CHAPTER VI
ROLE OF THE JUDICIARY – TERRORISM

The excellence of governance is based upon the judicial system i.e., an independent and impartial judiciary. The framers of our Constitution used the doctrine of separation of powers and the rule of law to balance rights of the individual and society. Many times the higher judiciary has been looked upon as the protector of human rights. It has been concerned with the repeated violations of human rights of the citizens on issues relating to religious fanaticism and intolerance. In order to check such violations an effective judiciary is a necessity. It is said that" the progress of society is largely dependent upon proper allocation of law to its society". The mere existence of a particular piece of legislation cannot solve the problem of the society unless the judges interpret and apply the law to ensure its benefit goes to the right quarters". Therefore the role envisaged for the judiciary, is to provide social justice to society.

The criminal justice system in India is facing challenges posed by modern technological advances and related criminal activity. Communication systems and financial transactions can take place in a matter of minutes over
long distances. Crimes in India are on the increase. The fear of violence and
terror has affected the lifestyles of ordinary people.

The criminal justice system\(^1\) in India is vast. Various stringent laws,
rules and regulations create a complexity, often resulting in delays, with the
prosecution unable to prove the charge. Innocent until proven guilty is the
traditional view. Within this frame work of law and order, the terrorist must
be arrested, tried, convicted and sentenced

"In such a permissive atmosphere crime naturally flourishes. When
ordinary crime goes unchecked, it becomes a fertile ground for organised
crime and terrorism to thrive"\(^2\).

Crime has its roots in society and organized crime and terrorism is
rooted in the events occurring all over the world. The last three to four
decades have witnessed as increase in terrorists activities taking place both
nationally and internationally. Political changes, militancy amongst certain
groups and in regions have created fertile ground for terrorist strikes.

\(^1\) Kashyap C. Subhash "The Citizen and Judicial Reforms" New Delhi, Universal Law Publishers Co.
\(^2\) Ibid p 227
In such circumstances the criminal justice system must make provisions for witness protection\(^3\) in order to create a sense of security for the witnesses, who has come forward to testify. In India\(^4\), POTA and KCOCA incorporates such provisions which is the exception to the rule. This would guarantee integrity of law enforcement agencies and effectiveness within the criminal justice system.

The Indian experience has been not far behind. Cross border terrorism in Jammu and Kashmir, hijacking of aircraft, the Naxalite Movement and Punjab became a terror torn State. The Government chose all legal methods to deal with terrorists and their activities. Besides common criminal law the Central Government has enacted special legislation to deal with such matters.

Although the Indian Nationalist struggle witnessed many acts of violence by revolutionaries fighting colonial domination. The worldwide, phenomenon of terrorism was witnessed in India when former Prime Minister Rajiv Gandhi was killed by a suicide bomber at Sripurumbudur\(^5\). National terrorist strikes and other activities have increased from time to time in some parts of the country eg. Jammu and Kashmir, Punjab etc. Our criminal justice

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\(^3\) Mentioned in the Malimath Committee Report.

\(^4\) Sometimes witnesses turn hostile due to social pressure or fear. The Malimath Committee Report is yet to be implemented.

\(^5\) 1991
system dealt with such acts under the I.P.C. and other enactments (common criminal law).

In 1967, the Unlawful Activities (Prevention) Act, dealt with providing an effective remedy for unlawful activities eg. Membership of notified association. Later the prevention of damage to public property dealt with causing damage to public property which costed the Government a loss of revenue. Other provisions provides for other kinds of measures aimed at preventing loss and damage to public property and society.

In 1971, under the Indira Gandhi regime the most stringent measures were brought about to deal with terrorism – preventive detention under the Maintenance of Internal Security Act, In the 1970’s civil liberties got a back seat while the country was in the grip of serious threats to its internal security.

The defence of India, the security of state and the maintenance of law and order was of immense importance, and the provisions sought to take care of situation which threatened the same. MISA was later repealed by the then newly elected Government.
In 1980, the National Security Act was enacted so as to deal with such matters and extremist activities. Terrorism in all its manifestations suddenly "entered" into the country. The IPC was not meant to cover acts of terrorism, organized crime and insurgency.

Between the mid-eighties and early 1990's many incidents took place like the kidnapping of diplomat Liviu Radu, and the Bombay blasts. Under the terrorist Affected Areas (Special Courts Act some definition was given to the world 'terrorist'.

The Terrorist and Disruptive Activities Act was enacted to deal with terrorist activities within the country, Special Courts were sent up to try such offences. Under the said enactment deterrent punishment was provided for taking into account the gravity of the situation.

However the provisions of the Act conferred great powers on the Government. Enacted at a time of strife, murder and mayhem in India the minority community leaders fact that it would only target them in society. The Act had a low conviction rate.

7 PWG, Naxalite Movement, ULFA, BODO Khalistan Liberation Front etc.
8 Sec. 2 (h) of the Act.
9 It deals with terrorism and disruptive activities.
10 Life imprisonment or death aiding and abetting was also a crime.
11 Terrorist acts were defined – Sec. 3 (1)
12 1.5% approx.
The Supreme Court in USMAN Bhai Dawoodbhai Memon and Others v. State of Gujarat\textsuperscript{13} felt it was an extreme measure taken by the State when the situation could not be controlled by procedures laid down by other laws. The special machinery was set to combat terrorism and related activities. However it should be used when the Governments' law enforcement machinery fails. It specifically refers to.

Terrorist Acts as defined in Sec. 3(1)

Whomsoever 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 poisonous or noxious gases or other chemicals or by other substances (whether biological or otherwise of a hazardous nature in such a manner as 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 detains any person and threatens to kill or injure such person in order to compel the Government or

\textsuperscript{13} AIR 1988 SC 922.
any other person to do or abstain from doing any such acts, commits a terrorist act.

It is however not possible to define terrorism in precise words. In HITENDRA VISHNU THAKUR V. STATE OF MAHARASHTRA\(^{14}\), the Supreme Court held that, "terrorist activity does not merely arise by causing disturbance of law and order or of public order. The fall out of the intended activity must be such that it travels beyond the capacity of the ordinary law enforcement agencies to tackle it under the ordinary penal law. Experience has shown us that ‘terrorism’ is generally an attempt to acquire or maintain power or control by intimidation and causing fear and helplessness in the minds of the people at large or any section thereof and is a totally abnormal phenomenon. What distinguishes it from other forms of violence, therefore appears to be the deliberate and systematic use of coercive intimidation. More often than not, a hardened criminal today takes advantage of the situation and by wearing the cloak of ‘terrorism’, aims to achieve for himself acceptability and respectability in the society, because unfortunately in the States affected by militancy, a ‘terrorist’ is projected as a hero by his group and often even by misguided youth. . . ."

\(^{14}\) 1994 SC 602
After the expiry of TADA in 1995, it was necessary to enact legislation to combat and control terrorist acts.

