CHAPTER 5

LEGAL CONTROL OF TERRORISM - THE INDIAN EXPERIENCE

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5.1 Legislation to Combat Terrorism - the General Considerations

The legislative response to terrorism varies from country to country. In Australia, The Australian Security Intelligence Organisation Act, 1979 added terrorism to espionage, sabotage, and subversion as a security risk. New Zealand did the same through the amendment, in 1977 to the New Zealand, Security Intelligence Service Act, 1969. These measures may be quite ample where terrorism is no immediate threat, but would not be sufficient to contain the kind of terrorist movements, based on the ideology of anti-capitalism, that flourished in Italy, Japan, and the former West Germany, and would prove impotent today in India and Sri Lanka, countries beset by extremely violent secessionist or irredentist movements. ¹

Anti-terrorist legislation endows the state with powers not conferred under the normal laws of the land, and while such legislation may not necessarily be immune from judicial review, the judiciary itself is required to see that there be speedy prosecution of detained suspects. Special courts are established, as in India, Italy, Northern Ireland, and Sri Lanka, where the usual safeguards attendant upon the prosecution of suspects under the ordinary criminal laws of the land may be curtailed. Courts in India require strict compliance of the Indian Evidence Act, 1872 (as amended in 2002).² But anti-terrorist legislations may have their own reduced evidentiary

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² Ibid
bureaucrats in the Designated Courts, for example, TADA provisions for confessions and eyewitnesses. 3

Anti-terrorist legislation need not suspend habeas corpus and other fundamental rights promised in the constitution of a state. Normalisation of extraordinary legislation in India, was taken to task by a Human Right Committee set up under the International Covenant on Civil and Political Rights. The attorney-general of India was asked to explain why the National Security (Amendment) Act and the Terrorist and Disruptive Activities (Prevention) Act, both occasioned by emergency, had not been officially declared as emergency legislation in fulfillment of Article 4(1) of the International Covenant on Civil and Political Rights. Derogations, if any, must be approved by the Committee as specified by the Covenant. The above mentioned acts were derogations from the covenant, as they appeared to be, given that they curtailed the right of assembly and sanctioned preventive detention without the right to judicial review. But such derogations were not approved by the Committee as specified by the Covenant. History reveals that the Prevention of Terrorism (Temporary Provisions) Act of 1939, a measure was introduced by the United Kingdom Government for a period of two years to meet the threat of IRA terrorism.

3 Arunabha Bhournik, Democratic Responses to Terrorism: A Comparative Study of the United States, Israel, and India, Denver Journal of International Law and Policy, Spring, 2005, p.334
Notwithstanding the act's "temporary provisions", annual renewal kept taking place until 1954, inspite of the fact that IRA terrorism had declined substantially by 1940.4

5.2 Anti-terrorist Legislation in Democracies

Democracies face acute dilemmas in confronting acts of violence, falling under the rubric of terrorism. Overreaction on the part of the government bears the risk of alienating the population, damaging government legitimacy to a great extent. Simultaneously, if government, judiciary, police and military fail to prove capable of upholding the law and protecting life and property, then their credibility and authority get undermined. Concerted acts / threats of violence form a challenge, which demands steady and painstaking response,5

Anti-terrorist legislation, is easy to be put in place than to be removed. The Maintenance of Internal Security Act (MISA) was passed by the Indian Parliament on the grounds that it gave the government enhanced powers to deal with threats posed to national security owing to strained relations between India and Pakistan. It remained operative until 1978, nearly seven years after the termination of the war with Pakistan. 39th Amendment to the Constitution of India placed MISA in the 9th

4 Supra note 1, pp. 9-10
5 Judith Large, Democracy, Conflict and Human Security: Further Readings, p.140
Schedule to the Constitution, making it totally immune from any judicial review on the ground that it contravened the Fundamental Rights, guaranteed by the Constitution.6

Legislation is designed with one intent in mind, but very often it starts serving an altogether different end, and mostly it is more true for anti-terrorist legislation or other like legislation introduced in the name of 'national security'. MISA was allegedly far from curbing terrorist activity, and making India safe from its real and imagined foes. It was allegedly used by the then Prime Minister Mrs. Indira Gandhi to stifle all dissent (irrespective of their legitimacy) against her authoritarian rule. MISA made things worse, not for her purported enemies, but for her critics, as the two-year period of the emergency between 1975 and 1977 saw the suspension of fundamental constitutional rights in the country7

Laws are always subject to abuse, but laws intended to be employed against terrorists are notoriously susceptible of manipulation by functionaries of the state (army officers, policemen, bureaucrats, or jail wardens). Immunity from judicial scrutiny encourages the state functionaries to use anti-terrorist legislation in initiating their personal vendettas. The Terrorist and Disruptive Activities (Prevention) Act of 1985, otherwise known as TADA is a good example to cite. The Government of India has been facing violent opposition by armed militants advocating separatism. TADA

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6 Supra note 1, p.19
7 Ibid, p.20
has been applied in Gujarat, which is not threatened by any secessionist or terrorist movement, to crush legitimate, usually non-violent, political activities of students and opposition. As per records, the largest number of arrests under TADA have been made in Gujarat. Strange but true is that the Central Industrial Security Force (CISF), created and empowered by special legislation to protect major industrial undertakings from terrorist or otherwise violent attacks, has often been employed to suppress trade union activity. Facts reveal that 434 of the 52,998 people detained under TADA by the end of 1992 were convicted, ie. 0.81 percent conviction rate. Surprisingly, in the terrorism torn state Punjab, the conviction rate for TADA detenu is 0.37 percent.  

Another pointer to the normalisation of such legislation is the very manner in which the passage of anti-terrorist legislation has been secured in the purportedly democratic countries. The United Kingdom had enacted a major piece of anti-terrorist legislation - Prevention of Terrorism (Temporary Provisions) Act. The Bill was subjected to only two hours debate in the House of Commons and approved without a division. The Parliamentary response to such legislation in India is more ominous. The last two-year extension of TADA, in the late summer of 1993 was subjected to a mere 70 minutes of discussion in the Lok Sabha, with only eight

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8 ibid
9 ibid

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members (in a 542 member House) spoke on the piece of legislation and it was through.\textsuperscript{11} Normalisation of an anti-terrorist legislation may contribute in negative since the perils from which it is supposed to rescue the democratic nation may be fully offset by its hazards.\textsuperscript{12}

5.3 Anti-terrorist Legislation in India

The British implemented "national security" laws in the pre independent India to create political dissent within Indian society. Some "preventive detention" laws, implemented by them continue existing today also. They defended preventive detention on grounds of extreme threats to public order and national security and in numerous cases applied the same arbitrarily. The East India Company Act, 1784, itself provided for the detention of any person who was suspected of participating in any correspondence or activities prejudicial or dangerous to the peace and safety of British possessions and settlements in India.\textsuperscript{13}

Then came the "Regulation III of 1818", an extra-constitutional ordinance, opposed to all fundamental liberties. The Regulation provided for the indefinite confinement, for reasons of State, of individuals against whom there was no sufficient ground to

\textsuperscript{11} Supra note 1, p.20
\textsuperscript{12} Ibid, p.21
\textsuperscript{13} C. Raj Kumar, Human Rights Implications of National Security Laws in India: Combating Terrorism while Preserving Civil Liberties, Denver Journal of International Law and Policy, Spring, 2005, pp.198-199
institute any judicial proceeding. In the early part of the twentieth century Indian nationalists demanded for the withdrawal of the Regulation.\textsuperscript{14}

Preventive detention, in those days, was authorized by:

1. the Defence of India Acts of 1915 and 1939,
2. the Government of India Act of 1919,
3. the Rowlatt Act of 1919, and
4. the Bengal Criminal Law Amendment Act of 1925.

