TERRORISM: A FUNCTIONAL EVALUATION OF EFFICACY OF LEGAL CONTROL MECHANICS

The twentieth century has been the bloodiest and the most violent century in the history of mankind. The inhuman and barbaric acts, which have lead to the killing of millions of people, have to be stopped. This century should find an answer to these problems and that too peacefully. For a just and peaceful society we need the rule of law. There arises the question, whether we have the answer to terrorism in law? There has been a spate of enactments by different countries to counter the threat of terrorism. How effective are they in their objective?

"The greatest danger to constitutionalism, to democracy and to the rule of law in the world, is terrorism."1 The solution to terror lies in building a saner and a just world. A world that is governed by law instead of brute force. Every country should be a nation of laws and a free institution. A democratic society is a peaceful society.

Terrorism is, first of all, a problem of the mindsets of individuals who claim to be aggrieved. In law, an aggrieved person brings his grievance to the court of law and seeks settlement by an impartial tribunal. A terrorist, however, is one who has lost faith in all existing systems of conflict resolution.2 Therefore he resorts to violent tactics, which get him what he wants. To be effective, the legal process must have a degree of legitimisation in the eyes not only of the prosecution but also of the accused.

One of the most pressing concerns for the judiciary is to promote a concept of security that is measured with reference to the security of human beings and not just the security of States. Above all, human security demands respect for the most basic and fundamental human rights – that civilians should never be deliberately harmed, tortured or killed – regardless of political ends, military objectives or ideological causes.

Should democratic governments violate democratic principles and individual freedoms in order to fight terrorism? This is an extremely important question, because if the answer is yes, these governments face a difficult choice. Either they must maintain the rule of uncompromising democracy and tolerate the evils of terrorism, or they must sacrifice some democratic freedoms to eliminate terrorism.³

We have already relinquished certain personal freedoms to protect ourselves from terrorism. For example while travelling by air, we permit searches of our person and baggage. In our fight against terrorism, many constitutional freedoms are compromised but this is necessary for the protection of national security and the ultimate rule of law.

L.M. Singhvi says that we need a better reconciliation between human rights and the rule of law, on the one hand, and the battle against terrorism on the other. Civil society has a vested interest in both these objectives – the preservation of human rights and the battle against terrorism. He further says that if we cannot provide a foundation – an ideological foundation, a conceptual foundation and an operational foundation – for such reconciliation, we will continue to remain bogged down in the semantics of terrorism, and will fail to deal with the problem of terrorism. The entire world is now being mobilised to join the coalition against terrorism. This coalition must have a framework, it must create a consensus. It will have to define a consistent short and long term agenda that is clearly committed to the creation of a lasting peace and global justice. Tribunals of adjudication will have to be established at the same time, to set the face of the world against terrorism in an unequivocal way.⁴

Role of Judiciary

Judicial protection, which is most needed during war times, unfortunately is least available because bold judicial souls become timorous when confronted with formidable executive claims of national security. This happened in England during World War II when relief was denied to

Liversidge who was detained on the subjective satisfaction of the Home Secretary, because of suspected hostile associations. The judiciary in the USA also faltered during World War II. In its decision in Korematsu it upheld then constitutionality of an Exclusion Order, which segregated only American citizens of Japanese descent in relocation centres, an euphemism for concentration camps. The court deferred to the judgement of the military about the reality and imminence of the danger of anticipated Japanese landings on the West Coast and suspected acts of sabotage.

Several years later in 1985 it was established before a District Court in California that the US government had knowingly withheld vital information from the court and also provided misleading information on the question of military necessity. Judge Patel, who decided the case memorably concludes: “Korematsu... stands as a constant caution that in times of war or declared military necessity, out institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability.”

For decades Israel has been the victim of unparalleled terrorism and has suffered immensely. Despite this environment the Supreme Court of Israel, under its President Aharon Barak has upheld the basic rights of suspected terrorists. In one its judgements the court declared “security considerations are not magic words. The court must insist on hearing the specific security considerations that prompted the government’s actions. The court must be persuaded that the security considerations actively motivated the government’s action, and were not merely a pretext. Finally, the court must be convinced that the security measures adopted were the available measures least damaging to human rights.” The Court’s insistence on strict judicial scrutiny, its application of the principle of proportionality and its approach are commendable and is worthy of emulation. Not unexpectedly the Court’s judgements have been subject to sever criticism. They are perceived by some as too liberal and thus hindering the fight against terrorism. President Barak’s response is “we as judges, have a north Star that guides us – the

1 See Singhvi, supra 2, p. 33, 36.
fundamental values and principles of constitutional democracy. A heavy responsibility rests on our shoulders. Even in hard times, we must remain true to ourselves...Some of the public will applaud our decision; others will oppose it. Perhaps neither side will have read our reasoning. We have done our part, however. That is our role and our obligation as judges."

People get impatient when there are no swift results in capturing and punishing terrorists. It is not realised that democracy has certain inherent disadvantages which authoritarian regimes do not suffer from and there are limits to the means that may be employed. President Barak has expressed this dilemma of democracy: "This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must always fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirits and its strength allows it to overcome its difficulties."5

USA, the self appointed leader of the world is violating the rights of people. Example is the military detention centre at Guantanamo Bay, Cuba. The detainees from 44 countries, scooped up in the war on terrorism, cannot challenge their arrests or plead their cases or even talk to a lawyer, because the U.S. government denies that they have those rights. They are not U.S. citizens, and the base, while under total U.S. control, is not on American soil; since 1903, it has been leased from Cuba for 2,000 gold coins a year, now valued at $4,085 in perpetuity. Amid a global argument about their rights, the U.S. Supreme court recently agreed to decide whether the captives at Guantanamo could at least challenge their detention in the federal court. The Geneva Convention rules governing treatment of traditional prisoners of war is that it includes strict rules limiting interrogation. So these detainees are called "enemy combatants", and there is no field manual outlining the rules for handling them.6

The old maxim that "justice must not only be done but also seem to be done" very aptly covers the American situation. The appearance of arbitrary, unfettered and unilateral power of the United States to do what it pleases across the world is as damaging to the legitimacy and credibility of international law and human rights as an affirmation that it actually has the legal authority to do so.