While TADA was centered around punitive measures POTA was primarily a preventive measure\textsuperscript{15}. It deals with terrorist acts and disruptive activities. By this enhancement the Government wanted to bring about stringent rules to deal with terrorism. It sought to overcome the flaws of other enactments. This law was intended to create a working order where the investigative agencies and other agencies in the criminal justice system could work together to secure a conviction of such persons who spread terror in society or disrupt, the peace and harmony in society. Also it increased the credibility and standing of the law enforcement agencies in Society. This would undoubtedly put an end to any extra-legal actions taken in many states to counter militancy and insurgency.

In the cases that have come up in the Supreme Court and other High Courts issues pertaining to terrorism have been dealt with within the parameters of law and justice. An analysis of the judgements bring to light every aspect of the law which the Courts have taken into consideration when deciding the case. The intention of the legislature is not to try every criminal

\textsuperscript{15} Under TADA 75000 were arrested and 72,000 were released because of lack of evidence.
under special laws, but deal with it as ordinary criminal activity. Every terrorist may be a criminal, but every criminal cannot be given the label of a terrorist.\textsuperscript{16}

As the country faces various challenges, where terrorism has acquired global dimension it has become imperative for the State to deal with it in every manner possible. Some have considered it as a peace time equivalent of a war crime\textsuperscript{17}. The Indian legal responsive can be seen in the latest enactment – the Prevention of Terrorism Act which was primarily designed to be preventive in nature. The important cases amply illustrate the law. All anti-terrorism legislation and ordinary criminal law are dealt with comprehensively.

USMANBHAI DAWOOD MENON AND OTHERS V. STATE OF GUJARAT\textsuperscript{18}

On the morning of March 10, 1987, there was an armed clash between the appellants who are members of a co-operative housing society and the two sons of the original Vendor Badubhai. As apprehended, the two sons of the original vendor put up armed resistance and in scuffle both sides sustained injuries. Police arrived at the time of incident and produced the appellants before the designated Court. The appellants moved an application for bail but

\begin{itemize}
\item \textsuperscript{16} ibid. at 13
\item \textsuperscript{17} AP Schmid of the U.N. Crime Branch.
\item \textsuperscript{18} AIR 1988 SC 922
\end{itemize}
was rejected. Then they moved the High Court and High Court also rejected the bail on the ground that the High Court had no jurisdiction. Hence an appeal by special leave petition was made.

In support of the appeal and the connected Special Leave Petitions, the Counsel for the appellants put forth the following submissions, that Part -III of TADA is 'supplemental' to the code and the code still applies except to the extent that it stands modified by the provisions of the Act, and particularly those contained in Part-IV.

While Sec. 11 (1) creates a special tribunal for trial of the offences under Section 3 or 4 of the Act viz., the Designated Courts constituted by the Central or the State Government under Section 9 (1) the various sub sections of Section 14 provide that the procedure and powers of such designated Courts shall be as specified therein particular emphasis is laid upon the provision contained in Sub Section (3).

The 'Source of Power' of a designated court to grant bail is not Section 20 (8) of the Act but Section 439 of the Code and that Section 20(8) only places limitations on such power.
Though the legislature has made an express provision in Section 20(7) of the Act which provides that nothing in Section 438 of the Code which deals with the power of the High Court or the Court of Session to grant anticipatory bail, there is no similar provision making Section 439 of the Code dealing with the power of the High Court or the Court of session to grant bail.

The State Government contended that where an enactment provides for a complete procedure for the trial of certain offences, it is that procedure that must be followed and not the one prescribed by the Code.

Where there is a special enactment on a specific subject as the Act in question which is a special law, the Act as Special Act must be taken to govern the subject and not the code in the absence of a provision to the contrary.

The Supreme Court accepted the contention of the State Government that the Act being a Special Act must prevail in respect of the jurisdiction and power of the High Court to entertain an application for bail under Section 439 of the Criminal Procedure Code or by recourse to its inherent powers under Section 482.
The Supreme Court also said that the designated Courts have not carefully considered the facts and circumstances and have rejected the applications of the bail mechanically. The Supreme Court upheld the judgement of the High Court and set aside the impugned orders passed by the designated court.

In NIRANJAN SINGH KARAM SINGH PUNJABI V. JITENDRA BHIMRAJ BIJJA AND OTHERS the Supreme Court stated that killing a member of a rival gang is not an act of terrorism. The matter was decided based upon intention of the appellant, who did not kill an innocent civilian. In such matters it was left to the Court to analyse the evidence placed before it. It was free to reject some contentions of the prosecution. It held that there was no offence under Section 3 (1) of TADA was made out and therefore the designated court could not try the offence. The other charges were left to ordinary courts to try the accused.

ERRAM SANTOSH REDDY & OTHERS V. STATE OF ANDHRA PRADESH

This Appeal was filed under Section 16 of the TADA Act 1985 against the Judgement of the designated Court. The appellants were found guilty.
under Section 307 read with Section 34 and sentenced to undergo rigorous imprisonment for a period of 5 years and under Section 3 and 3(2)(ii) of the TADA for a period of 5 years and also to pay a fine. They were also convicted under Section 5 of the Explosive Substances Act and sentenced to three years imprisonment.

All the accused were members of the CPI (ML) group lead by Sri. Kondapalli Seetharamaiah, creating terror in the people in order to over awe the Government established by law in the State of Andhra Pradesh by using fire arms, bombs etc.,

On 12.1,1986 in the early hours, the Inspector of Police received credible information that one of the accused was organizing his party to commit terrorist acts and disruptive activities in a house rented by one of the accused. The premises were raided. During the raid a bomb was hurled with a view to kill the police party. Later several arms and other explosives were recovered from the house.

In this appeal it was submitted that the acts alleged to have been committed by the appellants did not come within the meaning of terrorist act as defined under Section 3 (1). He submitted that no section of people were terrorized nor any one of them in the locality was injured because of the
hurling of the bomb and that the prosecution did not establish that the appellants acted in a manner with such intention as mentioned in Section 3 and they do not come within the meaning of the word "terrorist".

The Court held that it was established by the evidence that the Police raided the premises of accused and that one of them hurled a bomb on them. On surrender, fire arms and explosive substance were recovered from them and hence Section 2 (f) as well as Section 3 (1) are attracted. Section 3 (1) is very wide and covers any act which strikes terror in the people (or) section of the people would attract the said provisions. The fact that the accused were armed with the fire-arms as well as explosive substance and also hurled a bomb on the Police who were in the premises would go to show that the offence of the accused was to strike terror in the people (or) a section of the people including the police.\(^1\)

The next submission was that hurling of the bomb did not caused any injury to any one and that being so did not bring them within the meaning of the terrorist.

The Court held that the meaning of the ‘terrorist’ has to be gathered from Section 3 (1). That being so the facts established by the prosecution

\(^1\) Ibid. 1673
show that the appellants were armed with the fire-arms as well as explosives. This was within the meaning of ‘terrorist’. Hurling the bomb at the Police and other literature recovered from their possession in addition show that they were indulging in ‘terrorist acts’ and therefore they come within the meaning of the world ‘terrorist’. The appeal was dismissed.