Provisions of these laws enabled the State to detain a person for six months without disclosing the grounds of such detention. Few safeguards plus wide discretionary powers to government officials\textsuperscript{15} made these laws draconian.

The purported intent of the government in passing the Newspapers (Incitement to Offences) Act, the Explosives Substances Act, the Indian Press Act, the Criminal Tribes Act, and the Prevention of Seditious Meetings Act was to prevent terrorists from

1. calling public meetings,
2. publishing material to incite the people to revolt,
3. disseminating revolutionary literature, and so forth.

\textsuperscript{14} Supra note 5, p.16
\textsuperscript{15} Supra note 13
Even mild criticism of the British Government of India would make one a suspect. Thus it put an end to freedom of expression, the Indian press had been allowed. The Foreigners Ordinance of 1914 restricted the entry of foreigners into India. The 'foreign hand' theory, to account for the rise of secessionist and communal movements in the country, owes its origins partially to this ordinance. In the same year, the Ingress into India Ordinance came, which allowed the government to indefinitely detain and compulsorily domicile suspects, while the Defence of India Act of 1915 allowed suspects to be tried by special tribunals, decisions of which were not subject to appeal. Regulation III also continued to be available for the indefinite detention of suspects. The Rowlatt Act provided for the trial of seditious crime by benches of three judges. The accused was denied the benefit of either preliminary commitment proceedings or the right of appeal, and the rules of obtaining and using evidence were relaxed. The Act provided for preventive detention without the levying of charges and searches without warrants.

The leaders of the freedom movement, themselves were victims of these draconian laws, intended to protect "national security". They understood the very need to ensure that guaranteed constitutional and fundamental rights would protect individuals from government excesses after independence. So, Granville Austin rightly pointed out that the Fundamental Rights and Directive Principles enshrined in

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16 Supra note 1, p.16
17 ibid, p.17
the Constitution of India had their deep roots in the struggle for independence and were included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India. \textsuperscript{18} but the colonial legacy could not be abandoned in its entirety in the first flush of freedom as we saw the retention of preventive detention. both in the Constitution of India (Art. 22), and in the form of a Preventive Detention Act (1950).\textsuperscript{19}

In the post independence period, India experienced numerous secessionist movements and terrorist activities, which occasioned forcible legislative response through the introduction of the following statutes:

1. the Armed Forces (Special Powers) Act, 1958
2. the Unlawful Activities (Prevention) Act (1967, amended in 2004)
3. the Maintenance of Internal Security Act, 1971 (MISA)
5. the Terrorist Affected Areas (Special Courts) Act, 1984
6. the Terrorist and Disruptive Activities (Prevention) Act (1985, amended in 1987)
7. the SAARC Convention (Suppression of Terrorism) Act, 1993
8. the Prevention of Terrorism Act (2002).\textsuperscript{20}

\textsuperscript{18} Supra note 13
\textsuperscript{19} Supra note 1, p.17
\textsuperscript{20} Of these Acts, the following Acts have already been repealed:
On September 11, 1958, the Armed Forces (Special Powers) Act was passed by the Parliament of India to enable certain special powers to be conferred upon the armed forces in disturbed areas in the states of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura. To combat terrorism extremities in some states, the Government of India employed the military. The Armed Forces (Assam and Manipur) Special Powers Act of 1958 allows the state governor of Assam and Manipur to declare all or part of the state a "Disturbed Area," wherein military officers get discretion to kill armed individuals or groups and to conduct searches and arrests without warrants. The Government of India later invoked variants of this law in Punjab and Chandigarh in 1983 and Jammu and Kashmir in 1990.

The Unlawful Activities (Prevention) Act received the assent of the President on 30th December, 1967. The object of this Act is to provide for the more effective prevention of certain unlawful activities of individuals and associations and for matters connected therewith, where "unlawful activity", in relation to an individual

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22 Chris Gagne, Pota: Lessons Learned From India’s Anti-Terror Act, Boston College Third World Law Journal, Winter, 2005, pp.267-68
23 The Armed Forces (Punjab and Chandigarh) Special Powers Act of 1983
or association, means any action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise) -

(i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession;

(ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India. 25

Originally the Act was extended to the whole of India, excepting Jammu and Kashmir. The Act came into force in the State of Jammu and Kashmir on 1.9.1969. It empowered the Central Government to prohibit the use of funds of an unlawful association, notified under section 3.

The Act provided penalty for

(1) being members of an unlawful association

(2) dealing with funds of an unlawful association

(3) dealing with funds of an unlawful association

(4) contravention of an order made in respect of notified place

25 The Unlawful Activities (Prevention) Act, 1967
The Act prescribed punishment for unlawful activities as follows:

(1) Whoever either takes part in or commits, or advocates abets, advises or incites the commission of any unlawful activity, shall be punishable with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

(2) Whoever, in any way, assists any unlawful activity of any association, declared unlawful under section 3, after the notification by which it has been so declared has become effective under sub-section (3) of that section, shall be punishable with imprisonment for a term which may extend to five years, or with fine, or with both.

Independent India enacted the maiden extraordinarily repressive legislation in the West Bengal (Prevention of Violent Activities) Act of 1970, to crush the Naxalite revolt. The very next year came the Maintenance of Internal Security Act, 1971 (MISA), originating in the atmosphere of mutual suspicion and hatred between India and Pakistan, war broke out between the two in 1971.26

The Terrorist Affected Areas (Special Courts) Act received the assent of the President on 31-8-1984. The object of this Act is to provide for the speedy trial of certain offences in terrorist affected areas and for matters connected therewith. It empowers the Central Government to declare by notification any area to be "terrorist

26 Supra 1, p.18
affected area" and constitute such area into a single judicial zone or into as many judicial zones as it may deem fit provided in its opinion the offences of the nature specified in the Schedule appended to that Act are being committed in any area by terrorists on such a scale and in such a manner that it is expedient for the purpose of coping with such terrorists to have recourse to the provisions of the Act. The notification issued should specify the period during which the area shall for the purpose of this Act be a "terrorist affected area". Where the Central Government is of the opinion that the terrorists had been committing offences of the nature specified in the Schedule on such a scale and in such a manner in that area from the date earlier than the date of issue of the notification, that it is expedient to commence the period specified in the notification from such earlier date, the period specified in the notification may commence from that date subject to the proviso thereto.²⁷

'Scheduled Offence' means offences under Sections 121, 121-A, 122 and 123 of the Indian Penal Code and Sections 4 and 5 of the Anti-Hijacking Act, 1982. The Central Government established judicial zones in Jullundur, Patiala, Ferozepur and Chandigarh but abolished them by Notification Nos. S.O. 692, S.O. 693, S.O. 694 and S.O. 695 dated 25th September 1985 and transferred the cases pending before these Courts to ordinary courts. Two additional courts were constituted by the Government of India for trial of hijacking cases and Golden Temple case at Ajmer.

and Jodhpur but these two courts were also abolished by the Government vide Notification Nos. S.O. 655(E) and S.O. 722(E) dated 24th August 1990 and 28th September 1993 respectively.\textsuperscript{28}