Every country needs to defend its own citizens but it has to be done within the ambit of law. The attacks on the twin Towers in America were an international crime and they should be characterised and investigated as such under international law. After all nobody can take the law into their own hands if they don't have the authority to do so. The legal issue between the United States government and the Taliban government of Afghanistan should have been characterised as an extradition matter and pursued as such. If a country wants there are enough resources under international law to begin the process of criminal accountability. These include ad hoc international tribunals established by the Security Council of the UN, and tribunals established as a result of negotiations between concerned states, as happened in the case of the bombing of the Pan Am flight over Lockerbie in Scotland.

In no country should fundamental human rights take secondary importance to political expediency. This is where the role of the judiciary comes into play. The decision of a single judge or court can have national consequences for ordinary citizens. Therefore in the grey areas of political dissent, secessionist struggles and suitable punishment of state agents who perpetrate human rights abuses, the integrity of the courts can mean life and protection and death for thousands of people.

The difficulty of reconciling individual liberties with national security during times of war has been put across very well by Chief Justice William H. Rehnquist, who, in 1998, wrote a book on the subject, All the Laws But One: Civil Liberties in Wartime. He has stated:

"While we would not want to subscribe to the full sweep of the Latin maxim inter arma silent leges - in time of war the laws are silent - perhaps we
can accept the proposition that though the laws are not silent in wartime, they speak with a muted voice."7

Does the country need to relinquish some civil liberties to remain safe? If so, which liberties? The question of where to draw the appropriate line between national security and individual liberty is exceptionally difficult. Yet perhaps an even more complicated question is who should draw that line. Does the judicial branch necessarily take a back seat to Executive and their determinations regarding how the nation should fight terrorism? Or is this the time when the courts' scrutiny is most essential?

Ironically, the first case to come up before the Supreme Court of India in 1950 was to judge the validity of the provisions relating to the preventive detention of the communist leader Mr A K Gopalan. The majority of the judges in Gopalan's case confirmed the validity of the Preventive Detention Act. Article 21 of the Indian Constitution guaranteed to every person the right to life and liberty, a right which could not be denied without violating the due procedure established by law.

In A K Gopalan's case, the Supreme Court distinguished "procedure established by law" from the "due process of the law" by stating that any procedure duly enacted by the legislature would be a "procedure established by law". This trend of the Supreme Court continues today. The Supreme Court did not change its stand even after the Maneka Gandhi case in 1978 in which the Supreme Court held that the "procedure established by law" must also be just, fair, and reasonable.

Whenever these preventive detention laws have been challenged before the Supreme Court, the court has upheld their validity. Whether challenging the Preventive Detention Act in 1964 or the MISA in 1974 and 1975, or the National Security Act in 1982, or the Armed Forces Special Powers Act in 1983 or TADA in 1994, the Supreme Court has consistently maintained its stand.

The Constitution of India provides for a judiciary independent of the executive. Efforts have been made to keep the judiciary independent, though they have not always been successful. The tussle between the executive and

7 Kendall W. Harrison, “The Evolving Judicial Response to the War on terrorism”. Online at:
the judiciary is unending. However in the matter of anti-terrorism legislation the judiciary has followed the executive’s line of thought in dealing with alleged "national security" measures.

What approach has the judiciary taken in this regard? Let us start with a reading of the famous judgement of the Constitutional Bench, presided over by Justice S Ratnavel Pandian in Kartar Singh V. State of Punjab. In this case (two out of the five judges dissented) the judges issued a decision which proved that TADA is not violating the Constitution. By upholding the constitutional validity of the Terrorist Act, the judges proceeded on the assumption that the act is in consonance with the Constitution.

Justice Pandian took into account the fact that terrorism all over the world was on the rise and was potential threat to society. The majority judgement devoted about ten pages to "noticing" how terrorism in the country and on a global level had increased. He quoted the Home Minister's speeches during parliamentary debates as a source of evidence that terrorism is on the rise. He built a formidable case for anti-terrorist legislation in all of the 22 states where TADA was applicable. The bench felt that it was its duty to keep the Terrorist Act on the statute book in defence of India.

Over a decade ago, writ petitions were filed challenging the constitutional validity of the Armed Forces Special Powers Act, 1958 (as amended in 1972). The Armed Forces Special Powers Act empowers even a non-commissioned officer to shoot at any suspect who may create disturbance for the security of the State. No prosecution of the concerned officials could take place without seeking prior permission from the Union Government. The Act gives license for killings and is applicable in Jammu and Kashmir, Punjab, north eastern Indian States of Assam, Meghalaya, Manipur, Mizoram, Nagaland, Arunachal Pradesh and Tripura. Certain provisions of certain acts prove that we need to be very careful in our anti-terrorism legislation. They lend themselves very easily to misuse.

It is a fact that in times of hardship it becomes very difficult to keep a watchful and reverent eye on this document that we regard as the last word on law: the constitution. Denials of due process and invasions of privacy can
take away our freedom in this era of terrorism. If the emergency measures to combat terrorism don't have the necessary safeguards we could end up as a police state. Let us analyse how does our judiciary tackle stringent laws.

In *Lal Singh V. State of Gujarat*\(^8\) the admissibility of a confessional statement made to a police officer under TADA was in question.