SANJAY DUTT V. STATE, THROUGH CBI, BOMBAY: he had knowingly procured from the other accused three AK-56 Rifles, 25 land granades and one 9 mm Pistol and cartridges. By keeping them, had facilitated the terrorists acts – the bomb blasts of 12.3.1993 which killed a large number of persons and destroyed property worth lakhs of rupees.

The possession of arms and ammunition in a notified area is forbidden. The offence is punishable under Section 5 of TADA. Sanjay Dutt was in unauthorized possession of arms and ammunition. There could be punishment for five years and extend to life imprisonment according to the law. This was mainly due to the fact that the unauthorized possession of arms and ammunition attracted the statutory presumption that the weapon was meant to be used for terrorist purposes or a disruptive act. Sanjay Dutt was aware of

2 Ibid 1674
3 1994 5 SCC 540
the lethal and hazardous nature of the weapon. The burden of proof, to prove otherwise rested on the defendant. It was left to the Courts to see that the nature of the legislation and intention was not abused and misused. The object to the enactment was that the persons meant to be governed by its provisions should not escape the law. Accordingly “abuse had to be checked by constant vigilance and monitoring of cases”.

Mr. Sanjay Dutt on the other hand contended that the sole AK 56 found in his possession was for personal defence in the light of the threats received by his father and sister.

According to the judgement, with the enactment of TADA, Parliament had thought it necessary to deal with “terrorists, disruptionists and their associates or even those reasonably suspected of such association”. Further the Supreme Court was of the opinion that he was entitled to be dealt with under general criminal law as Section 5 of TADA did not apply in the present case”. The accused is entitled to prove that his unauthorized possession of such arms and ammunition was wholly unrelated to any terrorist or disruptive activity.

In the said circumstances the Supreme Court interpreted the necessary ingredients to attract Section 5 and also interpreted the intention of the
legislature when enacting this legislation. However this amply illustrates the ambiguity of the law and the difficulties faced by the prosecutors in getting a conviction from the Courts.

**IN SALIM AKHTAR VS. STATE OF UTTAR PRADESH**\(^{24}\) once again a conviction under Section 5 of TADA was brought before the Supreme Court. The police recovered a polythene bag containing a pistol, cartridges a bomb and RDX was recovered. However the recovery was from an open place accessible to all, at the instance of the accused. The seized articles were not sealed. As the place was accessible to all it, could not be accepted that the accused was in exclusive possession of the arms and equipment. Referring the ratio decidendi of the Sanjay Dutt case that the prosecution was required to prove that the accused was in conscious possession, unauthorisedly in a notified area.

This principle was also reiterated in **KHUDESWAR DUTTA V. STATE OF ASSAM**\(^{25}\). "Mere knowledge of the accused that incriminating articles were kept at a certain place does not amount to conscious possession and conviction Under Section 5 of TADA was set aside". Hence the conviction against the appellant was set aside.

\(^{24}\) (2003) 5 SCC 499
\(^{25}\) (1998) 4 SCC 492
In a landmark case the role of government was questioned in bringing about an enactment to deal with terrorism. In this case the Supreme Court analysed the penal and procedural provisions of the law in order to combat terrorism and uphold the survival of democratic polity, KARTAR SINGH VS. STATE OF PUNJAB, which was decided in 1994 looked into many aspects regarding its constitutional validity.

The Supreme Court in the course of this case decided that the TADA was within the legislative competence of India and was within the ambit of Entry 1, List 1, that is defence of India. The Court stated that terrorist or disruptive activity is criminal in content, reach and effect. But the Centre and State are empowered to legislate. Conceptually terrorism and public order are different in meaning and intent. ‘Terrorism is a new crime for more serious in nature, more graver in impact and highly dangerous”. Whereas “one pertains to law and order problem, the other may be political in nature coupled with the unjustifiable use of force threatening the security and integrity of the State”.

This case is also well known for enunciating the role of the police in the implementation of law and order in society. The prospect of upholding of human rights even as a part of a democratic society is a necessity of any law enforcing authority. The Court maintains and upholds the inalienable rights of
the citizens. The protection of human rights enjoyed by the citizens are the quintessence of two thousand years of human struggle. Mere possession of arms is insufficient to prove terrorist activity. It is necessary to show that the person intended to use them for terrorist or disruptive activity. Art 21 of the Constitution protects the right of every person.

The Supreme Court looked into the provision of three acts.


It made an in dept examination of the nature and scope of these acts. “The recent events occurring in the world necessitated such legislative measures, ..... in many parts of the world terrorism and disruption are spear heading for one reason or another and resultantly great leaders have been assassinated by suicide bombers and many dastardly murders have been committed”. It was noted that many youth were attracted by extremist ideology and indulged in serious acts of terrorism. This lead to the creation of an “embryonic imbalance and nervous disorder in society”. This posed serious law and order problems in international society. Therefore there was a need to strengthen vigilance and control the activities of militant terrorists in order to protect the community. India is no exception to this world wide
terrorism. This disruption and repression was seriously affecting the security of the nation and the lives of ordinary citizens. Brutal atrocities have shocked the entire nation. Officials of the security forces including the BSF were mercilessly gunned down.

Dwelling on the legality of the enactment the Supreme court stated “in order to combat and cope with such activities effectively, it had become necessary to take appropriate legal steps effectively and expeditiously so that the alarming increase of these activities which are a matter of serious concern could be prevented and severely dealt with, “terrorism poses a serious threat to the sovereignty and integrity of the country and creates insecurity in the minds of the public. In such circumstances ordinary criminal law cannot deal with the situation adequately and effectively. Therefore the government was compelled to enact legislation to deal with the peril of preempting terrorism. It was also brought about to deal with groups who aided, abetted and fomented terrorism by giving financial support and weaponry. It was necessary to adopt a multi-dimensional approach to the problem because these criminals know no territorial limits.

The law must balance the interests of society with the rights of the individual. Terrorism eroded the security of state. Because of its
transnational nature. Judicial notice was taken of the training camps across the border which provided training and indoctrination to the misguided youth.

The Supreme Court considered all aspects of procedural and substantive law including, recording of evidence, non-disclosure of identity of witness whose life may be in danger, recording of confession, release on bail and disruption of territorial sovereignty and integrity of the country.

In such circumstances the government could make provisions for combating the menace of terrorism by inter alia providing deterrent punishment for terrorists and disruptive activities.

STATE OF GUJARAT V. MOHAMED ATIK AND OTHERS²⁶

A public prosecutor moved in the trial court for permission to use a confessional statement recorded from an accused during investigation of another crime, but the trial judge disallowed the motion on the premise that unless the confession was recorded during the investigation of the very offence under trial it cannot be used in evidence of that case. The order thus passed by the trial court was challenged by the State of Gujarat by a special leave petition.

⁶ AIR 1998 SC 1686
The three respondents were accused in some cases registered by different police stations of Gujarat State following certain instances of bomb blasts at different places. It was revealed by the investigations that those instances were the aftermath of conspiracies hatched by conspirators operating in different areas. Hence offences were registered at different police stations and different investigating agencies commenced investigation in separate areas.

