LEGISLATIVE RESPONSE TO COMBAT TERRORISM

Disregard and contempt for human right have resulted in barbarous acts which outraged the conscience of mankind, and the advent of the world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspirations of the common people. Many international covenants on human rights and national constitution’s guarantee the right to life, liberty and security of the person. The movement for securing human rights to all gained strength after the conclusion of the Second World War. On the other hand, the states are under an obligation to maintain the sovereignty, unity and integrity of those countries from internal disturbance as well as external aggression. The ultimate goal of the human rights and also of sovereign powers is to ensure that the human beings wherever they are living are guaranteed the right to live in a peaceful and harmonious society by enjoying the right to life, personal liberty, safety and security.

The great scourge on humanity in recent times is the menace of terrorism. Even though it is not a new phenomenon, it attracted increased attention after the terrorist attack on the World Trade Centre in New York on 11 September, 2001. India has awakened to the threat of terrorism a long time ago, but the attack on the Indian Parliament on 13 December, 2001 and attack in Mumbai on 26 November, 2008 has prompted the Indian policy makers to take fresh notice of this desperate behaviour of certain sections of the society. It is with this backdrop that an attempt has been made in the paper to locate the various laws in India that aim at tackling extraordinary situations like terrorism and extremism. Ordinary criminal law may not be adequate to tackle the above situations and therefore it may be necessary to pass certain extraordinary legislation to deal with such extraordinary situations. The legal regime to control terrorist activities may be classified into

4.1 International Legislative Response

4.2 National Legislative Response
4.1 International Legislative Response

As regards the international law, the laws of war are considered, as a potential legal regime for the control of terrorist activities. The issues that arise at the international level include the principle of double criminality, the doctrine of political offences, the extradition, the right of asylum and the war crimes, for which there appears to be no uniform and universally acceptable approach.

4.1.1 League of Nations

Terrorism has been on the international agenda since 1934, when the League of Nations, predecessor of the United Nations founded during the June 1945 San Francisco Conference\(^1\), took the first major step towards discussing a draft Convention for the prevention and punishment of terrorism. Although the Convention was eventually adopted in 1937\(^2\), it never came into force.

4.1.2 United Nations Charter, 1945

The Problem of international terrorism in general has been under consideration of General Assembly since 1972. On September 23, 1972, the Assembly recommended the following item to be included in the agenda and brought before the Sixth Committee:

A measure to prevent International Terrorism, which endangers takes innocent human lives or jeopardizes fundamental freedoms. Study of the underlying courses of those forms of terrorism and acts of violence which lie in misery, frustration, grievance, and despair and which cause some people to sacrifice human lives, in an attempt to effect radical changes.\(^3\)

On its recommendations the General Assembly on December 18, 1972 adopted a resolution\(^4\) wherein it was decided to establish an Ad hoc Committee on International Terrorism of 35 countries. The Committee held its first session in 1973 without

---

1. 60\(^{th}\) Anniversary of San Francisco Conference, http://www.un.org/adorun/safrancisco
achieving any positive results. However, the Committee submitted its report to the Assembly. The latter was unable to consider the item for want to time until the thirty-first session held in 1976. In 1976, the Assembly adopted a resolution wherein it invited the Ad hoc Committee to work in accordance with the mandate originally entrusted to it. By the same resolution, the Assembly also invited States to submit their observations as soon as possible to the Secretary-General so as to enable the Committee to perform its mandate more efficiently, and it requested him to transmit to the Committee an analytical study of those observations. The Ad hoc Committee met in 1997 and submitted a report to the Assembly without any further progress. In 1979 and submitted a report to the Assembly without any further progress. In 1979 Session, the Ad hoc Committee worked out general recommendations relating to practical measures of co-operation for the speedy elimination of the problem of international terrorism. These recommendations reflected a common view of fundamental importance. On the recommendations of the Ad hoc Committee, the General Assembly on December 17, 1979 adopted a resolution\(^5\) wherein the act of terrorism was condemned and it urged all States, unilaterally and in cooperation with other States as well as relevant United Nations’ organs to contribute to progressive elimination of the causes underlying that kind of terrorism. By the resolution, the Assembly called upon all States to fulfil their obligations under International law to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts. Since 1979, no further progress has been made in the following years excepting the endorsement of the resolution adopted in 1979. The Ad hoc Committee in the year 2002 restarted negotiations on a comprehensive international treaty on terrorism. The committee began deliberation on difficult topics to tackle including those dealing with a definition of terrorism and its relation to liberation movements, possible exemptions to the scope of the treaty, in particular regarding the activities of armed forces, and how to advance the level and types of international cooperation to combat terrorism. However, no Convention has been concluded as yet. The United Nation Charter was a landmark in this unique legal development.

\(^5\) General Assembly Resolution 34/145, December 17, 1979.
4.1.3 Universal Declaration of Human Rights, 1948

Disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of the world in which human being shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspirations of the common people. The Universal Declaration of Human Rights permits enactments of law by the States to impose reasonable restrictions on the rights and freedoms of an individual for the purpose of protecting the rights and freedoms of the people in general.

“In the exercise of his rights and freedoms, every one shall be subject to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirement of morality, public order and general welfare of the democratic society.”