In the opinion of Mr. K.P.S. Gill, former Director General of Police of the State of Punjab in India, National security legislation is not just a definition of crimes or new patterns of criminal conduct and the prescription of penalties. It relates to the entire system, institutional structures and processes that are required to prevent and penalise such crimes, to preserve order, and secure the sphere of governance. A comprehensive set of counter-terrorism laws, as well as laws to combat organized crime be drafted and given a permanent place in our statute books. Gill's argument rests on particular state perceptions of threat, which are in turn primarily based upon law enforcement strategies, and does not consider the causes of terrorism or related threats. It is ironic also that there are consistent calls for more laws to protect Indian national security, when there is already a plethora of laws in India addressing protection of national security, including general crime prevention legislation.\textsuperscript{29}

The Constitution of India grants state and federal legislatures the power to enact laws providing for preventative detention.\textsuperscript{30} Both central and state governments incorporated preventative detention provisions -- albeit subject to certain

\begin{itemize}
  \item \textsuperscript{28} ibid
  \item \textsuperscript{29} Supra note 13, p.205
  \item \textsuperscript{30} India Constitution, Part. III, Art. 22(7), Pt. XXI, Art. 373
\end{itemize}
constitutional safeguards -- in several pieces of legislation. To combat gruesome terrorist violence in the State of Punjab, the central government passed the National Security Act (NSA) and TADA. Both the acts permitted preventative detentions under broadly defined conditions. In Jammu and Kashmir, the state government passed the Jammu and Kashmir Public Safety Act of 1978 (PSA), containing harsh preventative detention provisions. Several preventative detention laws have since expired, the NSA and PSA remain operative.  

'Terrorists and Disruptive Activities (Prevention) Act, 1985' (commonly known as 'TADA, 1985'). had been enacted with intended life span only of two years with the hope that the hazard of Terrorism would fade out. But it did not. The Legislature thus renewed the law in the form of 'Terrorist and Disruptive Activities (Prevention) Act, 1987' (commonly known as 'TADA 1987'). TADA, 1987 was initially enacted for limited period. But its life was extended from time to time, finally in 1993 so as to make it valid till 1995.

On 26th April, 1993, the SAARC Convention (Suppression of Terrorism) Act, 1993 was passed to give effect to the South Asian Association for Regional Cooperation Convention on Suppression of Terrorism and for matters connected therewith or

31 Supra note 22, pp.266-67  
32 Justice Y. K. Sabharwal, Chief Justice Of India, Meeting The Challenge Of Terrorism - Indian Model (Experiments In India), pp. 6-7, www.supremecourtofindia.nic.in/new_links/Terrorism%20paper.doc  
33 ibid, p.8
incidental thereto in compliance of the signing the Convention on the Suppression of Terrorism at Kathmandu on the 4th day of November, 1987 and ratification of the same.\textsuperscript{34}

The National Human Rights Commission (NHRC) in 1995 held the view that TADA should be removed from the statute book because it had no place in a democracy. TADA was allowed to lapse in 1995, following a nationwide uproar against its abuse by the law-enforcement authorities.\textsuperscript{35}

In its 173rd Report, the Law Commission of India\textsuperscript{36} mentioned that on the request of the Ministry of Home Affairs, Government of India to undertake a fresh examination of the issue of a suitable legislation for combating terrorism and other anti-national activities in view of the fact that security environment has changed drastically since 1972 (when the Law Commission had sent its 43rd Report on offences against the national security), with emphasis on the utmost urgency of the subject because the vacuum arising from the lapsing of the erstwhile Terrorist and Disruptive Activities (Prevention) Act, 1987 without arranging for any replacement by enacting any other law and also on being asked to take a holistic view on the need for a comprehensive anti-terrorism law in the country, the Commission had:

\textsuperscript{34} The SAARC Convention (Suppression of Terrorism) Act, 1993 No. 36 of 1993 [26th April, 1993]
\textsuperscript{35} V.Venkatesan, A terror of a Bill, Frontline, Volume 17 - Issue 16, August 5 - 18, 2000
\textsuperscript{36} Law Commission of India D.O. No.6(3)(53)/98-LC(LS), dated April 13, 2000

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1. circulated a working paper to all the concerned authorities, organisations and individuals for eliciting their views with respect to the proposals contained therein and also held two seminars for this purpose.

2. taken note of several points addressed by the speakers and after taking into consideration the several opinions expressed in these two seminars and the responses received.

3. taken into consideration the original Criminal Law Amendment Bill, 1995 introduced in Rajya Sabha, as also the Official Amendments proposed by the Ministry of Home Affairs.

The Report mentioned that the Commission had found a legislation to fight terrorism in India - a necessity today not just to subdue terrorism but also to arm the State to fight terrorism more effectively. The Commission recommended for various measures to combat terrorism, at the same time provided adequate safeguards designed to advance the human rights aspects and to prevent abuse of power. The Commission reported that it had thoroughly revised the Criminal Law Amendment Bill, as modified by the Law Commission.

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38 Supra note 36
India's Union Cabinet issued the Prevention of Terrorism Ordinance (POTO) in October 2001, claiming its action as a response to an upsurge of terrorist activities, intensification of cross border terrorism, and insurgent groups in different parts of the country. The state law enforcement was given sweeping powers to investigate, detain, and prosecute for a wide range of terrorist-related offenses. The ordinance targeted those who allegedly incited, supported, abetted, harbored, concealed, or benefited from the proceeds of terrorism. On December 13, 2001, terrorist attempted to attack the Indian parliament but failed. The Union Cabinet condemned the attack. Three months later, on Tuesday, March 26, 2002, for only the third time in over half a century, during a rare joint session (of the two Houses) of Parliament convened at the Prime Minister's request, the Prevention of Terrorism Bill was finally passed after a division — 425 in favour and 296 against and the temporary ordinance became the Prevention of Terrorism Act (POTA).

The list of persons detained and charged under POTO and later, POTA kept steadily growing till POTA got repealed. The arrests of MDMK leader and member of parliament Vaiko by the AIDMK government in Tamil Nadu, and Raghuraj Pratap Singh alias Raja Bhaiya's arrest by the Mayawati government in UP were labelled by

39 Joint Session Split Through Middle, The Telegraph, Tuesday, March 26, 2002
40 Radhika Ramaseshan, Atal Brawl Dwarfs Bill Battle, The Telegraph, Wednesday, March 26, 2002
41 Supra note 22, pp. 263-64
no other than various constituents of NDA government itself as politically motivated and epitomised the misuse of POTA.42

Under great pressure by the opposition, as well as NDA’s own allies DMK and MDMK, the deputy prime minister L K Advani, in a suo motu statement in the Lok Sabha on March 13, 2003 announced the setting up of a review committee under the provisions of section 60 of POTA, to check misuse of the act by looking primarily at the implementation of POTA43 to combat terrorism, not criminals.44 Accordingly a central review committee was constituted under the chairmanship of Justice Arun B Saharya, former Chief Justice of Punjab and Haryana High Court.45

Mulayam Singh government in Uttar Pradesh, decided to withdraw POTA in Raja Bhaiya’s case. The Supreme Court Bench, comprising Justice S. Rajendra Babu and Justice G.P. Mathur, issued notice on September 19, 2003 to the Uttar Pradesh Government on a writ petition, filed by the relatives of three residents of Pratapgarh district who had deposed as witnesses in certain murder cases against Raja Bhaiya, Uday Pratap Singh and Akshay Pratap Singh, challenging the decision of the Mulayam Singh Yadav Government to withdraw the charges under POTA against Raghbir Pratap Singh, alias Raja Bhaiya, MLA, asking the Government to state why

43 Review committee to check misuse of POTA, The Hindu, Friday, Mar 14, 2003, Front Page
44 Panel set to review Pota, India, The Statesman, March 14, 2003
45 Throw POTA out, Opinion Editorials, The Hindu, October 28, 2003
it was acting in a lackadaisical manner to invoke the POTA one day and withdraw it later.