The fourth respondent was arrested in connection with a crime. During investigation of that case a Superintendent of Police had recorded a confessional statement from the said respondent under Section 15 of the TADA Act.

The second respondent was arrested in connection with crime and his confessional statement was also recorded in the same manner.

In the mean while police charge sheeted the cases, which were registered at two other police station against the 4th respondent and some others. The designated court at Ahmedabad began proceedings to try those cases.
While the trial was in progress, the public prosecutor in that court felt that the confessional statements recorded by the police during investigation of the case registered under Section 15 of the TADA have to be used as prosecution evidence since they related to events which are subject matter of the cases registered in Kalupur and Karanj Police Stations. The application filed by the public prosecutor for permission to use such confessional statements was opposed on the main ground that the confession made in another case cannot be used in the crime registered by another police station.

The question that came up was “whether the prosecution be permitted to introduce and prove the confessional statement of an accused, alleged to have been made during the investigation of another offence committed on a different date, during the trial of that accused in another crime”.

During the pendency of these special leave petitions, the 4th respondent died and the case against him was abated.

It was held that when there is no statutory inhibition for using such confession on the premise that it was not recorded during the investigation of the particular offence which is under trial there is no need (or) reason for the court to introduce a further letter against the admissibility of the confessional
statement. It often happens that a confessor would disclose many acts and events including different facts of his involvement in the preparation, attempt and commission of crimes including the acts of his co-participators therein. But to expel every other incriminating disclosure than those under investigation of a particular crime from the ambit of admissibility is not mandated by any provision of law.

A confession is usable under Section 15 of the TADA Act would not become unusable merely because the case is different (or) the crime is different. If the confession covers that different crime it would be a relevant item of evidence in the case in which that crime is under trial and it would then become admissible in the case.27

However Shri S.K. Dholakia, the Senior Counsel who argued for the appellant state contended that the confession made by the 4th respondent is relevant in evidence to prove the criminal conspiracy involving the remaining accused as the said confessional statement relates to the role played by such of the remaining accused in the crime. The Counsel said that since the maker of the confession died, the relevancy of the confessional statement would fall within the ambit of Section 32 (3) of the Evidence Act.

27 Ibid 1688
It was held that even if the 4th respondent was alive his confession could have been used as against another person only under the strict parameters fixed in the proviso to Section 15 (1) of the TADA Act. The proviso reads thus: "provided that co-accused, abettor (or) conspirator is charged and tried in the same case together with the accused". But the moment the maker of the confession dies before conclusion of trial, the above proviso sinks into disuse because then it would be impossible to try the two persons together.

The Supreme Court allowed those appeals by setting aside the impugned order and permitted the prosecution to make use of the confessional statement recorded under section 15 of the TADA against the accused who were then facing trial.

In PARAS RAM V. STATE OF HARYANA, where the accused was found in possession of a country made Pistol it was held that Section 5 of TADA was not applicable. Further the Supreme Court stated that the words "arms and ammunition should be read conjunctively.

1992 SOL No 125
In SULEMAN V. STATE OF DELHI\textsuperscript{29} the matter before the Court concerned the recovery of a pistol which was not in working condition and with a live cartridge. It held that the live cartridge was an explosive within the meaning of Section 5 thereby upholding the conviction of the accused.

In most of the TADA cases the Supreme Court analysed the matter thoroughly before upholding the conviction of the designated court.

In RAMBHAI NATHBHAI GANDHVI V. STATE OF GUJARAT\textsuperscript{30} the Supreme Court clearly enunciated that the designated Court had no jurisdiction to take cognizance of the offence under TADA without the procedural prior sanction having been obtained. The prosecuting agency had not obtained a valid sanction as they had not placed relevant factors before the Director General of Police. The prosecution proceedings were quashed by the Court.

The Supreme Court has also kept the interests of society and the security of State upper most when deciding the matters brought before it. In an earlier case, the State of Maharashtra had appealed against the grant of bail by the judge of a designated Court. It was alleged that he had behaved

\textsuperscript{29} 1999 SOL No.221
\textsuperscript{30} 1997 SOL No.167, Sec. 20-A(2), 3, 4 and 5 should have been taken seriously by the Police. Also in Mohammad Yunus Vs. State of Gujrat.
illegally at the proceedings. Accordingly the bail was cancelled. It held that to
grant bail merely because the accused was a member of a big political
organization and his freedom could not be curtailed was incorrect and in error.
The merits of the case should have been considered.

The Supreme Court is the watchdog of the Indian constitution. The
scope of legislation has often been laid down by the Court. When special
provisions introducing stringent provisions and punishment are introduced, the
efficacy of the legislation is tested in Courts of Law. The appraisal of
evidence, and the rights of the individual are balanced with a legal frame work
and interpreted by the judiciary. In one of the most well known cases that
came up before the Court the provisions of TADA were clearly enunciated

(State of Tamil Nadu through Superintendent of Police
CBI / SIT Vs. Nalini and others.

With

T. Suthetiraja and Others Vs. State by DSP / CBI / SIT / Chennai

With

P. Ravichandran and others V. State through
DSP / CBI / SIT / Chennai

With

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Robert Payas and others V. State by DSP / CBI / SIT /Chennai

With

S. Shanmugavadivelu and others V. State by DSP /CBI / SIT, Chennai

With

S. NALINI AND OTHERS V. STATE DSP / CBI /SIT /CHENNAI

At Sriperumbadur – Rajiv Gandhi (Former PM) was assassinated along with eighteen others. The designated Court held that this was the result of a conspiracy which was successfully accomplished. This was because of India had sent forces to Sri Lanka against the LTTE. This angered some members of the Central Committee of the LTTE.

The arguments advanced stated that this was a terrorist act with the object to overawe the Government. However in order to prove the intention ‘Mens sea’ it was necessary to prove that the act was,

1) To overawe the government.
2) Strike terror in the people or any section of society.
3) Alienate a section of the people,
4) Adversely affect the harmony of society.

32 By a human bomb in May 1991
Further no lethal weapons, bombs, or chemicals and toxic substances were used. Thus in the assassination of the former Prime Minister the charges were framed confining itself to the acts that were evident and not any of the above mentioned. Hence offences under Section 3, 4 and 5 of TADA were not sustainable. There was no evidence to suggest that it was a conspiracy to overawe the government.

The act of killing and the intention to kill the former Prime Minister resulted in the death of eighteen others, which in all likelihood were casualties of the act and explosion. There was no intention to strike terror amongst any section of society.

Thus on examining the entire matter no terrorist act or disruptive activity was said to have occurred. Hence, due to the lack of evidence, the charges could not be sustained. In the light of the above, the Supreme Court came to a decision that the provisions of general criminal law were infringed and not TADA.

As the significance of the serious nature of this crime was considered, the Government felt that fresh legislation should be enacted to cover the gravity of the offences for the future. The NHRC also opined that TADA has
lost its efficacy. In the light of the above, the Government later enacted the

KALPANATH RAI V. STATE (THROUGH CBI) WITH OTHERS¹

Twelve persons were arraigned before the designated Court, and ten
were convicted for different offences. Some of them were said to be members
of the Dawood Inbrahım Gang. Three persons including former Minister
Kalprath Rai were found to have harboured hardcore terrorists.