Justice Shah observed that, “in some advanced countries like United Kingdom, United States of America, Australia and Canada etc. confession of an accused before the police is admissible and having regard to the legal competence of the legislature to make the law prescribing a different mode of proof, the meaningful purpose and object of the legislation, the gravity of terrorism unleashed by the terrorists and disruptionists endangering not only the sovereignty and integrity of the country but also the normal life of the citizens, and the reluctance of even the victims as well as the public in coming forward, at the risk of their life, to give evidence, the impugned section cannot be said to be suffering from any vice of unconstitutionality.”

Why is this provision being challenged? It is so because it has lot of scope for being misused. The police almost always resorts to torture as a mode of extracting a confession. Therefore what justice Shah has said is right provided there is a way of ensuring that the accused has not been tortured to make the statement. This is important because a person who is being tortured is ready to agree to anything that he is being told. In such a case it not a confession but an untrue statement, which would ultimately hold little value in court.

Justice Pandian in Kartar Singh’s case says: This total ban on the entry of a confessional statement recorded by a police officer into the area of judicial proceedings has placed the police at a great disadvantage as compared to several other enforcement agencies who also handle investigational work leading to prosecution in Court. This provision in the Evidence Act, which was enacted in 1872 bears relevance to the then situation in which the police were practically the only enforcement agency available to the Government and they had acquired notoriety for the adoption of

\(^8\) 1994 SCC (Cri.) 899
of several gross malpractices involving torture and other pressure tactics of an extreme nature to obtain confessions from the accused persons. More than 100 years have rolled by since then. We are aware that the police are still not totally free from adopting questionable practices while interrogating accused persons, but one cannot possibly deny that the greater vigilance now exercised by the public and the press, growing awareness of the citizens about their individual rights under the law and increasing earnestness and commitment of the senior levels of command in the police structure to put down such malpractices have all tended to reduce the prevalence of such practices in the police to a lesser degree than before. After a careful consideration of all aspects of this much debated question we feel that the stage has arrived now for us to take a small positive step towards removing this stigma on the police and make it possible for a confession made before a police officer to enter the area of judicial proceedings, if not as substantive evidence, at least as a document that could be taken into consideration by the court to aid it in inquiry or trial in the same manner as now provided in regard to case diaries under Section 172(2) Cr.P.C. and the confession of a co-accused under Section 30 of the Evidence Act.10

According to the judges in the above case, the time had come for a change in the old line of thinking. We need to evolve with the change in society. Moreover terrorism being a tough problem needed tough laws to counter it. Therefore in the judiciary’s view, now a confession made to a police officer could be admissible in evidence to a certain extent. One might then say that although we are placing our faith in the police, what happens if they do not uphold the sanctity of the provision and misuse it? Are there any safeguards provided in this regard?

Regarding the admissibility of confession made to a police officer as provided under section 32 of the Prevention of Terrorism Act, 2002, the Punjab and Haryana High Court in Simranjit Singh Mann V. Union of India11 visualised certain safeguards. These are:

9 2001 (3) SCC 221, para 21.
10 supra 8, para 27.33
11 2002 Cr LJ 3368 at p. 3380
Only an officer who is not below the rank of a Superintendent of Police can record the confession. 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 person has to be warned. The concerned officer has to explain to the accused in writing that “he is not bound to make a confession and that if he does so it may be used against him.” The accused has the option to remain silent. The police officer cannot compel him to make any confession. Still further, the confession has to be recorded “in an atmosphere free from threat or inducement” and has to be “in the same language in which the person makes it.” The matter does not end here. There is further safeguard. 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 written or recorded on mechanical or electronic device within 48 hours.” The magistrate has to “record the statement made by the person so produced and get his signature or thumb impression.” In case of “any 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.” The person has then to be sent to the judicial custody. It is clear that the provision provides enough protection to the person.

It is undoubtedly true that under the Evidence Act, 1872, the statement made before a police officer is not treated as substantive evidence. However, the departure from the provision under the Indian Evidence Act does not vitiate the provision. In fact, the issue has to be considered in context of the problem that confronts the country. If the innocent people have to be saved from the terrible trauma caused by terrorists, a departure from the archaic rules of evidence is essential. Therefore now that the safeguards are in place, the misuse of the provision is minimised. Also under the watchful eye of the judiciary such laws can be enacted and their abuse limited.

A similar provision regarding the confession made to a police officer was contained in section 15 of TADA. It was upheld in the case of Devinder
Pal Singh V. State N.C.T. of Delhi\textsuperscript{12} wherein the death sentence based on confession made by the accused before a police officer was sustained by their Lordships. By majority the court had held that “justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice according to law.”

On the same point the Supreme Court in Nazir Khan V. State of Delhi\textsuperscript{13} held that the similarity between the section 27 of the Indian Evidence Act and section 15 of TADA is that the confession has to be made voluntarily. This is a very important safeguard that is provided by the law.

In Lalli V. State of Rajasthan\textsuperscript{14} the Supreme Court held that the provisions of section 15 (2) are mandatory and must be strictly complied with. It was observed that the Superintendent of Police who recorded the confessional statement, stated therein that it was explained to the accused that the statement could be used against him as evidence and that he made the statement concerning the sequence of events completely on his own free will without any pressure. But the SP neither recorded it in the confessional statement, nor deposed while appearing in court as a PW that it was explained to the accused that he was not bound to make the confession as required under s. 15(2). Moreover no memorandum was prepared at the end of the confessional statement as required under s. 15(3)(b) of the Rules. Therefore section 15(2) was not complied with and the confession recorded was inadmissible. As the conviction was solely based on that confession, it could not be sustained.

Provisions like section 15 of TADA and section 32 of POTA lend themselves to a lot of misuse. Should such provisions be done away with? As we have seen in the cases before the courts, where there is a reasonable doubt as to the misuse of the provision, the judiciary has not sustained the conviction. This just shows that the judges are trying to curtail the misuse of the provisions of these stringent laws.