Subsequently, in the midst of several complaints, some of which came from the review committee itself about the lack of cooperation from state governments, an ordinance was promulgated on October, to amend section 60 of POTA by inserting three new subsections. broadening its review powers by conferring it with quasi judicial powers to examine whether there is a prima facie case for proceeding against an accused under POTA. \(^\text{46}\) Legislative elections were held between April 20 and May 10, 2004 to constitute the 14th Loksabha (the lower house of the Indian legislature). United Progressive Alliance (UPA) came into power on May 22, 2004, replacing the NDA government. On September 17, 2004, the Union Cabinet announced repeal of the POTA and amendment of the Unlawful Activities (Prevention) Act, 1967. The Home Minister said that three aspects of POTA were Draconian in nature —

a. police confession,
b. stringent bail provisions and
c. the fact that the onus of proving innocence was on the accused.\(^\text{47}\)

On December 6, 2004, the Lok Sabha passed a bill to repeal the anti-terror law (POTA).\(^\text{48}\) The Unlawful Activities (Prevention) Act, 1967 was amended by enacting

\(^{46}\) Legal Correspondent, The Hindu, Saturday, Sep 20, 2003

the Unlawful Activities (Prevention) Amendment Act, 2004 on December 29, 2004\textsuperscript{49} to include some provisions of POTA.

5.4 Constitutionality of Indian Laws preventing Terrorism:

A. Armed Forces Special Powers Act, 1958 (AFSPA)

In the opinion of Human rights organizations, AFSPA gives law enforcement and military a "license to extra judicially execute innocent and suspected persons under the disguise of maintaining law and order" and despite the extraordinary power given to the armed forces and the police, AFSPA has "manifestly failed" in solving the problems caused by the insurgency and has further isolated the residents of the troubled region from the central government. There is hardly any substantive evidence that the increase in police powers has led to a decrease in the targeted problem - be it insurgency or incidents of terrorism.\textsuperscript{50}

AFSPA is a quintessential example of a government favoring the military response due to the decreased burden of procedural safeguards they encounter if they opt to employ the criminal justice system.\textsuperscript{51} The provisions of the Indian Constitution are as follows:

\begin{itemize}
  \item \textsuperscript{48} Anti-terror amendment, The Telegraph, December 07, 2004, front page
  \item \textsuperscript{49} Anti-terror amendment, The Telegraph, December 07, 2004, front page
  \item \textsuperscript{50} Manas Mohapatra, Learning Lessons From India: The Recent History Of Antiterrorist Legislation On The Subcontinent, Journal of Criminal Law & Criminology, Fall, 2004, p.327
  \item \textsuperscript{51} ibid, pp.327-28
\end{itemize}
When any person is not arrested or detained under any law providing for preventive detention:

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.\(^{52}\)

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.\(^{53}\)

When any person is arrested or detained under any law providing for preventive detention: No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention.\(^{54}\) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person

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\(^{52}\) Article 22(1), The Constitution of India

\(^{53}\) Article 22(2), The Constitution of India

\(^{54}\) Article 22(4), The Constitution of India
the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.55

Despite all these requirements, AFSPA allows security personnel to detain suspects for days and months at a time without ever bringing them in front of a magistrate. Section 4(c) allows a person to be arrested without a warrant on the suspicion that they are going to commit an offence. Neither the arresting forces are required to communicate the grounds of the arrest, nor any advisory board is empowered to review the arrests under AFSPA.

There are two distinct probabilities:
1. AFSPA is not preventive detention legislation: Then Articles 22(1) and 22(2) are to be complied with.

2. AFSPA is a preventive detention legislation: Then requirements under Articles 22(4) and 22(5) are to be complied with.

So, in both the cases, 'AFSPA' contravenes the constitutional rules.

India, a party66 to the International Covenant on Civil and Political Rights (ICCPR), 1966 is bound by the article 2(1)57 of the covenant. The declaration of disturbed area

55 Article 22(5), The Constitution of India
57 Article 2(1) of the International Covenant on Civil and Political Rights: Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
(for the purpose of AFSPA) by the union government has been arbitrary since de facto emergency had been impaired without formal promulgation. It has violated articles 4(2), 6(1) and 9 of the ICCPR and also human rights. Violation of human rights in form of Extrajudicial killing, Enforced disappearance, Illegal detention and harassment, Rape and sodomy and Torture in the North East region tantamounts to gross transgression of the human rights standards.

Section 4(a), (b), (c) and (d) make direct transgression upon articles 21 and 22 of the Constitution. The power to 'fire upon' to the extent of 'causing death' is given to even a non-commissioned officer on reasonable suspicion. So, the power to commit extra-

58 Article 4(2) of the International Covenant on Civil and Political Rights: No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
Article 6(1) of the International Covenant on Civil and Political Rights: Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
Article 9
1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

59 Committee on Human Rights Report (COHR) on Manipur and the NE region: Extrajudicial killing pp. 1-82
60 Committee on Human Rights Report (COHR) Enforced disappearance pp.83-84
61 Committee on Human Rights Report (COHR) Illegal detention and harassment p p.85
62 Committee on Human Rights Report (COHR) Rape and sodomy pp.86-89
63 Committee on Human Rights Report (COHR) Torture [p.90-104
judicial execution is not only arbitrary, it is unjust and unfair and nothing but legitimisation of outright extrajudicial murder.  

The Supreme Court disposed of the writ petition nos. 5328 of 1980, 550 of 1982 and 9229 and 9230 of 1982, which challenged the constitutionality of AFSPA, on November 27, 1997 only, taking indifferent stand on the extrajudicial execution of the North East People. Accepting a set of guidelines to be followed at the time of enforcing the law, the Supreme Court upheld the validity of the Armed Forces (Special Powers) Act, 1958, the repeal of was also recommended by the Chairman of the National Human Rights Commission in 1996. The constitutional bench, headed by Chief Justice, J. S Verma, in the judgment observed that the parliament could enact the impugned statute, under power conferred under article 248 read with list 1 entry 2, entry 97 and entry 2A, inserted after the 42nd Constitutional amendment. According to the People's Union for Democratic Rights, the court refused to go into the actual working of the Act and deemed it irrelevant for purposes of deciding its constitutionality.

B. The Terrorist Affected Areas (Special Courts) Act, 1984; Terrorist and Disruptive Activities (Prevention) Act, 1985 & 1987 [TADA]

In Kartar Singh v. State of Punjab and Kripa Shankar Rai v. The State of U.P. and Another, the constitutional validity of the three Acts in general and the various

65 Dr. Naorem Sanajaoba, AFSPA, 1958 - A Law Review
66 Dr. Naorem Sanajaoba, AFSPA, 1958 - A Law Review

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provisions of the Acts in particular, were challenged inter alia on the following grounds:

(1) the Central Legislature has no legislative competence to enact these legislations

(2) the impugned Acts or some of the provisions of these Acts are in contravention of or ostensibly in violation of any of the fundamental rights specified in Part III of the Constitution;

According to the petitioner, the Acts and the provisions thereto, which are in utter disregard and breach of humanitarian law and universal human rights, not only lack impartiality but also fail the basic test of justice and fairness which are well established and recognised principles of law.67

The Supreme Court held, inter alia,

(a) the Terrorist Affected Areas (Special Courts) Act, 1984, the Terrorist and Disruptive Activities (Prevention) Act, 1985 and the Terrorist and Disruptive Activities (Prevention) Act, 1987 fall within the legislative competence of Parliament in view of Article 248 read with Entry 97 of List I and could fall within the ambit of Entry 1 of List I68, namely, 'Defence of India.'