Imposing reasonable restrictions on the rights and freedoms of unscrupulous elements constituting a serious threat to the public order on account of their involvement in activities causing destruction of life, liberty and property of other fellow beings, these laws, far from being at variance with the Universal Declaration of Human Rights, are very much in consonance with its provisions in Article 29. These anti terror laws do not deny any person equality before law or equal protection before laws, which are guaranteed by Article 7 of the Universal Declaration of Human Rights, reads as follows:

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

6 Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.
7 Preamble to the Universal Declaration of Human Right, 1948.
8 R.C. Jha, Anti-terror laws vis-a-vios Human Right, IBR Vol. 21 (1) 1994, at 82-83.
9 Para 2 of Article 29 of UDHR.
10 Article 7 of UDHR
Terrorism itself involves violation of Human Rights and the anti terror laws have been enacted to protect the Human Rights of the people trampled upon by the terrorist with impunity. As provided by the Universal Declaration of Human Rights:

“Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”\(^{11}\)

Therefore when terrorists perpetrate acts of terrorism, they destroy the rights and freedoms of a fellow human being or a group of fellow human being in contravention of the principles enshrined in the Universal Declaration of Human Rights. In times of emergency, the Universal declaration of Human Rights does not prohibit enactment of more stringent laws to tackle the problem of terrorism.\(^{12}\) Justice V.R. Krishna lyer rightly describes the importance of Universal Declaration on Human Rights as follows:

“The trinity of values underlying the System of equal justice constitutes the bedrock of the burgeoning world legal order. Justice, Social, Economic and Political, is the first fundamental paramount human right to secure which to every person is the tryst with destiny the United Nations and its member nations have made by unanimously passing the Universal Declaration of Human Rights.”\(^{13}\)

4.1.4 International Covenant on Civil and Political Rights, 1966

Implicit in the concept of Rule of law is the recognition of the need to strike balance between liberty and public order and since the law provides this balance, the anti-terrorist laws emerge as the dividing line between chaos and order. In the context of the serious threat to the human rights and freedoms rather than as destroyers. International Covenant on Civil and Political Rights unlike Universal Declaration on Human Rights does not prohibit enactment of more stringent laws to tackle the

\(^{11}\) Article 30 of UDHR  
\(^{12}\) Universal Declaration of Human Rights, General Assembly Resolution 217A (III) U.N. Doc A/810 at 71 (1948)  
problem of terrorism. A reference may be made in this respect to the provisions contained in Article 4 of the International Covenant of Civil and Political Rights, which defines rights in great detail than Universal Declarations as follows:

1. In time of public emergency which threatens the life of the nation and existence of which is officially proclaimed, the parties to the present covenant may take measures derogating from their obligations under the present covenant to the extent strictly required by the exigencies of the situation provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion, or social origin.

2. No derogation from Article 6, 7, 8 (paragraphs 1 and 2) 11, 15, 16 and 18, may be made under this provision.

The only rights which may never be suspended or limited even in emergency situation in terms of Article 4 of the Covenant, being right to life, freedom from torture, freedom from enslavement or servitude, protection from imprisonment for debt, freedom from retroactive penal laws, the right to recognition as a person before the law, and freedom of thought, conscience and religion. Article 14 of the International Covenant on Civil and Political Rights States:

All persons will be treated equal before law without any discrimination in civil and criminal cases, the press and public has been kept on public interest, presumption of innocence is given to the accused of criminal charges, human rights guarantees in full equality, rehabilitation of juvenile, right to review and appeal is allowed to all accused. When it is found that there was miscarriage of justice he has to be pardoned and finally the right against double jeopardy.

The following list identifies the major terrorism conventions open to ratification by all states. A brief summary is provided in each case of the principal provisions in each instrument. In addition to the provisions summarized below, most of these conventions provide that parties must establish criminal jurisdiction over offenders
(e.g., the state(s) where the offense takes place, or in some case the state of nationality of the perpetrator or victim, or in the case of an aircraft, the State of registration).

4.1.5 **International Conventions**

1. **Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963**

This Convention was adopted at Tokyo on 14\(^{th}\) September, 1963. It applies to offences and other acts prejudicial to good order and discipline on board an aircraft, committed while the aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any State. The aim of this Convention was to ensure the safety of the aircraft and of the persons and property thereon. The aircraft commander, members of the crew and, in specific circumstance, even passengers on board, is empowered to prevent the commission of such acts and to disembark the person concerned. The aircraft commander may also disembark the offender or, if the offence is serious, deliver him to the competent authorities of a contracting state when the aircraft lands. The state of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board.

2. **Convention for the Suppression of Unlawful Seizure of Aircraft, 1970**

This Convention was adopted by the International Civil Aviation Organization on 16\(^{th}\) December, 1970 known as the Hague Convention. It made hijackings punishable by severe penalties and made it an offence for any person on board an aircraft in flight to ‘unlawfully’, by force or threat thereof, or any other form of intimidation, to seize or exercise control of that aircraft to attempt to do so.

The Convention defines the act of unlawful seizure of aircraft, and the Contracting States have undertaken to make such an offence punishable by severe penalties. Under the Convention a State, whether or not it is the State of registration, is obliged to take necessary measures to establish it jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him. The Convention requires any Contracting State in which the aircraft or its passengers or
crew are present to facilitate the continuation of the journey of the passengers and crew as soon as possible and to return the aircraft and its cargo to the person lawfully entitled to possession without delay. It requires the party to extradite the offenders or to submit the case for prosecution and requires parties to assist each other in connection with the criminal proceedings brought under the Convention. This anti-hijacking treaty, among other measures, provides for the extradition of hijackers and imposes heavy penalties on the hijackers of aircraft. Article 1 of the Convention provides that any person who on board an aircraft in flight unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of, that aircraft or attempt to perform any such act commits an offences and under article 2 each contracting party has undertaken to make the offence punishable by severe penalties. The parties to the Convention have agreed under article 10 to afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences and other acts mentioned in article 4. Any dispute between the contracting parties shall be submitted to the arbitration.