\textsuperscript{12} JT 2002 (3) SC 264.
\textsuperscript{13} 2003 SCC (Cri) 2033
\textsuperscript{14} 2005 SCC (Cri) 822
The Supreme Court in such cases follows a particular line of reasoning. It says that a law can’t be shelved merely because it can be misused is illustrated by the case of State of Rajasthan V. Union of India\textsuperscript{15}. It was held in this case that "merely because power may sometimes be abused, it is no ground for denying the existence of power. The wisdom of man has not been able to conceive of a government with power enough to answer its legitimate needs and at the same time incapable of mischief."

The Supreme Court in the case of Niranjan Singh V. Jitendra Bhim Raj\textsuperscript{16} held that the courts should not allow misapplication of law by ensuring that “those whom the Legislature did not intend to be covered by the express language of the statute are not roped in by stretching the language”. The court frowned upon invoking the deadly provision of TADA, for example in cases of gang rivalry and other crimes which can be met under the ordinary penal laws. This got reaffirmed by the Supreme Court in the case of Dilawar Hussain V. State of Gujarat.\textsuperscript{17} It stated that using a law like TADA to handle communal riots is invalid and unacceptable since the intention of the Legislature was to confine the applicability of the Act to secessionist and terrorist activities against the State and not to cover ordinary crimes for which provisions exist in the Indian Penal Code.

In the judgement of Hitendra Thakur V. State of Maharashtra\textsuperscript{18}, calling for stricter implementation of the law, the court said:

"Every terrorist may be a criminal, but every criminal cannot be given the label of a terrorist only to set in motion the more stringent provisions of TADA. The criminal activity in order to invoke TADA must be committed with the requisite intention as contemplated under section 3(1) of the Act by use of such weapons as have been enumerated in section 3(1) and which cause or are likely to result in the offences as mentioned in the section."

As regards section 30 of POTA, 2002, which was in question in People's Union of Civil Liberties V. Union of India\textsuperscript{19}, its constitutional validity

\textsuperscript{15} 1978 (1) SCR 1.
\textsuperscript{16} AIR 1990 SC 186
\textsuperscript{17} AIR 1991 SC 56
\textsuperscript{18} RCR 1994 (3) 1568
\textsuperscript{19} 2004 (1) RCR (Cri) 379
was upheld. Section 30 confers discretion to the concerned Court to keep the identity of the witness secret if the life of such witness is in danger. The Court held that this provision is necessary to protect the life and liberty of a person who is able and willing to give evidence in support of the prosecution in grave criminal cases. It further held that the right of cross-examination per se is not taken away by section 30 and that it is constitutionally valid.

On the point regarding the bail of accused under POTA, the High Court has observed in Simranjit Singh Mann V. Union of India\textsuperscript{20} at para 76

It is undoubtedly true that in cases of ordinary crime, ‘bail and not jail’ is the normal rule. Liberty of the citizen is important. However, as already stated, the terrorist belongs to a totally different class. A stringent provision regarding the grant of bail is only intended to preserve public peace. It is to ensure that there is no recurrence of the crime. Thus, the court has been empowered to deny bail unless it is “satisfied that there are grounds for believing that he is not guilty.” Grant of bail is always a matter of discretion with the Court. Guidance for the exercise of the undoubted discretion cannot be said to be arbitrary or unreasonable. This all the more so in the context of the malaise that the statute aims to check.

With regard to the constitutional validity of POTA it was observed in the above case:

The punishment provided under the Act has a clear rationale. The efficacy of law often lies in the penalty attached to it. The state needs to arm itself with adequate authority to protect the liberty of the law abiding. The existing laws were not enough to fulfil the desired objective. Thus, the impugned Act was made. This is a good man’s shield. Also his sword. There is a clear basis for granting protection to the witness varying the normal procedure to a limited extent: permitting the confession recorded by an officer not below the rank of a Superintendent of Police to be used against the accused and in placing a restriction on the grant of bail to a person charged with an offence under the Act. It does not violate the constitutional mandate.

\textsuperscript{20} 2002 Cr LJ 3368
There are definite safeguards in the statute. The mere possibility of the power being abused is not enough to annul the Act. The door has to be kept open for trial and error. In any event, even if some authority acts arbitrarily, the law's arms are long enough to reach it. The Act provides adequate remedy against the acts of arbitrariness.

In *Shaheen Welfare Association V. Union of India*\(^2\) a petition was filed under TADA wherein undertrials had been kept for an unusually long time without the trial being conducted against them. The Court in this case held

The petition thus poses the problem of reconciling conflicting claims of individual liberty versus the right of the community and the nation to safety and protection from terrorism and disruptive activities. While it is essential that innocent people should be protected from terrorists and disruptionists, it is equally necessary that terrorists and disruptionists are speedily tried and punished. In fact the protection to innocent civilians is dependent on such speedy trial and punishment. The conflict is generated on account of the gross delay in the trial of such persons. This delay may contribute to absence of proper evidence at the trial so that the really guilty may have to be ultimately acquitted. It also causes irreparable damage to innocent persons who may have been wrongly accused of the crime and are ultimately acquitted, but who remain in jail for a long period pending trial because of the stringent provisions regarding bail under TADA.

To tackle such a situation the court said that “the proper course is to identify from the nature of the role played by each accused person the real hardcore terrorists or criminals from others who do not belong to that category; and apply the bail provisions strictly insofar as the former class is concerned and liberally in respect of the latter class.”

Arnab Goswami in his book *Combating Terrorism: The Legal Challenge* asks certain relevant questions. He says was the rise in incidents of terrorism really a consequence of weak laws? Or was it the ineffective implementation of existing laws? If the laws were to be strengthened, made

\(^{2}\) (1996) 2 SCC 616
more matter of fact, would they contravene human rights? The Peoples Union for Democratic rights argues forcefully, against bringing in a new legislation:

“The premise of such a demand is that the ordinary law and the normal criminal justice system have failed to cope with these crimes. The failure is not attributed to the law enforcing machinery – its inefficiency or corruption – but to weakness of the law based on principles of liberal jurisprudence and notions of natural justice, principles like the right to equal treatment before the law, the right to fair trial and the right to be deemed innocent until proven guilty beyond reasonable doubt. And so if the law is to be effective in dealing with terrorists it can only do so if these principles are overturned and these rights are taken away.”