The background of these twelve are that they had links with three
separate incidents of terrorism - Vadrai incident, the Bombay blasts of
12.03.1993 where many died and others were seriously injured and the third
being the J.J. Shootout case.

The Supreme Court laid down, that the accused cannot be convicted
simply because he was a terrorist. For purposes of conviction under Section
3(5) of TADA he should belong to a terrorist gang, which committed terrorist
acts subsequent to 23.5.1993. If they have not committed any terrorist acts
after the date, then the conviction cannot be sustained.

¹ 1997 sol No.208.
Harbouring a terrorist without knowing that the person was a terrorist in no offence under Section 3 (1) Thus, Kalpnath Rai was acquitted of the charges. Conviction with regard to the others was upheld.

In this case the meaning of terrorist was explained. Also other procedures were looked into. The Supreme Court was of the view that the designated court had a larger duty to take care of such details.

In PRASAD RAMKANT KHADE V. STATE OF MAHARASHTRA the appellant along with others was sentenced for 10 years imprisonment and fine of Rs.1,000/- under TADA Sec. 3 (5), 5 and 6.

Criminal Gangs operated in Mumbai, indulged in extortion, murder and land grabbing. They also killed members of rival gangs, one led by Arun Gawali and the other of Dawood Ibrahim. Weapons hand grenades and detonators were seized from the accused.

The accused later made a voluntary statement to the Police which was recorded. He gave various details and the police acting on it seized AK 56 rifles and other ammunition from a safe house. Later the appellant denied the

34 AIR 2000 SC 138.
35 In the process some were chased by the mob and had to be hospitalized. Some were killed there in the JJ Hospital shootout case.
charge that he had made such a statement. The prosecution rested their case on the disclosure made by the appellant.

This disclosure was challenged. Also the rifle found could not be linked to the appellants activities.

Various other contentions were also taken up before the Supreme Court as to actual possession of the weapon and other incriminating articles. Also the articles seized was not at his instance.

The Supreme Court after a careful perusal of the case, dismissed the criminal appeal as there was no merit in the matter.

GHULAM NABI WAR AND ANOTHER V. STATE OF NCT OF DELHI

The Police in Delhi on receipt of secret information, that members of the Muslim Mujahiddin were hiding somewhere in South Delhi with plans of terrorist attacks in the City, raided the house in question. The accused and another were found inside the said premises. During search operations a bag containing RDX, detonators / cash, fax receipts and three Photostat copies written in Urdu were also recovered. The prosecution claimed that this was a formula to make a bomb. Later the accused were charged with offences under

36 (2000) 9 SCC 13
37 A terrorist organization of Jammu & Kashmir
TADA, IPC and the Explosive Substances Act. The accused was convicted of the offences and sentenced to eight years imprisonment.

Ghulam Nabi had already spent six and a half years in jail and taking into consideration his education, good family background, his age etc, his sentence was reduced to that which he had already undergone.

This illustrates the view of the judiciary is giving the accused and opportunity to get back into the main stream and lead a normal life.

The Supreme Court, viewed these special and stringent provisions of law, with seriousness. In order to apply the provisions of TADA, prior approval under Sec. 20A is a pre-requisite where the facts clearly indicate that prior permission was not granted, the courts have carefully considered the appeal, and given relief to the appellant. In Mohammad Yunus Vs. State of Gujrat\(^\text{38}\), the Supreme Court stated that as “the mandatory provisions of Section 20A (1) of TADA has not be complied with and a charge under the provisions of Section 3 and 5 cannot be sustained in the criminal case”.

\(^{38}\) 1997 SOL No.203
BABU KUTTAN R. PILLAI AND ANOTHER V. STATE OF MAHARASHTRA\(^39\)

The city of Mumbai is a commercially important City where there is substantial wealth from trade and commerce. Over the years organized crime has increased with gangs targeting developers, hoteliers and other businessman by extorting money.\(^40\) They originally asked for Rs. 10 lakhs, but later settled for 5 lakhs, from M/s. Kalpataru Constructions Company engaged in developing a property at Pali Hill.

Later on agreement to pay, a meeting was fixed. Meanwhile the police was informed. The accused were surrounded and the Police apprehended them. Later a case was filed under Section 3 of TADA. The trial judge convicted two under ordinary criminal law and acquitted the five others. The two accused who were sentenced approached the Supreme Court in appeal. It was held that there was no illegality in the sentencing of the trial judge and dismissed the appeal.

\(^{39}\) (2001) 9 SCC 409 Seven Persons faced trial.
\(^{40}\) Also known as “Phandani” or protected money.
SAN PAL SINGH V. STATE OF DELHI.\textsuperscript{41}

In 1991, two police officials and constables noticed a suspicious looking person who alighted from a vehicle. He was stopped and searched. A country made pistol was recovered from him and also two cartridges. He was later arrested and charged under TADA. The designated sentenced him.

On appeal to the Supreme Court, it was argued that his conviction was on the basis of the statements of the two police officials and that there were no public witnesses. The appellant also stated that such witnesses were available but not association with the search. However, had no public witness been available it was a different matter.

The Supreme Court maintained that it was unsafe to maintain the conviction of the appellant and acquitted him.

SIMRANJIT SINGH MANN V. UNION OF INDIA\textsuperscript{42}

In this case the constitutionality of the Prevention of Terrorism Act was discussed. The Punjab and Haryana High Court referred to the situation the country was facing regarding terrorism. It observed that parts of the country

\textsuperscript{41} AIR 1999, SC 49 The same was held in Narsi Vs. State of Haryana AIR 1999 SC 234.
\textsuperscript{42} 2002 Cr. LJ 3368
“continued to remain disturbed for a long time”. This situation poses serious concern for both citizen and society. In such a situation the country requires a “permanent anti-terrorist law”.

Addressing the issue of constitutionality of POTA the Court stated “that the terrorist causes a terrible trauma to the innocent. His acts pose a threat to the human society”, such persons “who threaten the integrity, security or sovereignty of India or strikes terror in the people . . . . cannot complain of discrimination when he is treated differently from another who commits a breach of law under totally different circumstances.

In this enactment the right and liberty of individuals are completely protected as there is a complete procedure established for the judicial process ensuring fairness and impartiality on the part of the police. A perusal of the provisions of the enactment indicate the safeguards placed for the accused are clear and adequate. Procedure should not be arbitrary or oppressive thus following the letter of the law. The law must protect people and property in the prevailing circumstances that pose a threat to the integrity the innocent and punish the guilty. The existing laws were incapable of handling such situations and hence this enactment.

3 From the Report of Law Commission.
However, the words ‘terror’, ‘terrorist’ or ‘terrorism’ have not been defined. The use of a dictionary meaning has been suggested. The provisions of the Indian Penal Code do not cover terrorist acts or organized crimes. The justice delivery system had to be equipped to deal with heinous crimes.