3. **Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971**

This Convention was signed at Montreal, on 23rd September, 1971. It deals with acts not dealt with in the Tokyo and The Hague Conventions. This Convention defines a wide spectrum of unlawful act against the safety of civil aviation to make the offences punishable by severe penalties. The Convention contains provisions on jurisdiction, custody, prosecution and extradition of the alleged offender similar to those of the Hague Convention. Like the Tokyo and The Hague Conventions, the Montreal Convention does not apply to aircraft used in military, customs or police services. Article 5(1) has established a form of universal jurisdiction over the offender, as provided in article 5(1) of the Convention. The scope of the Convention is primarily determined in terms of the “international element” provided in article 1(a), (b)(c), (d) and (e). the Convention applies, irrespective of whether the aircraft is engaged in international or domestic flight, only as provided in article 4(2) of the Convention, namely, if the place of take-off or landing, actual or intended, of the aircraft is situated
outside the territory of the State of registration of the aircraft; or the offence is committed in the territory of a State other than the State of registration of the aircraft.

In the case of air navigation a facility, the Convention applies only if the facilities destroyed, damaged, or interfered with are used in international air navigation.

4. **International Convention against taking of Hostages, 1979**

This Convention is applicable to the offence of direct involvement of complicity in the seizure or detention of, and threat to kill, injure or continue to detain a hostage, in order to compel a State to do or to abstain from doing any act as an explicit or implicit condition for the release of the hostage. It required each state to make this offence punishable under its law. The States were further required to take all measures to ease the situation of the hostages and secure their release, and departure of the hostages. If necessary, the State may prosecute and extradite the alleged offenders, as these offences shall be deemed to be extraditable.

5. **Convention of the Physical Protection of Nuclear Material, 1980**

This convention was signed on 3rd March, 1980 at Vienna. It has two-fold objectives; i.e., to establish levels of physical protection required to be applied to nuclear material used for peaceful purposes while in international nuclear transport and to provide for measures against unlawful acts with respect to such material while in international nuclear transport as well as in domestic use, storage and transport. Other provisions of the Convention e.g., making specified acts punishable offences under national law, to establish jurisdiction over those offences and to prosecute or extradite alleged offenders apply also to nuclear material used for peaceful purposes while in domestic use, storage and transport. The States Parties are obliged to make punishable under their national law the international commission of acts without lawful authority dealing with nuclear material causing or likely to cause death or serious injury or damage to any person or property; theft or robbery of nuclear material; embezzlement or fraudulent obtaining of nuclear material; demands for nuclear material.

The Protocol adds to the definition of “offence” given in the Montreal Convention of 1971 unlawful and intentional acts of violence against persons at an airport serving international civil aviation which cause or are likely to cause serious injury or death and such acts which destroy or seriously damage the facilities of such an airport or aircraft not in service located thereon or disrupt the services of the airport; the qualifying element of these offences is the fact that such an act endangers or is likely to endanger safety at that airport. These offences are punishable by severe penalties, and Contracting States are obliged to establish jurisdiction over the offences not only in the place where the offence was committed in their territory but also in the place where the alleged offender is present in their territory and they do not extradite him to the State where the offence took place.

7. **Convention for the Suppression of Unlawful Act against the Safety of Maritime Navigation, 1988**

This Convention was signed at Rome on 10th March, 1988. It applies to the offences of direct involvement or complicity in the international and unlawful threatened, attempted or actual endangerment of the safe navigation of a ship by the commission of any of the following acts: Seizure of or exercise of control over a ship by any form of intimidation; violence against a person on board a ship; destruction of a ship or the causing of damage to a ship or to its cargo; placement on a ship of a device or substance which is likely to destroy or cause damage to that ship or its cargo; destruction of, serious damaging of, or interference with maritime navigational facilities; knowing communication of false information; injury to or murder of any person in connection with any of the preceding act. The Convention applies to ships navigating or scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States, or when the alleged offender is found in the territory of a State Party. The offences, referred to in the Convention, are deemed to be extraditable offences and States Parties have obligations to establish their jurisdiction over the offences.
described, make the offences punishable by appropriate penalties, take alleged offenders into custody, prosecute or extradite alleged offenders, cooperate in preventive measures, and exchange information and evidence needed in related criminal proceedings.

8. **Protocol for the Suppression of Unlawful Act against the Safety of Fixed Platforms Located on the Continental Shelf, 1988**

This Protocol was signed at Rome on 10th March, 1988 on the same day when the Protocol on the suppression of unlawful acts of violence at airports serving international civil aviation, 1988. The Protocol applies to the offences described for the suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 when committed in relation to a “fixed platform.” It is an artificial island, installation or structure permanently attached to the sea-bed for the purpose of exploration or exploitation of resources or for other economic purposes. States Parties have obligations in relation to establishing their jurisdiction over the offences described, making the offences punishable by appropriate penalties, taking alleged offenders into custody and prosecuting or extraditing them.