(b) the power vested on the Central Government to declare any area as 'terrorist affected area' within the terms of S. 3(1) of the Terrorist Affected Areas (Special Courts) Act, 1984 does not suffer from any invalidity;

(c) the contention that Sections 3 and 4 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 are liable to be struck down on the grounds that both the sections cover the acts which constitute offences under ordinary laws and that there is no guiding principle as to when a person is to be prosecuted under these sections, is not tenable;

(d) Section 8 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 is not violative of Articles 14 and 21 of the Constitution;

(e) challenging the validity of S. 9 on the ground of lack of legislative competence has no merit;

(f) Section 9(7) of the TADA Act is valid. At the same time, the Court suggested the Central Government and the State Governments to keep in mind, at the time of appointing a Judge or an Additional Judge to the Designated Court, that the Judge designate has sufficient tenure of service even at the initial stage of appointment so that no one may entertain any grievance for continuance of

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service of a Judge of the Designated Court after attainment of superannuation;\\n\\n(g) transfer of any case pending before a Designated Court in a State to any other Designated Court within that State or in other State, is only a statutory order and not a judicial order, if the order is granted by the Chief Justice of India on a motion moved in that behalf by the Attorney General. Section 11 (2) and (3) are not violative of Article 14 of the Constitution;\\n\\n(h) Section 15 of the TADA Act is neither violative of Article 14 nor of 21. The Central Government is suggested certain guidelines to be incorporated by appropriate amendments in the Act and the Rules made thereunder;\\n\\n(i) The challenge made to S. 16(1) does not require any consideration in view of the substitution of the newly introduced sub-section by Amendment Act 43 of 1994 giving discretion to the Designated Court either to hold or not to hold the proceedings in camera;\\n\\n(j) Sub-sections (2) and (3) of S. 16 are not liable to be struck down. The view of the Full Bench of the Punjab and Haryana High Court in Bimal Kaur (AIR 1988 Punj & Har 95) to ensure the purpose and object of cross-examination, is

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70 R. M. Sahai, J in Kartar Singh, Petitioner v. State of Punjab, 1994-(003)-SCC -0569 –SC, 1994-(100)-CRLJ -3139 –SC: no one should be appointed as designated court who has retired from service

upheld. The identity, names and addresses of the witnesses may be disclosed before the trial commences, but subject to an exception that the Court may decide not to disclose the identity and addresses of the witnesses especially of potential witnesses, whose life may be in danger, if identity is disclosed.

(k) The existing appeal provisions provided under S. 19 are not constitutionally invalid. The Parliament may devise a suitable mode of redress by making the necessary amendments in the appeal provisions;

(l) Sub-sections (3) and (4)(a) of S. 20 do not suffer from any infirmity on account of the inclusion of the Executive Magistrate and Special Executive Magistrate within the purview of Sections 164 and 167 of the Code of Criminal Procedure in respect of their application in relation to a case involving an offence punishable under the TADA Act or any rule made thereunder, so is Clause (a) of S. 15 of the Special Courts Act, 1984.

(m) Section 20(7) of the TADA Act excluding the application of S. 438 of the Code of Criminal Procedure in relation to any case under the Act and the Rules made thereunder, have not deprived the personal liberty of a person as enshrined in Art. 21 of the Constitution;

(n) The deletion of the application of S. 438 in the State of Uttar Pradesh by S. 9 of the Code of Criminal Procedure (U.P.) Amendment, 1976 does not offend either Article 14 of 19 or 21 of the Constitution and the State Legislature is
competent to delete that section, which is one of the matters enumerated in List III of the Seventh Schedule and such deletion is valid under Art. 254(2) of the Constitution;

(o) High Court has jurisdiction to entertain an application for bail under Art. 226 of the Constitution and pass orders either way, relating to the cases under the TADA Act of 1987, that power should be exercised only in rare and appropriate cases in extreme circumstances. But the judicial discipline and comity of Courts require that the High Courts should refrain from exercising the extraordinary jurisdiction in such matters.

(p) Section 22 of the TADA Act is struck down as being opposed to the fair and reasonable procedure enshrined in Art. 21 of the Constitution.

R. M. Sahai, J wanted to add, inter alia, the following:

(i) Section 5 can be invoked only when the prosecution is able to establish that there was some material on record to show that the arms and ammunition mentioned in the Section were likely to be used for any terrorist or disruptive activity or that they had been used as such.

(ii) as regards bail under Art. 226 of the Constitution, the High Courts being constitutionally obliged to ensure that any authority which exercises judicial and quasi-judicial powers in its jurisdiction functions within the framework of law is entitled to entertain the petition to determine if the proceedings were not an
abuse of process of Court. But while exercising discretion the court must not be oblivious of the sensitivity of the legislation and the social objective inherent in it and, therefore, should exercise it for the sake of justice in rare and exceptional cases the details of which cannot be fixed by any rigid formula.

(iii) A proviso could be added to Section 19 that where convictions are for offences other than Sections 3 and 4 of Act 28 of 1987 the accused may be entitled to file an appeal in the High Court itself and in case an appeal against conviction is filed by the Government in this Court then the appeal filed by the accused in the High Court should stand automatically transferred.

K. Ramaswamy, J. dissented to the majority view in Kartar Singh v. State of Punjab72, also regarding Constitutionality of the propriety in exercising the under Art. 226 by the High Court of the matters covered under the Act.


POTA was a measure introduced by the State to adopt twin-legged strategy,73 one dealing with the terrorism as a crime, and the other for steps that could be termed as preventive in nature. The constitutionality of POTA was challenged before the Supreme Court of India in People’s Union for Civil Liberties v. Union of India.74 As

74 People’s Union for Civil Liberties Vs. Union of India, AIR 2004 SC 456: 2003 (10) SCALE 967: (2004) 9 SCC 580
per the petitioner, the provisions POTA, in pith and substance, fall under Entry 1 (Public Order) of List II, where Parliament lacks legislative competence. Held by the Supreme Court, the impugned Act falls within the legislative competence of Parliament in view of Article 248 read with Entry 97 of List I. It could fall within the ambit of Entry 1 of List I, namely, Defence of India.

The challenge was on the ground of violation of the basic human rights as well. According to the Supreme Court, the protection and promotion of human rights under the rule of law is essential in the prevention of terrorism and there comes the role of law and court's responsibility. In the process of combating terrorism, human rights, if violated, will be self-defeating. Terrorism often thrives where human rights are violated and that adds to the need to strengthen action to combat such violation. The lack of hope for justice provides breeding grounds for terrorism. Terrorism itself is an assault on basic rights. The fight against terrorism must be respectful to the human rights. The Constitution of India laid down clear limitations on State actions within the context of the fight against terrorism. Court is required to maintain this delicate balance by protecting "core" human rights. Constitutional soundness of POTA needs to be judged by keeping these aspects in mind.75

Sections 4, 14, 18, 19, 20, 21, 22, 27, 30, 32 and 49 of POTA were also challenged.