It may be noted that various countries\(^44\) have gone through the same experiences and had enacted legislation to deal with and combat terrorism.

**KARAMJIT SINGH V. STATE (DELHI ADMINISTRATION)\(^45\)**

Karamjit Singh was a driver in the Delhi Police. On reliable information that he was involved in terrorist activities and that some of them stayed at his residence. Also that he had some explosive material. In a raid conducted at his residence, explosive materials, detonators and other equipment were found charges were framed under the Explosives Act and TADA. Later, during trial he stated that neither the quarters were his nor had he made a disclosure statement. Further he stated that the testimony of the police witness should not be relied upon on account of non-examination of a public witness.


\(^{45}\) 2003 5 SCC 291
The Supreme Court was of the opinion that when the incident took place in 1990 terrorism was at its peak and it was quite natural for members of the public to have avoided getting involved in a police operation for search or arrest of a person having links with terrorists.⁶

Therefore they rejected the contention that on account of the non-examination of a public witness, the testimony of a prosecution witness, in this case police personnel, should not be relied upon. Accordingly the appeal was dismissed.

JAMEEL AHMED AND ANOTHER ETC. V. STATE OF RAJASTHAN⁷

In an appeal to the Supreme Court the appellants alleged that the confession recorded under Section 15 of TADA cannot be solely relied upon, and the evidence needs to be corroborated. However the provisions of TADA are different from the common criminal law of the land.

A confession so made is admissible evidence against accused and co-accused, provided, it was voluntary and truthful. Further the Supreme Court specified that the confession is admissible in the trial of a co-accused of or offence committed and tried in the same case together with the accused

⁶ Ibid at 297
⁷ 2003 SOL Case No. 262
who makes the confession. The recording of the confession by a Police Officer is acceptable by the Court. It should be credible in nature so as to create confidence in the mind of the court to reply on such confession.

In SUKHWANT SINGH V. STATE THROUGH CBI⁸ the same contention was raised. Relying on the same judgement, the Supreme Court reiterated its rationale. Further it stated “a confession of a co-accused can be the basis of conviction of another accused so implicated in that confession.

In this matter the confessional statements of two other co-accused implicated the appellant, when all were tried together before the designated court. The Supreme Court felt that this was not a ground to reject the confessional statements of the co-accused, as the prosecution relied on them as evidence against designated court must find it acceptable. The prosecution had established the involvement of the appellant in the purchase of explosives and its transportation to Punjab.

On Dec. 13, 2001, terrorists attacked our Parliament in Delhi. Some were killed in the shootout with the police. The Supreme Court noted that despite the fact they had grown upon this land, they “had betrayed the very land which brought them up” Further “persons who help terrorists to enter

⁸ (2003) 8 SCC 90 the appellant had made no confessional statement.
India and carry out fidayeen attacks are as liable as the hardcore terrorists themselves”. They are enemies of mankind and they deserve no leniency”. Considering this the “rarest of the rare case where three accused persons should be given the death penalty instead of life imprisonment.

This was the first conviction under POTA with the sentence of death pronounced to the three two of them belonged to the Jaish-e-Mohamed.

In the case of Navjot Sandhu (alias Afsan Guru) a mild sentence of five years imprisonment was awarded.

The terrorists were also sentenced separately under criminal law. This was very seriously dealt with by the Special Judge who awarded the punishment as a deterrent to others.

STATE THROUGH SPECIAL CELL, NEW DELHI V. NAVJOT SANDHU AND OTHERS

On 13.12.2001 five terrorists attacked the Parliament and were shot dead in the encounter. During the course of investigation apart from arms and other equlplments, six SIM cards, Mobile Phone and slips of paper containing telephone numbers were recovered from the terrorists. Due to the exigency of

9 2003 6 SCC 641.
the situation, the policy were authorized to intercept messages. Later it was found on interception of conversation that the respondents were involved in the conspiracy. They were in contact with Ghazi Baba, a Pakistani National and Supreme Commander of the Jaish-e-Mohammed, which is a notified and banned terrorist organization under POTA. Later a strict regime of the POTA provisions were added to the charges. All documents were made available to the respondents.

They stated that the intercepted conversation should be excluded as evidence from the trial. The Special Judge dismissed the application on approaching the High Court in appeal, the order was set aside. The State then appealed to the Supreme Court. The Supreme Court stated that Section 34 of POTA has been circumvented. "the ends of justice did not require interference at this stage". These issues could have been raised during statutory appeal. The impugned order was set aside.

STATE OF GUJARAT V. SALIMBHAI ABDULGAFFAR SHAIKH

GODHRA TRAIN INCIDENT CASE – Powers of High court under Section 439 of Section 482 Criminal Procedure Code. In the granting of bail its

50 Admissibility of evidence was an important issue.
51 2003 SOL No. 527 An inquiry is being instituted as to the origin of fire on the train at the instance of the Minister for Railways.
legality was questioned. It was held that the jurisdiction of Special Court should be invoked first. It is only thereafter an appeal against Special Court’s Order refusing bail with lie under Section 34 before a Division Bench of High Court. In view of the said specific provision under section it was 34 (4) held that the High Court cannot exercise powers available under section 439 of section 482 Criminal procedure code.

In Godhra Train incident case, the accused respondents were charged in respect of various offences under IPC, Railway Act, Prevention of Damage to Public Property Act and Bombay Police Act. Their bail applications were rejected because Section 3(2) and (3) and Section 4 of the POTA to the main charge sheet was added. Before the High Court the prosecution pleaded that the respondents should first approach the Special Court for grant of bail under POTA and they could approach High Court only after the decision on the said matter. It was submitted that in view of the specific provisions of POTA, the learned Single Judge, who was seized of the matter had no jurisdiction to hear the bail application. However, High Court allowed all the bail applications exercising powers under section 439 read with Section 482 Criminal Procedure Code.
Setting aside the order passed by High Court and allowing the appeals it was held under Section 34 (4) of POTA, the appeal can lie only against an order of Special Court. Hence unless there is an order of the Special Court, refusing bail, the accused will have no right to file an appeal before the High Court praying for grant of bail to them. Existence of an order of the Special Court is therefore, Sine qua non for approaching the High Court.

In the present case, the respondents did not choose to apply for bail before Special Court for offences under POTA and consequently, there was no order or refusal of bail for offences under the said Act. The learned Single Judge exercising powers under Section 439 Read With Section 482 Criminal Procedure Code granted them bail. The order of the High Court is clearly without jurisdiction as under the scheme of the Act the accused can only file an appeal against an order of refusal of bail passed by the Special Court before a Division Bench of High Court and therefore the order under challenge cannot be sustained and has to be set aside. Even on merits the order of High Court is far from satisfactory.

In July 2002, Vaiko, leader of the MDMK and eight others were arrested under POTA. This was mainly because of his speech he had made at a rally in Tirumangalam. He made pro-LTTE remarks which lead the
Government to take his remarks seriously. After the assassination of Rajiv Gandhi the Central Government had banned the LTTE. Also the LTTE was categorized as a “terrorist organization” under POTA.