The Convention required each State Party to prohibit and prevent the manufacture in its territory of unmarked plastic explosives. Plastic explosives will be marked by introducing during the manufacturing process any one of the detection agents defined in the Technical Annexure to the Convention. The Convention also requires each State Party to prohibit and prevent the movement into or out of its territory of unmarked explosives and to exercise strict and effective control over the possession of any existing stocks of unmarked explosives. Stocks of plastic explosives not held by authorities performing military and police functions are to be destroyed or consumed for purposes not inconsistent with the objectives of Convention, marked or rendered permanently ineffective, within a period of three years from the entry into force of the Convention in respect of the State concerned. The Convention also
establishes as International Explosives Technical Commission, experts in the field of manufacture or detection of, or research in, manufacture, making and detection of explosive, report its findings through the Council of ICAO, to all State Parties and international organizations concerned, and propose amendments to the Technical Annexure to the Convention, as required.


This Convention was adopted at New York on 15th December, 1997. It entered into force on 23rd May, 2001. It provided that it shall be applicable to the offence of international and unlawful delivery, placement discharge or detonation of an explosive or other lethal device, in a place of public use, State or Government facility, a public transportation system with the intent to cause death or serious bodily injury or extensive destruction likely to or actually resulting in major economic loss. Any person who commits in offence participates an accomplice in any of these acts, organize others to commit them or in any other way contributes to their Commission in liable to be punished. The offence shall be deemed to be extraditable offence between states parties under existing extradition treaties and the Convention itself.


This convention was adopted at New York on 9th December, 1999. It came into force on 10th April, 2002 when 22nd instrument of ratification was deposited with the U.N. Secretary-General. It applies to offence of direct involvement or complicity in the

---

14 The U.N. General Assembly adopted it by resolution A/RES/54/109 U.N. Doc. A/54/49 Vol. I, 1999. The U.N.G.A. resolution 51/210 of 17 December, 1996 called upon the states to take steps of prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organization. The G.A. Resolution 52/165 of 15th December, 1997 terrorists and terrorist organization. The G.A. resolution 52/165 of 15th December, 1997 called upon the State to consider, in particular, the implementation of the measures set out.

15 The U.N. General Assembly adopted it by resolution A/RES/54/109 U.N. Doc. A/54/49 Vol. I, 1999. The U.N.G.A. resolution 51/210 of 17 December, 1996 called upon the states to take steps of prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organization. The G.A. Resolution 52/165 of 15th December, 1997 terrorists and terrorist organization. The G.A. resolution 52/165 of 15th December, 1997 called upon the State to consider, in particular, the implementation of the measures set out in para 3(a) to (f) of its resolution 51/210.
international and unlawful provision or collection of funds, whether attempted or actual, with the intention or knowledge that any part of the funds may be used to carry out any of the offences described in the conventions listed in the annexure or an act intended to cause death or serious bodily injury to any person not actively involved in armed conflict in order to intimidate a population or to compel a Government or an international organization to do or abstain from doing any act. Article 2 says that any person commits an offence or within the meaning of the Convention if that person by any means, direct or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in knowledge that they are to be used, in full or in part, in order to carry out (a) an act which constitutes an offence with the scope of and as defined in one of the treaties listed in the annex; or (b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking any active part in the hostilities in a situation of armed conflict, when the purpose of such act by in nature or contest is to intimidate a population or to compel a Government or an international organization to do or to abstain from doing any act. In article 1(1) the term ‘funds’ has been defined. It means assets of every kind, whether tangible, movable or immovable, however acquired and legal document or instruments in any form including electronic or digital, evidencing title to or interesting, such assets, including, but not limited to, bank credits, travelers cheques, money orders, shares, securities, bonds, drafts and letter of credit.

The provision or collection of funds in this manner is an offence whether or not the funds are actually used to carry out the prescribed acts. The convention required each state to take appropriate measures, in accordance with its domestic legal principles for the detection and freezing, seizure or forfeiture of any funds used or allocated for the propose of committing the offences described. The offence shall be deemed to be extraditable offence between states parties under existing extradition treaties and the Convention itself.

As regards India, she has been a victim of terrorism for about two decades. Terrorist attacks on the Indian Parliament, various parts of Jammu and Kashmir and other parts of the country have further aggravated the situation and the Indian Parliament, in the spirit of the relevant resolutions of the United Nations, particularly Resolution No.
1373(2001), has enacted the law to fight the menace of terrorism, which is popularly known as POTA (PREVENTION OF Terrorism Act 2002). It has been enacted to make provisions for the prevention of and for dealing with terrorist activities and for matters connected there with. This Act extends to the whole of India. Every person shall be liable to punishment under this Act for every act or omission contrary to the provisions thereof, of which he is held guilty in India. Any person who commits an offence beyond India which is punishable under this Act shall be dealt with according to the provisions of this Act in the same manner as if such act had been committed in India. The provisions of this Act apply to (a) citizens of India outside India, (b) persons in the services of the Government, wherever they may be, and (c) persons on ships or aircrafts, registered in India, wherever they may be. Save as otherwise provided in respect of entries at Serial Numbers 24 and 25 of the Schedule to this Act, i.e. “Communist Party of India (Marxist-Leninist) People’s War, all its formations and Front Organizations and Maoist Communist Centre (MCC) all its Formations and Front Organization”, this Act shall be deemed to have come into force on the 24th day of October, 2001 and shall remain in force for a period of three years from the date of its commencement, but its expiry shall not affect, (a) the previous operation of, or anything duly done or suffered under this Act, or (b) any right, privilege, obligation or liability acquired, accrued or incurred under this Act or (c) any penalty, forfeiture or punishment incurred in respect of any offence under this Act, or (d) any investigation, legal proceeding or remedy or punishment as aforesaid, and any such investigation, legal proceeding for remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Act had not expired. This Act contains 64 sections and is divided into six Chapters. Chapter I being preliminary deals with short title, extent, application, commencement, duration and savings and defines certain words and expressions used in the Act. Chapter II consisting of sections 3 to 17 provides for punishment for, and emasures for dealing with terrorist activities. Chapter II consisting of terrorist activities. Chapter IV in sections 23 to 35 deals with constitution, place of sitting, powers and jurisdiction of Special courts with respect to trial of offences and transfer of cases to regular courts. Chapter V consisting of sections 36 to 48 relates to interception of communication in certain cases. It also deals with application for authorization of interception of wire,
electronic or oral communication, decision by Competent Authority, submission of order for review and annual report of interception. Chapter VI being miscellaneous one aims at modified application of certain provisions of the Code of Criminal Procedure, 1973 (2 of 1974), cognizance of offences, officers competent to investigate offence under this Act arrest, presumption as to offences under section 3, bar of jurisdiction of courts, punishment and compensation for malicious action, impounding of passport and arms licence of person charge-sheeted, etc.