75 ibid, p. 596
On S.4, the petitioners argued that since the knowledge element is absent the provision is bad in law. The Court holds that there exists a mental element in the word possession itself. The Court holds that there is no infirmity in Section 4.\footnote{ibid}

Section 14 was challenged, alleging that it gives unbridled powers to the investigating officer to compel any person to furnish any information if the investigating officer has reason to believe that such information will be useful or relevant to the purposes of the Act. The petitioners submitted that Section 14 is violative of Articles 14, 19, 20(3) and 21 of the Constitution. A journalist or a lawyer does not have a sacrosanct right to withhold information regarding crime under the guise of professional ethics. A lawyer cannot claim a right over professional communication beyond Section 126 of the Evidence Act. The section is only to allow the investigating officer to procure certain information that is necessary to proceed with further investigation. Section 14 was held valid by the Court.\footnote{ibid}

Section 18 was challenged alleging that Schedule u/s 18(1), naming some organisations as terrorist organizations is without any legislative declaration. The Act also has no provision for such declaration. So section 18(1) is unconstitutional and violative of Articles 14, 19(1)(a) and 19(1)(c) of the Constitution. And section 18(2) gives the Central Government unchecked and arbitrary powers to add to or remove...
from or amend the Schedule u/s 18(1). The rights guaranteed by Article 19(1)(c) is subject to restriction provided under Article 19(4) of the Constitution and the Court says that declaring organisations as terrorist organisations is intra vires Article 19(4). So the Court held Section 18 constitutionally valid.\(^78\)

Section 19 was challenged alleging delegation of excessive powers to the Central Government in the appointment of members to the Review Committee and the inadequate representation of judicial members would affect the decision making and consequently it may affect fair judicial scrutiny. U/s 60, the Review Committee Chairperson shall be a person who is or has been a Judge of a High Court. Mere presence of non-judicial members can not be treated as a ground for\(^79\) invalidation of Section 19. So the Court held Section 19 constitutionally valid.\(^80\)

Sections 20-22 were challenged mainly on the ground that mens rea for offences was not made a requirement and this was liable to misuse. The Court held the view that offence under sections 20 or 21 or 22 needed positive inference that a person had acted with intent of furthering or encouraging terrorist activity or facilitating its commission. So, these sections were limited only to the activities with the intent of encouraging or furthering or promoting or facilitating the commission of terrorist

\(^{78}\) ibid
\(^{79}\) Kartar Singh v. State of Punjab, 1994-(003)-SCC-0683, para 265
\(^{80}\) Supra note 69
activities and like that there could not be any misuse. With this clarification, the sections were held by the Court to be valid constitutionally.\textsuperscript{81}

Section 27 was challenged alleging that the section was in violation of Articles 14, 20(3), and 21 of the Constitution for the reason that

(a) no power had been left with the Court to decide whether the request for samples from a suspect person sought for by investigating office was reasonable or not.

(b) no power had been given to the Court to refuse the request of the investigating officer.

(c) It was not obligatory for the Court to record any reason while allowing the request and

(d) the section was a gross violation of Article 20(3) of the Constitution since it amounted to compel a person to give evidence against himself.

The Court did not find any blanket responsibility upon the Court to grant permission immediately upon the receipt of a request. On the contrary, the Court found granting permission well within the ambit of the Court's discretion. The discretionary power granted to the Court presupposed that the court would have to record its reasoning for allowing or refusing a request. The Court did not find violation of Article 20(3) sustainable. The Court also referred to section 91 of the CrPC which empowers a Criminal Court and also a police officer to order any person to produce a document or other thing in his possession for the purpose of any enquiry or trial. The Court also

\textsuperscript{81} ibid
stated that the samples within the meaning of section 27 formed an aid for further investigation and did not make any conclusive proof for conviction. The Court held Section 18 constitutionally valid.\textsuperscript{82}

Section 30 was challenged alleging that the section was in violation of the right to fair trial and principles of natural justice, guaranteed under Article 21 of the Constitution. Even during emergencies, rights under Articles 20 and 21 cannot be denied. The section was alleged to be in violation of the dictum in Kartar Singh's case as it did not contain the provision of disclosure of names and identities of witness before commencement of trial, whereas fair trial includes the right for the defence to ascertain the true identity of an accuser.

The Court clarified that this section only conferred discretion to the concerned Court to keep the identity of the witness secret if the life of such witness was in danger. The Court recalled the unpleasant reality that often witnesses do not come forward to depose before the court even in serious cases mainly due to fear of their life. This precarious situation creates challenges in the criminal justice administration in general and terrorism related cases in particular. The Court commented that a fair balance between the rights and interest of witness, rights of accused and larger public interest had been maintained in this section. Under this section anonymity of the witness would be maintained only if the Special Court got satisfied that life of

\textsuperscript{82} ibid
witness would be in jeopardy, if his/her identity got disclosed. The Supreme Court had endorsed similar procedure in Gurbachan Singh v. State of Bombay, 1952 SCR 737 at 743 : (AIR 1952 SC 221) This case was quoted with approval while deciding the constitutional validity of section 16 of TADA in Kartar Singh v. State of Punjab, 1994-(003)-SCC-0683, para 208.

The Court admitted that keeping secret the identity of witness, though in the larger interest of public, is a deviation from the usual mode of trial. In extraordinary circumstances this path may prove to be a compulsion to ensure the safety of individual witness. The Special Courts, after taking into account all the factual circumstances of individual cases would be required to forge appropriate methods to ensure the safety of individual witness in one hand and ensure fair trial. The Court held Section 30 constitutionally valid.83

Section 32 was challenged, claiming that there was no need to empower police to record confession since the accused had to be produced before the Magistrate within 48 hours and the Magistrate could record the confession. The petitioners were in doubt as to whether

(a) there was justification for extended time limit of 48 hours for producing the person before Magistrate

83 ibid
(b) the confession recorded by the police officer would have validity after the magistrate had recorded the fact of torture and had sent the accused for medical examination

(c) both the confession before the police officer as well as the confession before the Magistrate would form evidence

(d) the confession statement before the Magistrate could not be used as evidence for mechanically putting seal of approval on such statement.84

The Court noted that section 15 of TADA was similar to this section and was upheld by this Court in Kartar Singh's case, 1994-(003)-SCC at pages 664-683. All guidelines suggested by the Court in this case had been taken into account while enacting this section, namely section 32 in form of sections 32(3)-32(5). The accused got an opportunity to rethink over his confession. Magistrate's responsibility to record the statement and enquire about the torture and provision for subsequent medical examination made the provision safer. According to the Court, it is a settled position that if a confession is forcibly extracted, it is a nullity in law. The Court after commenting that judicial wisdom would surely prevail over irregularity, upheld the validity of this section.85

Section 49 was challenged, the main grievance being that u/s 49(7), a Court could grant bail only after getting satisfied that an accused was not guilty of committing such offence and that would be possible only after recording of evidence. Because of

84 ibid
85 ibid
the proviso to section 49(7), bail would be granted to the accused after minimum one year of detention.86

Section 49 of POTA was similar to section 20 of TADA, constitutional validity of which was upheld by the Court in Kartar Singh's case. The Court observed that by virtue of section 49(8), the powers under sections 49(6) and 49(7) pertaining to bail was in addition to and not in derogation to the powers under CrPC or any other law for the time being in force for granting of bail. The offences under POTA were much more complex than that of ordinary offences and that being so the investigating agencies might need the custody of the accused for a longer period. So, sections 49(6) and 49(7) were not unreasonable.87