Vaiko and others were arrested under Sections 21(2) and 21(3) of POTA, Section 13 (1) (a) of the Unlawful Activities (Prevention) Act and Sections 109 and 120B of the Indian Penal Code.

The Government of (Tamil Nadu) Chennai was of the view that the speech of Vaiko was in “support of a terrorist organization” and that his address encouraged support” for the LTTE. His words as a politician could inspire a number of people. He was charge sheeted under POTA.

Vaiko spent a considerable time in Jail. He was released from Jail in early 2004 on the 8th April this year, the Central POTA Review Committee looked into the arrest of the MDMK leader. The Review Committee stated that their speeches do not form a case under POTA” as applied by the Government of Tamil Nadu. There was nothing to support that Mr. Vaiko was at any time “involved in acts of terrorism”.

52 The Three Member Committee is headed by Justice Arun B. Saharya.
According to Vaiko the ‘voicing of support for the Tamil Elam” was no offence in a democratic policy by the setting up of a review committee the Government upheld democratic principles of law and justice in India.

The Supreme Court in recent times has come down heavily on terrorism stating that “Violence and Crime Constituted a threat to an established order and are a revolt against a vicilised and orderly society” calling for steps to deal with terrorism, the Supreme court has said, it is a “deliberate and systematic use of coercive intimidation”.

The lack of a proper legal definition of terrorism has lead to the present problem and is a major obstacle to meaningful national and international counter measures. Even in the U.S. many definition are used in different context to explain terrorism.54

Judicial attitudes towards terrorist activities have been important in laying down the logic and rationale of deciding cases and interpreting anti-terrorist legislation. Common criminal laws have also been relied upon by the law enforcement agencies when preparing the prosecution. The Special Judges of the designated courts had to sift through the evidence presented by both sides to do justice to each case.

54 The Hindu, April 7, 2004.
Human rights and the rights of the accused have been given importance in deciding issues. The matter could result in life or death for the offender. Hence an in-depth analysis of both the role of the law and the rule of law has to be applied in all matters that were raised before the Court by the offenders and State alike.

**JUDICIAL ATTITUDES TO TERRORISM – FOREIGN GOVERNMENTS**

**COALITION OF CLERGY, LAWYERS AND PROFESSORS V. BUSH**

A coalition of Clery, lawyers and professors brought a claim on behalf of persons held involuntarily at Guantanamo Naval Air Base, Cuba.

A writ of habeas corpus on behalf of persons captured in Afghanistan by the Armed Forces of the United States were being held at a naval base in Cuba. The coalition alleged that the detainees were deprived of their liberty “without the due process of law”. They have neither been informed of the charges against them neither were they allowed to meet legal counsel.

55 The Supreme Court has been particular that there is our no arbitrariness in invoking these stringent provision against the accused. Another point that merits our attention is that India ratified the international Covenants on Civil and Political Rights and Economic, Social and Cultural Rights in March 1979. One of the reservations concerned Article 9 of the former Covenant. It was subject to preventive detention provision of Article 22 (3) to (7) of our Constitution.
Because of the tragedy of September 11, 2001 the United State Government took action against members of the Al-Qaeda and the Taliban. This was also done to prevent any future attacks of international terrorism. During successful military operations in Afghanistan many members of the Al-Qaeda and the Taliban were captured. Some detainees were transferred to Cuba. They languished in jails after being denied the right and assistance of legal counsel. The courts in the United States were not seized of the matter as they were denied access to file writ petitions.

However it was held that the coalition failed to demonstrate any relationship with the detainees. It lacked 'next friend relationship' to being a habeas petition on their behalf. In regard to the rights of the detainees, it upheld the same to approach the courts.

In KHALED A.F. AL ODAH ET AL V. UNITED STATES OF AMERICA the complaint was brought on behalf of twelve detainees by the fathers and brothers of the twelve Kuwaiti nationals detained in Cuba. They brought about three actions questioning the legality of their confinement at a military camp in Cuba.

Ibid. at 408
Upholding the order of the District Court that their appeal was beyond the jurisdiction of the federal courts, the case was dismissed for lack of jurisdiction.

In Hamdi V. Rumsfeld, the father of Hamdi filed a petition that as an American Citizen he enjoyed protection of the Constitution. Hamdi was detailed at Norfolk, Virginia without any charges and without being allowed the right to legal counsel. The State felt that Hamdi was an enemy combatant, taken into custody in Afghanistan, a zone of active military operations.

An American Court recognized the right of the government to detain persons during hostilities. These cases raised an important issue before the Courts – i.e., the role of the Courts in times of war – The safeguards guaranteed to ordinary citizens do not translate into the arena of armed conflict. U.S. Law and the Geneva Conventions were also looked into.

The Court's held the Hamdi was held in accordance with the constitution and its authorization for use of force due to the Al-Qaeda attack and therefore he was not entitled to any relief. When a nation comes under attack then the administration has at its disposal wide powers including

*superscript 58* this case was decided in 2003.
detention without assistance of counsel. In so far as terrorism is concerned most countries take a serious view of such acts.

In the Pinochet case the former President of Chile, General Augusto Pinochet was arrested in the U.K. Chile asked for his extradition to face many charges including the crime of terrorism when he was in power. However, during proceedings in the British Courts had to release him on grounds of health. Later he was allowed to return to Chile.

THE BROGAN CASE

Terrorism represents a creeping threat to western European societies. It aims at the very heart of democratic institutions. In most cases its immediate impact on the average individual is not considered sufficient, in Western Europe, to justify the called for in cases of war or full-fledged internal conflict, would be considered as imposing too heavy a limitation on individual rights and freedoms with the risk of playing the terrorists game.

Under the European Convention of Human Rights (the Convention) states have the choice between suspending of certain rights and freedoms outright, pursuant to Article 15(4) and placing a more elastic interpretation on

59 42 ILM 884 2003 p 884
some of its provisions in an attempt to keep with in the Convention's boundaries. However, the question of compatibility with the Convention is doubtful. In 1957, the British parliament enacted the Prevention of Terrorism (Temporary Provisions) Act 7 with the aim of countering terrorism more effectively. In September and October 1984, four individuals- suspected of being members of the provisional IRA-were arrested under section 12 of this Act and were taken to detention centres. There they were interrogated and then released without being charged, after 5 days and 11 hours, 6 days and 16.5 hours, 4 days and 6 hours, and 4 days and 11 hours respectively, under Section 12, the police were entitled to arrest any persons suspected of terrorist-related offences, detain him or her for a maximum of 48 hours, and, if desired, ask the competent Secretary of State for an extension of the 48 hour time limit; the Secretary is empowered to grant a maximum of five additional days granted an extension in this case. The prolonged detention was therefore legal under British legislation.

The four persons who had been subjected to prolonged detention filed a complaint with the European Commission of Human Rights alleging that Britain had violated several paragraphs of Article 5 of the Convention, among these para 3, because, after their arrest, they had not been taken promptly before a judge (or released). 10. The European Commission of Human Rights
(the commission), the first international body to review the case, maintained that only the two longest detentions contravened para 3. The European Court of Human Rights (the court), however, held that all four cases involved a violation of Article 5 of the convention.