4.1.6 UN Resolutions on Measures to Eliminate International Terrorism

1. Resolution of 1994

The General Assembly of United Nations considered the question of elimination of international terrorism and approved the declaration on measures to eliminate international Terrorism vide its resolution dated 9-12-1994. It urged the State to take all the measures at the national and international levels to eliminate terrorism. The UN felt deeply disturbed by the:

(i) Worldwide persistence of acts of international terrorism, which endanger or take innocent lives, have a deleterious effect on international relations and may jeopardize the security of States.

(ii) Increase in acts of terrorism based on intolerance or extremism and the growing dangerous links between terrorist groups and drug traffickers and their para-military gangs which have resorted to all types of violence endangering the Constitutional order of States and violating basic human rights.

(iii) Desirability for closer co-ordination and cooperation among Stats in combating crimes closely connected with terrorism, including drug trafficking, unlawful arms trade, money laundering and smuggling of nuclear and other potentially deadly materials and stressed the,
(iv) Imperative need to further strengthen international cooperation and take and adopt practical and effective measure to prevent, combat and eliminate all forms of terrorism that affect the international community.

In this Resolution, the State members of the UN affirmed their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable. They constitute a grave violation of the purposes and principles of the UN and pose a threat to international peace and security, jeopardize friendly relations among the States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms.

The Resolution called upon the States to fulfil their obligations under the UN charter and other provisions of international law with respect to combating international terrorism and urged the States to take the following measures:

(a) To refrain from organization, instigating, facilitating, financing, encouraging or tolerating terrorist activities and ensure that their territories are not used for terrorist installations or training camps;

(b) To ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts;

(c) To endeavour to conclude special agreements to that effect as a bilateral, regional and multilateral basis and prepare model agreements on cooperation’s;

(d) To cooperate with one another in exchanging relevant information concerning the prevention and combating of terrorism;

(e) To take promptly all steps necessary to implement the existing international conventions on this subject to which they are parties, including the harmonization of their domestic legislation with those conventions;

(f) To take appropriate measures before granting asylum for the purpose of ensuring that the asylum seeker has not engaged in terrorist activities and see
that refugee status is not used in a manner contrary to the provisions of international Law.

The States were also urged to review the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all forms with the aim of developing a comprehensive legal framework. The resolution also urged those states which have not yet become parties to international Conventions and protocols relating to fighting against international terrorism to become parties. The following measures were, therefore, suggested to enhance international cooperation:

(A) A collection of data on the status and implementation of existing multilateral, regional and bilateral agreements relating to international terrorism, including information on incident caused by intentional terrorism and criminal prosecution and sentencing, based on information received from the depositories of those agreements and from member States;

(B) A compendium of national laws and regulations regarding the prevention and suppression of international terrorism in all its forms based on information received from members States;

(C) An analytical review of existing international legal instruments relating to international terrorism, in order to assist Stats in identifying aspects of this matter that have not been covered by such instruments and could be addressed to develop further a comprehensive legal framework of Conventions dealing with international terrorism;

(D) A review of existing possibilities within the United Nations system for assisting States in organizing workshops and training courses on combating crimes connected with international terrorism.

2. Resolution of 2000

The U.N. General Assembly again considered the agenda item entitled “measures to eliminate international terrorism” and vide its resolution No. 22/158 of December, 12, 2000 strongly condemning:
(i) All actions, methods and tactics of terrorism as criminal and unjust, wherever and by whomever committed;

(ii) Reiterated its view that such actions are in any circumstance unjustifiable, and further

(iii) Reiterated its call to all States to adopt every measure in accordance with the charter of the UN and the relevant provisions of the international laws, including international standards of human rights.

3. Resolution Adopted by the Security Council

Subsequent to the event of 11th September, 2001 in USA, on 28th September, 2001, the UN Security Council adopted resolution No. 1373 (2001), which was sternest ever on the measure to eliminate International Terrorism. The resolution called upon the States inter alia to take ‘appropriate measures in conformity with the relevant provisions of national and international law, including standards of human rights.’ A series of steps were taken so as to prevent terrorist attacks. They have set up a Committee known as “Combat Terrorism Committee” (C.T.C.), which shall act as important organ to combat terrorism against international terrorism. In addition to it a branch know as C.T.E.D. has been established, which shall give technical known how to States against terrorism.

The States were also called upon, inter alia, to exchange information in accordance with international and domestic law, and to take appropriate measures in conformity with the relevant provisions of national and international law, including standards of human rights.

