh,
K. Balagopal has said, "it is an illusion to believe that terrorism is a temporary phenomenon. What should follow from that realisation is not that we need a permanent law against terrorism, but rather that the country – and perhaps the world at large – is faced with a set of political-social problems which appear to find democracy as currently practised the world over inadequate. It is not the case that militancy is always very reasonable in the grievances it espouses and the rationale it offers for itself. Yet, the search should be for a deeper democracy that can handle real dissatisfaction within its terms, and reduce wilfully intractable dissent to such a numerically small scale – assuming that most of the people are willing to be reasonable most of the time, without which assumption democracy itself would be a fool’s ideal – that the real difficulties that beset the handling of ‘terrorism’ are substantially reduced. Not is it the case that there is available readymade an ideal form of democracy that will answer this need. But that is what we should be searching for, and not for the incorporation of more and more harsh provisions in the law, which will only add some ‘lawful’ violence to the lawless, if not always mindless, violence of militancy."\(^{47}\)

It is true that we are faced with a situation wherein there are no easy answers. But in our fight against this menace we should not take a back seat. Our anti-terror laws are sufficient and effective to combat terrorism. We just need to be more careful and vigilant about the implementation of these laws.

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