If it is not disputed that a longer pre-trial detention may often be necessary in terrorist cases, Attention must be drawn to the individuals who may authorize the extensions. This is a rather delicate question because it entails a judgment on the different procedural systems of Member States. The Convention clearly requires that the authority entitled to remand the arrestee in custody must have “judicial power.” This provision was further clarified in the Schiesser case where the Court stated that the authority must” be independent of the executive and the parties. The 1984 Prevention of Terrorism Act, however, provides that the authorization to extend detention beyond 48 hours be given by the Secretary of State, a member of the executive.

BRANNIGAN AND Mc BRIDE V. UNITED KINGDOM

Brannigan (B) and McBride (M) were arrested on suspicion of involvement in terrorism under a law which allowed detention for up to seven

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days, with any period after the first two days being authorized by a
government minister. They were kept in custody forever six and four days
respectively and during their detention they were repeatedly interrogated and
denied access to reading and writing material, as well as radio and television,
but they were visited by their solicitors (in B's case forty-eight hours after his
arrest) and were seen by doctors. B and M were released without charge. At
the time of their arrest derogation under Article 5, announced in Parliament,
was in force with respect to the power under which they were detained.
Although the government had indicated when making the derogation that it
would examine whether a judicial process could be introduced, it later stated
that this had not proved possible. The lawfulness and reasonableness of the
initial arrest and subsequent extensions in the detention of suspected terrorists
could be reviewed through an application for habeas corpus but B and M had
not sought this remedy. They complained about the failure to bring them
promptly before a judge, as well as the lack of an enforceable right to
compensation and of an effective remedy.

The Court held (1) that the length of their detention without being
brought before a judge was inconsistent with Art 5(3) and, as there was no
enforceable right to compensation, Article 5(5) had also not been respected;
(2) that a public emergency existed at the relevant time to which the
derogation was a genuine response and it was not invalidated by the examination of whether greater conformity with ECHR obligations could be ensured; (3) that, having regard to the need for extended detention in investigation and prosecuting terrorist crime and the risk to the independence of the judiciary from involving them in this process, as well as their vulnerability to terrorist attack, the decision against judicial control of it did not exceed the margin of appreciation; (4) that habeas corpus, the right to consult a lawyer after forty eight hours, the right to inform a relative or friend about their detention and the right of access to a doctor, as well the review of the law’s detention; (5) that, as the government’s statement to parliament about the derogation was in keeping with the notion of an official proclamation, there was no basis for the view that it was inconsistent with the United Kingdom’s obligations under ICCPR Art 4

MURRAY V. UNITED KINGDOM

Murray (M) lived in a house together with her husband and their four children. Several weeks after two of her brothers had been convicted of offences connected with the purchase of weapons for a terrorist organisation, D (a female soldier) was told at an army briefing that M was suspected of

involvement in the collection of money for the purchase of arms for the terrorist organisation. D was instructed to go to M’s house, arrest her under a power given to the armed forces in respect of persons suspected of committing an offence (s.14 of the 1978 act) and bring her back to an army screening centre.

The Court held (1) that, as the object of questioning during detention under Article 5(1) (C) was to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest, facts which raise a suspicion need not be of the same level as those needed to justify a conviction or the bringing of a charge; (2) that the length of the deprivation of liberty may also be material to the level of suspicion required; (3) that, as the use of confidential information was essential in combating terrorism, credence could be attached to the existence of some reliable information grounding the suspicion against M; (4) that the evidence of the genuineness of the suspicion established in the civil action brought by M was material to its reasonableness and the line of questioning pursued by her interviewer also supported the conclusion that she was suspected of committing a specific offence; (5) that, having regard to the level of actual justification required at the stage of suspicion, the special exigencies of investigating terrorist crime and the foregoing considerations, there did exist
sufficient facts or information providing a plausible and objective basis for suspecting M even though the power of arrest was framed in essentially subjective terms; (6) that it did not matter that M was neither charged nor brought before a court but released after the interview as the purpose of an arrest must be considered independently from its achievement;

The Court adhered to its general approach that, when interpreting and applying the ECHR, account must be taken of the special nature of terrorist crime, the threat it poses to democratic society and the exigencies of dealing with it. In doing so it must also be conscious that attempts to remedy stormed terrorism can be as dangerous for democracy and the rule of law as the affliction itself;

AJURI V. IDF.COMMANDER IN WEST BANK

The Israeli Government is faced with the task of providing security to its citizen against attacks by suicide bombers and acts of violence by Palestine. The Government has used a variety of methods in furtherance of their objectives eg. demolition of houses, curfews, targeting such terrorists and preventive detention.

63 Case No. HCJ 7015 / 02 (2002) Israel L Rep. 1
In this case the Israel Defence Force (IDF) Commander in Judean a and Samaria had ordered three residents to live in the Gaza strip for two years in July 2002. The Supreme Court, sitting as the High Court of Justice discussed the legality of such orders. According to the petitioners, the provisions of the Fourth Geneva Convention, Relative to the Protection of Civilian Persons in Time of War was violated by this order. They expressly referred to Art 49 which prohibited mass forcible transfers and deportations from occupied territory by the occupying power. Also, reference was made to Art 78 which stated that the occupying power if it considered it imperative, could subject them to assigned residence for reasons of security.

In the opinion of the Court it was held that assignment of residence could be made only on evidence, which “shows clearly and convincingy that if the measure of assigned residence is not adopted, there is a reasonable possibility that he will present a real danger of harm to the security of the territory”. The court took notice of the fact that it had to ensure that the discretion of the military commander was within limits. The security of state had also to be looked into.
In two cases the court sustained the order of the IDF Commander. They were actively involved in terrorist activities and were responsible for the attack on a Bus Station in Tel Aviv in which five were killed. Also, working together they were responsible for the deaths of more than twenty Israelis.

The third was the brother of the two terrorists who had looked after them. However the evidence could not establish that any of the help given was in support of terrorist activities. Hence the Court set aside his order.

In circumstances when Israelis were being killed it was difficult to balance human rights with the security of State. The Israeli population was being terrorized and so were the Arabs suffering. In such cases the role of the Court became important as the final arbiter of justice.

It may be noted that the United States Government is reluctant to have tribunals set up, for separating prisoners of war from unlawful combatants in Afghanistan which is prescribed according to the Geneva Convention. Relative to the Treatment of Prisoners of War. Also it has excluded the civil courts from determining the correctness of certain military decisions.
The administration employs a wide range of options when dealing with terrorists. The most effective way to fight terrorism is to disrupt their plans and organisation. In such situations, constitutional protection is necessary e.g. Protection guaranteed under Part-III of the Indian Constitution. This framework sets the parameters within which the law enforcement agencies must operate. The judicial process upholds the liberty of the individual and safeguards the security of the state.
The Naxal mind and methods

Expanding Naxal network

esurgent Naxals up the ante