4. Resolution Adopted by U.N. General Assembly in 2006

In September, 2006 all the member States passed a resolution approving the policy to combat the international terrorism, and framed a detailed plan to fight the terrorism. This shows that the U.N. has taken further steps to face the terrorism at international or other level. In fact two things are necessary to combat the terrorism:
(i) Co-operation between all the member Stats of U.N. for fighting the terrorism and to remove its ugly face from this globe, and

(ii) Participation of people to assist the police and army so that they can successfully combat the international terrorism.

As regards the co-operation between all the nations, there is immediate necessity of amending the Preamble of the U.N. Charter, which contains the words “to save succeeding generations from the scourge of war, which twice in our life-time has brought un-told sorrow to mankind”. In its place the following lines be substituted:

“To save the present and succeeding generations from the scourge of war and terrorism this has brought untold sorrow to mankind.”

Unrestrained Freedom, with Reasonable Restrictions, in Democratic Countries Invites Outsiders to Work Feely. In India and other democratic countries every citizen and other persons enjoy unrestrained freedom, which of course is subject to reasonable restrictions. Thus guaranteeing right to security, in a way, has come to define the basic function of the State. It is precisely for these reasons that the State has been given the power to use force, but the force can and should be used only the way that the procedure laid down in the laws mandates. The procedure is evolved in pursuance of the objectives for which the State came into being. Therefore, essence of any law should necessarily be the concern for the right to life and security of the individual.

Another point is why a person assists the terrorists, or why he himself becomes a terrorist. It may be on account of religious grounds, poverty, or ethnic grounds, heart burning against a particular race or religion. It is the duty of the State to maintain law and order. It rests not only on mere passing of law in the State. It is common sense that where there is widespread deprivation, there cannot be order. A hungry man cannot be expected to be a law abiding citizen. There have to be ways and means through which people should be enabled to earn a decent livelihood to start with and opening and widening up of opportunities which will be conducive to improve their quality of life. If such conditions are not created, it is not only that the individual violates the law but the law cannot be enforced because of its poor moral and material
base. Thus ‘welfares’ becomes a part of the governance warranting passing of several laws. It is in this backdrop that one has to discuss terrorism. An average human being craves to live in an orderly, peaceful and a dignified life. There are a number of ways through which human beings could be divided, alienated and deprived. These undesirable processes could be overcome, if only the mainstream political processes strive towards a responsible, responsive and sensitive political system.

The second approach, on the contrary, is that there are always misconceived cause exposed by the misled and crime-prone individuals and groups whose sole purpose is to disturb the social order, as that is the way they express themselves. Such individuals or groups are not amenable to reason. Since the law is rooted in human reasons, the ordinary laws cannot deal with such explosive situations. They argue that these ‘distortions’ should be put down with iron hand. They dismiss attempts at reasoning as useless, if not dangerous. They go one step forward and maintain that they are indirect associates and abettors of violence and disorder.

There is also a new trend of cross-border terrorism. In a globalizing world order, the States, unable to respond to the internal demands, can shift the balance to the neighboring countries or generate fear to divert the public attention. Once a State succeeds in tracing the causes for internal crisis to external adversaries, it becomes difficult for the people to put pressure on their Government for solving the basic problems. There are also several instances where nations are at loggerheads for various historical reasons breeding violence. Such violence cannot be dealt by the ordinary municipal laws. It is this context that gives rise to repressive laws, which could be used not only against the external enemy but also to suppress and repress internal dissent. Thus cross-border terrorism contributes in a large measure to arbitrary exercise of power.

**International Humanitarian Law**

International Humanitarian law, also known as the law of war, the laws and custom of war of the law of armed conflict, is the legal corpus comprised of the Geneva conventions and the Hague convention, as well s subsequent treaties, case law and
customary international law. It defines the conduct and responsibility of belligerent nation, neutral national and individuals engaged in warfare, in relation to each other and to protected person usually meaning civilian.\textsuperscript{16}

The absence of any similar ad hoc bodies, the unwillingness of the international community to establish a standing tribunal with criminal competence in the area, and the limited use of humanitarian law by national criminal tribunals in post-conflict situations despite the creation of universal jurisdiction over grave breaches of the four Geneva Conventions of 12 August 1949 on the protection of war victims all contributed to a situation in which international humanitarian law seemed to be playing quite a limited role in the post-conflict arena, generating only sporadic academic interest. The picture has now changed almost beyond recognition.

Not only has the role of international humanitarian law in post-conflict situations become an area of increasing scholarly focus, there has also been a noticeable whittling away at the perceived isolation of this area of law, with the result that the links between humanitarian law and other areas of public international law have become more clearly visible. Three factors have contributed largely to these developments: the first has been the growing convergence of international humanitarian law and international human rights law, most obviously in the adoption, virtually verbatim, of the fair trial provisions of the 1966 International Covenant on Civil and Political Rights in the two 1977 Protocols additional to the Geneva Conventions.

The second factor involves two interrelated developments. One is the emergence in recent years of a trend towards structured (some would say choreographed) peace processes in relation to intractable or stalemated violent conflicts (examples include El Salvador, the former Yugoslavia, Palestine/Israel, South Africa, and Northern Ireland). Since the balance of forces or the circumstances in these conflicts were such that no side was able to achieve a military victory and thus to impose its will on the

\textsuperscript{16} Goel, Vaibhav (Dr.) An Introduction to origin, Evolution and Development of International Humanitarian Law, International Humanitarian Law: An Anthology, 2009, Lexis Nexis Butterworth
other(s), the negotiating processes have had to attempt to reconcile the interests and concerns of all sides.