The Supreme Court of India in the famous case of *Saheli v. Commissioner of Police* held that compensation can be ordered to be paid by the concerned government when its policemen cause bodily harm including battery, assault, false imprisonment, physical injury and death. Therefore if the police arrests a person without any justification, even while purporting to act under the National Security Act 1980 or the TADA or POTA, or if they do not produce the arrested person before a magistrate within 24 hours, or if they deprive him of the opportunity to have legal advice, or if he is subjected to torture, he can approach the High Court or the Supreme Court under Article 21 of the Constitution and seek compensation from the government.

Therefore we don’t need more laws to curb terrorism; we need a justice system that punishes terrorists before we forget what their crimes were. We need procedures, which are simpler, improved evidence recording facilities and increase in the number of sitting judges to decrease the pending litigation. The public needs to see results. This requires revamping the whole system. Every limb of the government needs to do something. There ought to be a true separation of powers between the executive, legislative and the judicial branches of government, with each acting as a responsible check on the powers and acts of others. There must be an independent civil service and

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23 1990 (1) SCC 422
non-political security force, unswayed by political loyalties. Acts of government should be transparent and the judiciary independent and courageous under fire. A full debate should occur on the affairs of state in its representative organs and in the public for a civil society to flourish. Media must not only be vibrant and inquiring but also mature and accurate.

Another problem that is faced with regard to the judiciary in the terrorist affected areas is the low rate of conviction of the offenders. K.P.S. Gill says, "It is nigh impossible to secure a conviction in any case of terrorism in a disturbed area – and the problem here is not the absence of suitable anti-terrorism legislation, but of the courage and will to implement even the ordinary laws of the land... In J&K, after ten years of terrorism and thousands of innocent lives lost, not a single conviction has as yet been secured for a terrorist crime (though some seven convictions have been passed for minor offences under the Arms Act and the Explosive Substances Act). The argument that this is a consequence of the infirmity of our laws does not hold water – the same laws enabled a court in Chamba in Himachal Pradesh to convict one offender on January 20, 2000, sentencing him to life imprisonment on the charge of conspiring with Kashmir based terrorists in a massacre... This only proves that it is not the judicial system that is flawed or lacking in the power to punish. It is the lack of will and courage within members of the judiciary that is the basic problem. Apart from outright cowardice, moreover, we appear to completely lack the will to punish crime, and a regime of unqualified licence currently prevails in all theatres of strife in the country. An effective war against terrorism in the absence of effective judicial institutions – indeed, in the face of judicial officers who are actively hostile to the agencies of the state – becomes increasingly difficult and sometimes even forces a resort to extra-constitutional measures."24

In a way the justice system is also to blame. Omar Sheikh, the man charged with Daniel Pearl’s murder, was in the judicial custody of the Indian government for five years. Along with him was Azhar Masood, who were escorted by our external affairs minister to Kandahar in exchange for the

passengers of IC-814. If they had not been awaiting their trial and the judiciary had decided their fate, this would certainly not have been our fate. There are flaws in our justice system which need to be rectified. It is our system, which keeps dangerous terrorists under trial for so long. Which system takes ten years to bring terrorists to justice?

Many democratic states attempt to deal with internal terrorism as essentially a problem of law enforcement and judicial control viewing terrorist actions as serious crimes and dealing with them firmly under the criminal code. There have been some remarkably successful applications of this approach, for example against the early generations of the Red Army Faction in West Germany and against the Red Brigades and other terrorism groups in Italy. In both these cases it is true that the laws and the judicial process had to be strengthened in order to cope with the ruthlessness and cunning of the terrorists. But it is manifestly the case that in both countries essential democratic values and institutions and the rule of law remain intact despite these long and bitter campaigns of terrorists to undermine the State and to provoke it into over-reaction. Therefore if we work in a concerted manner, wherein we give up our selfish desires, the problem can be tackled.

No system that arrives at a decision after a litigation process that can extend over decades delivers anything that could deserve the title of ‘justice’. If judicial action is to have any deterrent impact, especially on the hardened cadres of terrorist and organised crime groupings, the link between crime and punishment must be swift and inexorable. Also if these laws are followed with intelligence and without partisanship, this would be entirely consistent with Constitutional provisions and the provisions relating to the independence of the judiciary. Every organ of the government has to play its part sincerely and with dedication to increase the level of effectiveness.

**Empirical Evaluation**

Terrorism has the world in its grip, where no one knows where the next strike is going to occur. In the present study, an attempt has been made to find an answer to this menace in the form of an efficacious legal framework
and legal procedures. Keeping in view the relevance of this present study an empirical evaluation was conducted. An interview schedule was structured to evince the responses, the views and perceptions of respondents from different sections of society. These respondents tackle different aspects of terrorism during the course of their work. Data was collected from these 20 respondents in the form of recordings. Qualitative data has been used in the findings and inferences drawn wherever necessary. Respondents’ views have been quoted verbatim. Further a pilot study was conducted to standardise the interview schedule. Thereafter prior appointment was taken from the respondents before the interview. Majority respondents did not have a problem with their names being used in the study. However those respondents who were not comfortable with the mention of their names have been kept anonymous, particularly judges from different legal forums. Propriety demands that their names should not be disclosed.