Combined reading of Sections 49(6) and 49(7) reveals that the Public Prosecutor had to be given an opportunity of being heard before releasing the accused on bail. In case he opposed, the Court would have to be satisfied that the accused was not guilty of committing such offence. The Court also commented that there must be an accidental omission of the word ‘not’ in between the words ‘shall’ and ‘apply’, as otherwise the proviso would lead to absurdity. The Court did not find the additional conditions regarding bail unreasonable, so upheld the validity of section 49.88

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86 ibid
87 ibid
88 ibid
5.5 Lessons from India's Experience

A. Extra judicial application of AFSPA

Law enforcement and military may extra judicially execute innocent and suspected persons under the disguise of maintaining law and order, using AFSPA\(^89\) as a tool. After the indefinite fast undertaken by Ms. Irom Sharmila since 2001 demanding repeal of the Armed Forces (Special Powers) Act, 1958 and the death of Kr. Th. Manorama Devi on 11.7.2004 while in the custody of the Assam Rifles, there was an intense agitation launched by various civil society groups in Manipur. The Union Home Minister visited Manipur in September 2004 and reviewed the situation with the officers of the State Government and the Security/Intelligence agencies. Many delegations and citizen groups raised a demand for revocation of the AFSPA. Some people demanded a review of the Act or favoured retaining the Act. Prime Minister visited Manipur in November 2004 and during such visit, several organizations individuals met the Prime Minister with similar pleas and got the assurance from him that their demand would be considered sympathetically.\(^90\)

As a result of this, a 5-Member Committee was set up under the Chairmanship of Justice B.P. Jeevan Reddy, retired Judge of the Supreme Court, the terms of reference for the Committee being review the provisions of the Armed Forces

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\(^89\) S.4(a) of AFSPA

(Special Powers) Act, 1958 as amended in 1972 and to advise the Govt. of India whether-

(a) to amend the provisions of the Act to bring them in consonance with the obligations of the Government towards protection of Human Rights or

(b) to replace the Act by a more humane Act.\textsuperscript{91}

The views expressed before the committee and the representations received, inter alia included that under the protection provided by the Act, several illegal killings, fake encounters, torture, molestations, rapes and extortions took place in the north eastern states. Specific complaints against the Assam Rifles cited instances of killing of innocents, including women and children.\textsuperscript{92} Few very serious offences are as follows:

\textbf{Unlawful detention and inflicting of injury}

An Independent People's Enquiry Commission (IPIC) was constituted by human rights defenders. Justice Suresh, former Judge of the Bombay High Court was invited to lead the Commission. He readily accepted the invitation. Justice Suresh along with other members arrived at Imphal on October 21, 2000 and held a session at the local community hall on October 22.

\textsuperscript{91} ibid, p.5
\textsuperscript{92} ibid, pp.42-66
Kuraijam Pranam Singh came in person and testified before the Commission. He was picked up by ‘F’ Company of Assam Rifles near Maibam Lokpaching while he was travelling by a bus. He was blindfolded and taken to their camp, where his clothes were taken off, hands and legs were tied up. He was hung upside down and beaten up severely and also was administered electric shocks. On July 30, 2000 a wooden rod was inserted up into his anus and vigorously stirred, causing severe pain and bleeding. The rod broke inside his anus. Chilli powder was applied to his eyes, anus and genitals. On the same day, he was taken to the Nambol Police Station and then to the Community Health Centre, Nambol where he was referred to the Jawaharlal Nehru Hospital, Porompat. He was admitted into the Jawaharlal Nehru Hospital the same day, where he was operated upon on August 4, 2000. Medical examination at the Jawaharlal Nehru Hospital, Porompat, on July 30, 2000, had revealed serious injuries.93

A First Information Report (FIR) against Pranam Singh was filed by Laljit, Naik Subedar, Assam Rifles on August 1, 2000, alleging him to be a supporter of the banned People's Liberation Army. Subsequently, On being approached by Pranam's father with the query as to whether Pranam has been produced before them as per section 57 and 167 of Criminal Procedure Code and Article 22 of the Constitution of India, the Chief Judicial Magistrate Bishenpur, passed an order dated August 7,

93 Preeti Varma (ed), The Terror of POTA and other Security Legislation, pp. 341-42

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2000 explaining that neither Pranam nor any case record on him had been produced before him till date. Then his father moved the Gauhati High Court, Imphal Bench by filing a Habeas Corpus case, [case number WP (Crl) 11 of 2000 on 9 August 2002] and the very next day he filed a report to the police, alleging arbitrary detention and torture of his son Pranam Singh by 'F' Company Assam Rifles. The very same day the High Court issued a direction to the Assam Rifles personnel to hand over Pranam Singh to the nearest police station. On August 17, 2000 the Assam Rifles as well as the police testified before the High Court denying Pranam Singh's custody. The same day, the Court directed all the respondents, including the Officer-in-charge of Jawaharlal Nehru Hospital, Porompat, to produce the detenue before the court the following day at 10 a.m. before the division bench (convened as a special sitting) of the Court.

On August 20, 2000, the police personnel produced the records of Pranam Singh's arrest before the Chief Judicial Magistrate, Bishnupur, alleging that Pranam Singh was arrested on August 1, 2000. The Magistrate described the FIR against Pranam Singh as a false and fabricated story as the accused was already in the judicial custody in Jawaharlal Nehru Hospital, Porompat on July 30, 2000 in a critical state preparing for a major operation, so it was impossible to arrest him on August 1, 2000 from a place about 25 kilometres from the hospital. The Magistrate released Pranam
Singh on bail on August 26, 2000 after executing a personal bond of Rs. 10,000 and a surety of the same amount.

The Commission recommended that an Inquiry be ordered by the High Court by appointing an Inquiry officer under its supervision, empowering him to call for all records and summon witnesses including army personnel involved in the case and with a direction to the Officer to submit his report to the High Court itself, on the basis of which the Court would grant compensation to Pranam Singh and also direct the government to prosecute the officers concerned, for unlawful detention and for causing grievous injury to Pranam Singh. 94

**Rape committed by Army personnel:**

Many rapes go unreported due to fear of social stigma and when it is committed by the Army, most of them go unreported because of futility of taking up an embarrassing legal battle against the mighty Army. Miss Rose was raped repeatedly in Manipur by an officer of the Border Security Force in 1974, the maiden rape case to be recorded against an army personnel. Miss Rose committed suicide, while the perpetrator could not be punished due to lack of sufficient evidence. 95

94 ibid, pp. 342-44
95 Ibid, p. 345
M. Mercy Kabui, aged about 25 years, wife of M. Akham Kabui, resident of Lamdan village testified before the Commission. On July 19, 2000 around 5.30 p.m, while she was standing with her husband and father-in-law at the Verandah of their house, saw Devashis Bishwas, the CRPF Commander with six CRPF jawans reaching their courtyard. The Commander instructed the CRPF jawans to arrest her husband and to take him to their camp and left. Three CRPF jawans arrested her husband and keeping him at a little distance away from their courtyard started beating him. Her father-in-law requested them to stop beating her husband. The other CRPF personnel caught her neck and forcibly pushed her inside the house. They forcibly took her to the bed at the room and two of them started forcibly touching upper parts of her body. She requested them not to molest her. Then they forcibly pulled her legs and hands apart, keeping her at gun point. Then the said two Jawan raped her one after another. Hearing her shout for help, her father-in-law came running inside the room. The two CRPF jawans left the room. Semen discharged from the two CRPF personnel got stained on her petticoat and phanek. A complaint was lodged by Mercy herself in the Loktak Project Police Station on July 20, 2000 at about 3.00 p.m. which was registered as FIR No. 10(7) 2000 Loktak P.S. under section 376 and 34 IPC. The Investigating Officer of the case seized the Blue cotton Phanek having
semen stain and one Petticoat having semen stain. The Medical examination took place only after three days.\textsuperscript{96}

She was produced by the Police before the Chief Judicial Magistrate, Bishnupur for recording her solemn statement under section 164 of CRPC on July 29, 2000. The statement of her husband and father-in-law were recorded. No arrest had been made till October 22, 2000. The concerned Police officials were waiting till October 22, 2000 for the result of the DNA test, blood samples of which were collected on August 21, 2000 at the office of the Professor and Head of Department, Forensic Medicine, RIMS, Imphal.