This has frequently required that questions of past violations of human rights law and international humanitarian law be addressed. The other, related development has been the process of structured transition from military to civilian rule in recent decades; most obviously in Latin America (examples include Chile and Brazil). These processes have generated a discourse on “transitional justice”, into which the post-communist transitions in Eastern Europe have fed.

Central to this inquiry has been the question of how democratic successor governments should deal with serious violations of previous regimes, with particular reference to the institutional vehicles for engaging with past violations. Its themes therefore mesh neatly with those which have emerged in recent peace processes; indeed, it is possible to subsume many legal issues relating to the latter under the general “transitional justice” umbrella\(^\text{17}\).

Enforcing International Humanitarian Law is one of the most difficult aspects of this interesting field of international law. On one hand International Humanitarian Law in a certain sense constitutes a law beyond the law, i.e. a set of legal rules which becomes applicable after the prohibition of the use of force, one of the most fundamental tenets of international law, has been breached. On the other hand does International Humanitarian Law apply equally to the attacking as well as the defending party to a conflict? Finally is it illegal to retaliate in kind, once International Humanitarian Law has been violated by one party to the conflict. Both aspects can make it difficult to explain to the general public why respect for International Humanitarian Law is crucial. The question before us is which tools are available for the enforcement of International Humanitarian Law against non-state actors in modern asymmetric conflicts.

We will especially have a look at alternatives to courts as a tool of IHL enforcement. Courts, while often serving as a useful tool for IHL enforcement within the context of

\(^{17}\) http://www.icrc.org/eng/resources/documents/misc/57jq7.htm, Last Accessed 16/5/2013 at 3.30 pm (I.S.T), Meerut, U.P, India
western armed forces, are in insufficient deterrent for enemies ready to killed innocent civilians with suicide attacks. Fundamental to all difficulties relating to the enforcement of international law is the classical and by now outdated point of view of the Westphalia legal system to the effect that only states (or international organizations of states) can be subjects of international law, a view that has been confirmed in the UN General Assembly's *Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States (1965)*.

The principle of non-intervention is the most visible sign of this problem: in contrast to domestic law the international legal system lacks a higher authority independent of states which can exercise the force necessary in order to ensure compliance with the law. This problem comes to light especially when International Humanitarian Law is being violated: not only has the International Criminal Court in The Hague only a limited jurisdiction, military considerations will always play an important role in the decision-making process of those engaged in combat. Furthermore might terrorists want to gain a certain degree of legitimacy for their actions in violation of International Humanitarian Law by jumping on the relativism bandwagon.

For the enforcement of International Humanitarian Law *political means* holds true as for the enforcement of international human rights outside a framework providing for courts and commissions, i.e. that half-hearted political attempts at enforcing legal obligations will most often fail to be successful, since states' interests will collide with their obligations under international human rights law and International Humanitarian Law, especially in case the own security is concerned. Recent developments in the U.S. such as the treatment of prisoners in Guantánamo Bay, the USA PATRIOT Act etc. are indications of such a tradeoff of human rights and International Humanitarian Law in favour of a perceived safety. Negative sanctions, e.g. on regimes harbouring terrorists, are also not too likely to yield the results envisaged, since it is never the leadership but ordinary people who will suffer, as has been the case in Iraq, North Korea, Afghanistan and South Africa. The examples of Iraq and North Korea serve as

---

18 The Case of the 'Detainees' in Camp X-ray at the U.S. Naval Base in Guantánamo Bay (Cuba) Before the Inter-America Commission on Human Rights, available on http://papers.ssrn.com/papers.cfm?abstract_id=390440
reminders, that the toll paid by the civilian population due to sanctions imposed on the regime under which they live (and more often than not suffer, too) can backfire dramatically. Negative sanctions limited to e.g. UN Security Council-imposed arms embargoes, furthermore only work, if all states participate and the embargo is enforced as well, conditions that will only rarely be met in practice.

4.2 National Legislative Response

Independent India’s constitutional maintain is a proud one. In combating same of the most serious terrorist threat in the world, a durable enduring and ever improving commitment by India its project fundamental rights can serve as an international example and in recent years, the Indian government has taken several positive steps to limit the use of its anti-terrorism laws and to renew its efforts to transform its colonial era polices and criminal justice institutions following the recent bomb blast in Mumbai the Indian government. Also wisely chose not to enact new draconian legislation to replace POTA emphasizing instead the need to upgrade its intelligence and investigative capacity to prevent act of terrorism and hold perpetrations accountable. There are about twenty to thirty Acts passed either at the central or state levels. The laws enacted to cope with the ‘terrorism’ are as follow:-

4.2.1 The Constitutional of India

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

“The question before us is this, whether the exigencies of the freedom of individuals or the exigencies of the State is more important. When it comes to a question of shaking the very foundations of the State, which State stands not for the freedom of
one individual but of several individuals, yield the first place to the State. The new Article 15-A\(^{19}\) is a very happy compromise.”\(^{20}\)

Another learned Member P.K. Sen a member from Bihar also supported such measure and observed:

“There may be certain things in the provisions of the Articles which appear to be rather against the fundamental rights, but an awareness of the troubled times which not only this country but also all other countries in the world are passing through, some special measures for the security of the State are necessary.”\(^{21}\)