**Interview Schedule**

The interview schedule was structured in a way that public opinion is ascertained with regard to four basic issues. The first part of the interview schedule was devised to find the respondents’ views on the issue of rise in terrorist activities and the reasons behind it. The second part related to the existing laws to tackle terrorism. The views of the respondents were sought on the adequacy of the existing laws and their deficiencies. The third part of the interview schedule dealt with the law enforcement system which includes the enforcement agencies and their systems and procedures on investigation. The views of the respondents were sought on the efficiency of this investigation/enforcement system. The last part of the interview schedule dealt with the activities of the Human Rights Organisations and their impact on the efforts to deal with terrorism.

**Unstructured Interviews**

Besides the above detailed interview schedule, some unplanned/unstructured interviews were also held with certain individuals who

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have been connected with certain aspects of terrorism. Their opinions, views and perceptions regarding the specific area of terrorism that they were involved in were sought. These interviews were largely unstructured as the individuals being interviewed were experienced in limited areas concerning terrorism and consequently the effort was to seek their opinion regarding such areas in order to maintain the purity of the research work.

**Sample of Respondents**

The structured interviews (in the form of the above detailed interview schedule) were held with certain individuals who were highly experienced and were directly involved at the grass root level with terrorism and all its different aspects. This involvement in turn gave these individuals a rich treasure of practical experience in dealing with different aspects of terrorism. These 20 respondents included teachers who could provide academic/conceptual inputs, lawyers from a variety of courts to share their experiences on the ability of the different anti-terror laws to deal with the problem, judges from a variety of legal forums (including High Courts and Human Rights Commissions) to share their experiences in the deterrence abilities of the existing criminal justice system in dealing with the problem, members of the Indian Defence Forces who shared their experiences at the grass root level on the causes, effects and operational modes of terrorism and the psyche of the individuals involved with it and members of the Police Forces who shared their experiences on the efficiency of the different laws and procedures in dealing with the problem.

**Findings**

As mentioned above the first part of the interview schedule deals with the growth and expansion of terrorism. Majority of the respondents firstly include use or threat of use of violence in the description of terror. According to them the aim of the terrorists is achieved by this use of violence with intent to create terror especially by killing innocent people. Prof. I.P. Massey, and eminent teacher in the legal field describes it as, "Philosophically speaking..."
terrorism is our defence mechanism against our own insecurities which grow due to our ignorance of our own universe and the universe of other persons. Reality speaking it is premeditated harming/killing of innocent civil population for whatever reason.” One of the judges from the Punjab and Haryana High Court describes it as an activity by certain dissatisfied citizens to attract the attention of the rest of the country towards their demands, feelings and aspirations. Therefore we can say that terrorism includes violence and the reason behind the use of this violence is to create an atmosphere where the people have no choice but to take note of them, their activities and their demands.

On the question as to whether terrorism was on the rise in India, majority respondents answered in the affirmative. There were a few respondents including two judges from the Punjab Human Rights Commission who felt that terrorism was not on the rise in India and that it continued as before. For those who felt that it was on the rise, the reasons given were varied. Majority felt that it was due to political opportunism and religious diversity and fundamentalism. A few respondents also felt that it was due to poverty, inequality and exploitation in the country. Mr. R.S. Cheema, Advocate General Punjab and a leading criminal lawyer said that, “there was a lot of hidden and suppressed violence in the mindset of the people in India, which was born of certain social settings and expectations not being fulfilled in the people.” Some respondents also felt that the unresolved Kashmir problem contributed to the increase in terrorism. Therefore what is clear is the fact the terrorism is present in India. The reasons attributable to this variety of terrorism are varied.

The second part of the interview schedule deals with the institutional and functional deficiencies in the existing anti-terror laws in India. 60% of the respondents felt that India does not have an adequate anti-terror law. Amongst the respondents who said that India did have an adequate law, the ones from the police forces felt that TADA was fairly adequate and effective.

As regards the inadequacies and inefficiencies in the existing laws, majority felt that the fault lay in the enforcement mechanism. Any law can be misused but what is required is that the police agencies and the executive authorities should implement the law in letter and spirit. Mr. R. S. Cheema
particularly felt that the anti-terror laws in India were actually detention laws. He said, “In Punjab the laws ended up in smoke. There was no bail. People were in for the entire period of one year. Only appeal was to the Supreme Court. For a common man to go to the Supreme Court was impossible. Cases didn’t come up. They were also manoeuvred. Bail was not granted under law. Laws were not deftly made. They were not intelligently drafted. They were only draconian and harsh laws. They were not effective as they did not cover different aspects of terrorism.” He feels that anti-terror laws have not been properly drafted. One of the judges from the Punjab and Haryana High Court also felt that a major drawback is the lack of witnesses and that nobody comes forward to support the prosecution. One of the practicing lawyers also said that a major deficiency in the law was that inadequate powers were given to the police. Mr. Sarabjit Singh, the retired Director General of Punjab Police felt that some provisions in the anti-terror law were very good for eg. He said, “TADA made the possession of an AK-47 an offence even when AK-47s were not easily available”. He in fact recommends that possession of certain weapons should be an offence. He further says that misuse of laws can be checked for eg. in the case of section 25 of the Evidence Act, which deals with the admissibility of a confession made to police officer. Under TADA and POTA, a confession made to a police officer has been made admissible as evidence. This is one of the main points of controversy under these anti-terror laws. But Mr. Sarabjit Singh says that one can obviate the possibility of torture with the provision of video-recording. He then further says that another manner of misuse which happens at the hands of the police is at the time of recording the statement of a person. Some police officers record the statement and do not seal it in front of the witness; with the result it becomes infructuous in court. Ms. Kiran Bedi, India’s first woman IPS officer feels, “the biggest deficiency in the law is that confessions before police officers are not valid. Also that the legal process is heavily on the side of the accused.”