The Commission recommended for:

i  conducting a proper investigation by the police

ii  arrange for an Identification parade

iii  arranging for the protection of the family by the government, and in particular, the police.

iv  considering Mr. Devashis Bishwas, the Assistant Commandant of CRPF as an accused person and charging him for abetting the crime and also booking him under 120 (B) of IPC.\textsuperscript{97}

\textbf{Arbitrary Killings}

\textsuperscript{96} Ibid, p. 345-46
\textsuperscript{97} ibid, pp. 346-48
There are numerous cases of arbitrary killings by the armed forces. The most well documented cases are:

(a) the Heirangoithong Massacre (1984): 13 spectators of a volley ball match were arbitrarily killed by the CRPF;

(b) the Oinam Massacre of (1987): 15 villagers were arbitrarily murdered by the Assam Rifles;

(c) the RMC Massacre (1996): 9 civilians including a medical student were killed inside the hospital premise by the CRPF;

(d) the Tonsem Lamkhai (1999) 10 civilians including State Government employees on election duties were arbitrarily killed by the CRPF.

People argued – States, where the law and order problem was worse than that of Manipur and in those States, the army had not been deployed, and AFSPA had not been made applicable. People demand withdrawal of Army from Manipur, at least, the army should not be given uncontrolled powers to kill people.98

B. Abuse of TADA

National Human Rights Commission report revealed that Gujarat, with no militant activity as such, once accounted for 19,000 out of 65,000 TADA cases registered. In Punjab, Maharashtra, Kashmir, and Andhra Pradesh, thousands of people were lying

98 Ibid, pp.349-50
in jail without even once produced before the court of law. Survey on TADA cases revealed instances of false arrests, police excesses, and extortion. People were imprisoned under TADA for matters entirely different from violent political acts.99

The Union Home Ministry claimed a total of 52,268 people were arrested under the TADA between 1985 and February 15, 1993. Of these, only 434 were convicted. The vast majority of detainees were eventually freed on bail or released without charge. On 24 August 1994, Mr. Rajesh Pilot, the Minister of State of Home, stated that of the 67,000-odd persons detained since TADA came into force, only 8,000 cases were tried and of them only 725 persons were convicted. The review committees of TADA, inter alia stated that in more than 50,000 cases, TADA was wrongly applied.100

An accused submitted an affidavit before a designated TADA court, claiming that he was arrested on April 4, 1993 and since then he was beaten, hanged, infused electric shocks on his penis, fingers, tongue and in the nose; red chilly powder was inserted into his anus and the same was also rubbed into his testicles and also he was forced by the police to eat human excreta till he was produced in the court on April 12, 1993.101

100 ibid
101 Krishna Prasad, Anatomy of TADA, Mainstream, September 3, 1994, p.11
Armed by TADA, a police officer could make one born after decades of Mahatma Gandhi’s death, confess to assassination of the Mahatma. In rural side policemen used TADA for threatening the poor villagers by saying – don’t try to be smart, we will nab you under TADA. Stories of using TADA by the police for making some quick money by threatening to arrest under TADA was so commonplace that it was shown in the commercial movie 'Bomb Blast'. The Act indicated that it was intended to combat terrorist activities only but it had been extended to the whole country and had been freely applied to situations not contemplated by the Act.

C. Abuse of POTA

Mr. Lal Krishna Advani, the then Home Minister had assured the Parliament that POTA would not be abused. A year thereafter, he conceded that evidence of the misuse of POTA was so serious that it warranted review. To utter surprise it was found that the State of Jharkhand in particular appeared to have detained more people under POTA than terror torn Jammu and Kashmir. Children also were not spared in Jharkhand inspite of the Tamil Nadu High Court ruling on the police not to arrest juveniles under POTA.

Bhagat Singh (17yr old) and Prabhakaran (15yr old) were arrested on November 24, 2002. Both were made to strip and remain in their under garments and were beaten and tortured. Both were booked under POTA.

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102 ibid, p.13
103 ibid
104 Supra note 93
105 Supra note 22, pp. 273-74
106 Case registered for both in Cr. No. 1004 of 2002 on the file of the police, Uthangaraj Police Station
in violation of the Juvenile Justice (Care and Protection of Children) Act, 2000. In case of Bhagat Singh, the Tamil Nadu High Court delivered a judgment that POTA offence could not be brought against a juvenile.107

POTA was misused along communal and minority lines in Gujarat. Police invoked POTA to arrest 123 Muslims allegedly involved in an attack on a train full of Hindu passengers, despite evidence that the riots had been organized by right-wing Hindu groups. But POTA was not used against Hindus involved in pogroms killing over 2,000 Muslims. Gujarat Chief Minister did not find necessary to use POTA against the Hindu rioters.

According to Amnesty International, Gujarat Police did

(i) hold people for questioning for days, even for weeks without allowing them access to family members or to counsel

(ii) frustrate habeas corpus applications

(iii) threaten to arrest family members under POTA if they petitioned the government

(iv) torture detainees for confessions.108

POTA was invoked in Kashmir in March 2002 to detain Yasin Malik, a prominent figure in a coalition of parties which sought independence, or at least autonomy, from

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107 Supra note 93, pp. 33-40
108 Supra note 22, pp.274-75
the Indian union on the allegation that he illegally received a large sum of money from Pakistani couriers. In July 2002, he was given bail by the POTA Court taking into consideration his frail health. Police rearrested Malik within minutes under Jammu and Kashmir's Public Safety Act, which permits preventative detentions. Malik's detention and release speaks about the arbitrary application of POTA in particular and related laws in general in Jammu and Kashmir.109

D. Justice delayed

Speedy justice is the sine qua non of criminal jurisprudence. It serves the best interests of the accused and the prosecution both as to both it is true

For the accused, speedy trial is important because of the minimisation of
(i)  pre-conviction incarceration
(ii) the worry, anxiety, expenses and disruption to vocation and peace
(iii) impairment of the ability of the accused to defend himself in case of death or disability of witnesses.

For the prosecution, speedy trial is important because delay in trial may lead to:
(i)  non-availability of witnesses
(ii) disappearance of evidence by lapse of time.110

109  ibid, p. 277
Article 14 of the International Convention on Civil and Political Rights, 1966 endorsed the significance of the right to speedy trial. Article 3 of the European convention on Human Rights referred to speedy trial as a basic right. Unfortunately in India, neither the Constitution nor any existing laws or statutes specifically confers the right to speedy trial on the accused. But in the Supreme Court judgment in Hussainara Khatoon v. State of Bihar, Justice Bhagwati observed that procedure which does not ensure a reasonably quick trial can not be regarded as 'reasonable, fair or just' and it would violate Article 21 of the Constitution. Truly, Justice Delayed is Justice Denied.