Therefore what we can conclude is that our laws are good enough to handle most terrorist activity. It is only that there misuse should be checked. The enforcement agencies do need special powers to deals with such crimes but misuse at their hands must be curtailed. Laws can be misused but that is no reason for the law to be discarded.
On the question of the sufficiency of our ordinary criminal law in dealing such cases, 60% of the respondents feel that there are sufficient provisions in the Indian Penal Code which can deal with terrorism. The only difficulty they feel arises when there is delay in the trial process. 40% of the respondents felt that ordinary criminal law was insufficient to deal with terrorism as it was made to deal with day to day crimes only. Mr. Sarabjit Singh in fact feels that under normal times, criminal law which provides for 14 days police remand is sufficient. However it becomes different in cases of terrorist activity.

75% of the respondents feel that it is at the level of the judiciary that the problem and delay arises. An expert in the criminal field, Prof. R.S. Grewal says, “When years are taken to ultimately hold the trial, the evidence is forgotten. The terrorists ultimately go scot-free, which gives them encouragement. The problem that we face is that we don’t have enough judges. Moreover there is a lot of pressure on them. Sometimes even the lawyers delay the case.” Further as one advocate says, “we need to have a viable witness protection program, which would lead to a higher rate of convictions.” Ms Kiran Bedi recommends, “a speedy and effective trial held in front of a camera, which would provide protection to the witness.”

The outcome therefore is that though the criminal law may be sufficient in most cases to deal with terrorism, but we need to speed up our trial process. When a terrorist knows that he can be convicted in a month or so, it will definitely have some kind of a deterrent effect.

With regard to the question on whether we could adopt some of the provisions from the anti-terror laws of United States and United Kingdom, majority of the respondents were unaware of those laws. However most of them did say that every country has its own peculiar problems. Therefore no system of law can be duplicated without exception. Prof. I.P. Massey says, “laws in these countries lean heavily on real/imaginary security considerations and do not maintain the delicate balance between individual rights and the claims of security.” Mr. Sarabjit Singh in fact says, “The United States has gone overboard. Earlier they used to criticise us for infringing civil liberties but now they are doing it themselves.”

On the subject of adequacy of laws on cyber-terrorism in India, some respondents were not aware of the law. Majority felt that the Information
Technology Act was totally insufficient to deal with cyber-terrorism. Some felt that the police was not trained adequately in the field. What is actually required to deal with cyber-terrorism is that the law should be amended and modified at the same pace as the changes occurring in this field.

With regard to the question as to whether stringent provisions help in curbing terrorism, 70% respondents answered in the negative. They felt that it in not the stringency in the provisions of the law, rather it is the effective implementation of the law which actually helps in curbing terrorism. For those who answered in the affirmative, the view was that stringency again will only work if the time gap between arrest and conviction is reduced. If a terrorist knows that if he is arrested today and that he will be punished in the next 60 days and that too severely, it would certainly go a long way in curtailing this menace. Also majority of the respondents feel that the punishment should be commensurate with the crime if proved beyond doubt. One of the judges from the Punjab Human Rights Commission advocates the capital punishment for such a crime. Therefore stringency is needed but in the implementation and the punishment. Ms. Kiran Bedi says, “Stringent provisions should be incorporated in areas of confessions, bail and the burden of proof to be on the accused.”

On the point as to whether a confession made to a police officer should be admissible in evidence, majority respondents strongly felt that such a provision should not be a part of the anti-terror laws. They feel that the police in our country are not so mature and that they have a tendency to create false evidence. However members of the police forces felt the need for the people to place more trust in the police as the mistrust makes them misuse the provision. Prof. R.S. Grewal says, “The entire Evidence Act requires a re-look. The Act was made when we were governed by the colonial forces. The police at the lower level comprised of local Indians. The British were not in favour of giving any power to the natives. Unfortunately even after independence we have not conferred respect on the police and continue to view them with the eyes of the British with suspicion, hate and distrust.”

In my opinion we do need to have such provisions but with a check on the misuse of such provisions. The confession entirely should be video-recorded, which would help in proving the legitimacy.
The third part of the interview schedule deals with the role of investigating and enforcement agencies. On the point regarding the role of judiciary vis-à-vis harsh anti-terror laws the view of the respondents is varied. Mr. R. S. Cheema says, “When terrorism was at its peak, then the judiciary was favourable to harsh anti-terror laws and when terrorism was behind us then the judiciary had a very short memory and was harsh on harsh laws.” Lt. General Malhotra retired from the Indian Army who was in command of the defence forces in some of the most heavily terrorist infested areas at the peak of terrorism in Punjab feels, “the judiciary particularly at the lower level doesn’t try the terrorist in an appropriate manner. It treats him like a normal criminal whereas he is a hardened criminal, trained in violent ways to attack the innocent people.” Prof. Massey feels, “The judiciary supports reasonable discretionary powers but not wide discretionary powers. According to the Supreme Court, State terrorism is no solution to private terrorism as it legitimises terrorism and reduces the respect for law. Any problem, no matter how acute, must be solved in a civilised manner. This fortifies ‘due process’ approach of the Supreme Court under Article 21 of the Constitution.”

80% of the respondents feel that judges are unable to convict terrorists in the existing system. Majority of these respondents say that this is due to two reasons. Firstly there is lack of evidence due to delay in the process and also due to non-availability of witnesses who are genuine. The second reason is the fear in the mind of the judge that if a particular person is convicted by him, he might in turn cause harm to him and his family. This can be taken care of only when there is a speedy trial which results in the conviction of the offender. One of the judges from the Punjab and Haryana High Court says, “This is mainly on account of faulty and slip-shod investigation.” Mr. K. T. S. Tulsi an eminent lawyer practicing in the Supreme Court who has been closely involved with cases on the terrorist activity in Punjab says, “In Punjab, in spite of TADA having been made available to the Executive, in one form or the other from 1984 onwards, in the absence of effective co-ordination between the police and the executive on the one hand and the prosecution, investigation and judiciary on the other, the conviction rate in terrorist offences remained abysmally low. The lack of dynamic leadership in the other wings of the state, failed to infuse commitment amongst the members of the various
services, including the judicial services." 20% of the respondents feel that judges have been able to convict most of the terrorists. One lawyer says, "The conviction in the Red Fort attack case and the Parliament attack case are two examples which show that the judiciary does convict terrorists." The inference which can be drawn from this is that even when judges are unable to convict terrorist, it may be on account of several factors which need to be rectified.

With regard to the question if non-conviction has a serious demoralising effect on the working of the police, all respondents answered in the affirmative. Mr. R. S. Cheema says, "It undermines the faith of the policeman and they start believing in direct action like encounters." One of the lawyers practicing in the Punjab and Haryana High Court says, "It destroys the motivation of the force to catch the terrorists at the cost of their lives." Therefore non-conviction certainly reduces the initiative and the police then resorts to extra-judicial solutions like encounters.

75% of the respondents feel that our criminal justice administration agencies have been unable to enforce anti-terrorism laws. This is due to the fact that accountability has declined. One of the lawyers says that it is due to two reasons. One due to the decline in prosecution and the other due to the decline in investigation.

95% of the respondents say that laws have been misused by the criminal justice administration agencies. Some say that it was the police which misused them because of the power that it gave them and their use of these laws as preventive detention laws. Others say that it is also due to the reason that false witnesses are created to secure results.

60% of the respondents feel that the police does react late in cases of terrorist attacks. 10% feel that they do not. The rest feel that it only happens in certain cases. The reason which they give for this is the lack of intelligence input and also that they are not adequately trained and motivated to track the terrorists. They have a lot of political interference which undermines their output. Mr. Sarabjit Singh, the retired DGP says, "Most state police forces including the British civil police are designed to deal with normal crimes. Their training, their numbers, their weaponry are all designed for this purpose. But when they face sophisticated weapons and extraordinary situations like terrorist cases, their reaction time is slow. For them to modify themselves
takes time. To convert a normal state police into an anti-terrorist police takes time.” Therefore we can say that it is not entirely the fault of the police. Mr. K.T.S. Tulsi says that if we continue to suspect the bonafides of the police, it will only get further demoralised.

The fourth part of the interview schedule deals with the role of Human Rights Organisations in the field of terrorism. 40% of the respondents say that the human rights organisations care more for the rights of the terrorists than the rights of the victims and the public. Their view is that they generally speak the language of the terrorists and are heavily biased towards them. 40% of the respondents feel that the human rights organisations never support terrorism as such as it can't be defended or justified. Prof. Massey is of the view that National and State Human Rights Commissions have always taken a balanced view. 20% of the respondents say that one can't give a blanket statement as these organisations are from certain selected sections of the public. Therefore they are more receptive and more concerned about the rights of those sections. A survey conducted by the Punjab Police established the fact that most human rights organisations are formed to take money given to the terrorists victims. It is these organisations which have given the rest a bad name. However these human rights organisations do have a role. They provide a check on the working of the police and other agencies involved in this battle.

40% of the respondents are of the view that if the human rights organisations lay more stress on the rights of the terrorists, it has a demoralising effect on the working of the police and other anti-terrorist organisations. This is due to the fact that the terrorists go scot free despite their best efforts. 30% of the respondents feel that laying too much stress on the rights of anybody is not right. Stress must be there where it is due. 20% respondents feel that if anti-terror laws are misused and the police victimises the people, then it is a natural consequence that human rights organisations will come forward. Therefore what we can clearly establish is that every organisation has a role to play. Even human rights organisations are a part of this set up and they must do their duty in a balanced manner without looking at personal benefits.
Lastly majority of the respondents feel that laying too much stress on the rights of the terrorists hinders the work of the judiciary and other government agencies. The human rights card must not be overplayed. A balanced view is always necessary. Mr. Sarabjit Singh is of the view, “Balance is required between the rights of the law abiding citizen as well as the rights of the terrorists. Although it sounds very egalitarian that all people have equal rights but a person who has used violence and terror against society does not have the right to be given the same amount of rights and protection as an ordinary citizen.”

What is established through the interview schedule is that terrorism is present in the country. Secondly we do have laws to combat terrorism but these laws are being misused and they are not being implemented properly. The judiciary also has been lax in its duty. This is partly due to faulty investigation and the lack of witnesses coming forth to depose in the favour of the innocent. We need a total revamp of the working of our criminal justice system to weed out this menace from our society.

Concluding Remarks

Terrorism symbolises deep changes in the political structure of society. The evidence of eroding political order is everywhere. Democratic process is facing the crises of legitimacy, periodic elections are becoming lesser and lesser effective; the credibility of politicians – policy makers and holders of political power is being lowered by every passing day and; authority of state is being challenged in greater dimensions. The government has become ineffective and the conflict resolution mechanism has become feeble.26

Terrorism is a serious threat to human rights because it is a powerful temptation to sacrifice principled commitment to the due process of law in the name of defending national security and public safety. A humane and a sustainable solution to the problem of terrorism should consist of two elements. First, continuing and accelerating international co-operation in addressing the underlying causes of the poverty, frustration and powerlessness that motivates terrorists and their supporters. Second,
establishing effective legal mechanisms for prosecuting and, if convicted, punishing terrorists, but with full protection of the due process of law.

It is imperative that the parameters within which each agency of the government is to operate in the fight against terrorism should be clearly determined and suitably legislated. Every level of governance should be held accountable and their performances at each level should be properly audited. All the necessary legislative and legal steps necessary should be taken against the agencies that misuse and abuse their powers and resources.

Whether the fight against terrorism is a fight to secure civil liberties or is it that in the garb of fighting terrorism the innocents get caught in the net? The answer to this lies in the hands of the citizens of the country. If they don't wake up and decide their future they will lose the opportunity forever.