However, certain other members like Mahavir Tyagi had opposed the law of preventive detention on the ground that “life liberty and pursuit of happiness are the three fundamental rights. The State come into being not because it has any inherent rights of its own, but because the individual, who has inherent rights of life, liberty, foregoes a part of his own rights and deposit’s it with the State. The State is thus organized and constituted not by depriving the people of their inherent rights. the introduction here of a detention clause changes the chapter of fundamental rights into a penal Code worse than the Defence Rules of India of old Government. it is not the business of the Constituent Assembly to vest in the hands of the future Governments power to detain people.”\(^{22}\) B.R. Ambedkar supported the preventive detention laws totally by overruling the objection of members like Mahavir Tyagi. Thus, the Constituent Assembly took cognizance of the extreme situations like terrorism and provided certain measures to curb the same.\(^{23}\)

### 4.2.2 Law Commission 173\(^{rd}\) Report\(^{24}\)

The Law Commission of India, an advisory body headed by a former Judge of the Supreme Court, recommended in April 2000 the adoption of a law designed to deal

---

\(^{19}\) At present Article 22 of Constitution is dealing with safeguards to arrested persons at exception thereto.

\(^{20}\) Constituent Assembly Debates, Vol. IX, at 1543.

\(^{21}\) Constituent Assembly Debates, Vol. IX, at 1543.

\(^{22}\) Constituent Assembly Debates, Vol. IX, at 1543.


\(^{24}\) http://lawcommissionofindia.nic.in/tada.htm
firmly and effectively with suspected terrorists and their activities, thus departing from the liberal investigation and trial procedures normally in use. The Commission was of the view that the impact of terrorism, both internal and external, over the past few decades in India fully justified the measures envisaged in the proposed legislation. When the very existence of a liberal society is at stake, they opined, drastic measures meant to strengthen law enforcement and the maintenance of public order are a necessary evil.²⁵ The Law Commission while examining the Prevention of Terrorism Bill, 2000 observed.²⁶

Law Commission is of the opinion that a legislation to fight terrorism is today a necessity in India. It is not as if the enactment of such legislation would by itself subdue terrorism. It may, however, arm the State to fight terrorism more effectively. There is a good amount of substance in the submission that the Indian Penal Code (IPC) was not designed to fight or to check organized crime of the nature we are faced with now. Here is a case of organized groups or gangs trained, inspired and supported by fundamentalists and anti-Indian elements trying to destabilize the country who make no secret of their intentions. The act of terrorism by its very nature generates terror and a psychosis of fear among the populace. Because of the terror and the fear, people are rendered sullen. They become helpless spectators of the atrocities committed before their eyes. They are afraid of contacting the Police authorities about any information they may have about terrorist activities much less to cooperate with the Police in dealing with terrorists. It is difficult to get any witness because people are afraid of their own safety and safety of their families. It is well known that during the worst days in Punjab, even the Judges and prosecutors were gripped with such fear and terror that they were not prepared to try or prosecute the cases against the terrorists. That is also Combating Terrorism Stated to be the position today in J & K and this is one reason which is contributing to the enormous delay in going on with the trials against the terrorists. In such a situation, insisting upon independent evidence or applying the normal peace-time standards of criminal prosecution, may be impracticable. It is necessary to have a special law to deal with a special situation. An

²⁵ http://www.nic.in/lawcom/tada.htm.
²⁶ Law Commission 173rd Report
extraordinary situation calls for an extraordinary law, designed to meet and check create and provide internal structures and safeguards against possible abuse and misuse of the Act and altogether a different thing to say that because the law is liable to be misused, we should not have such an Act at all.

The Government of India in the Ministry of Home Affairs requested the Law Commission to undertake a fresh examination of the issues of a suitable legislation for combating terrorism and other anti-national activities in view of the fact that security environment has changed drastically since 1972 when the Law Commission had sent its 43rd Report on Offences against the National Security. The Government emphasized that the subject was of utmost urgency in view of the fact that while the erstwhile Terrorists and Disruptive Activities (Prevention) Act, 1987 had lapsed, no other law had been enacted to fill the vacuum arising there from. The result is that today there is no law to combat terrorism in India. The Commission was asked to take a holistic view on the need for a comprehensive anti-terrorism law in India after taking into consideration similar legislations enacted in other countries faced with the problem of terrorism. Accordingly, the Commission had taken up the study of the subject and prepared a Working Paper (Annexure 1), which was circulated to all the concerned authorities, organizations and individuals for eliciting their views with respect to the proposals contained therein. Two seminars were also held for this purpose. The first seminar was held on December 20, 1999 at the India International Center, New Delhi. A second seminar was held on January 29, 2000 in association with the India International Centre in the auditorium of Indian International Centre.27

4.2.3 The Indian Penal Code, 1860

Chapter V.A. has introduced into the criminal law of India a new offence, namely, the offence of criminal conspiracy.28 It came into existence by the Criminal Law Amendment Act, 1913. The Britishers introduced this Section to deal the problem of freedom movement carried out by the native people. Conspiracy under the Penal Code was punishable in two forms viz. a) conspiracy by way of abetment, and b) conspiracy

27 http://www.lawcommissionofindia.nic.in,
28 Section 120A of Indian Penal code, Definition of Criminal conspiracy
involved in certain offences.\textsuperscript{29} In the former an act or illegal omission must take place in pursuance of conspiracy in order to be punishable while in the latter membership suffice to establish the charges of conspiracy. In 1870 the law of conspiracy was widened by the insertion of conspiracy in Indian Penal Code.\textsuperscript{30} Under the law of conspiracy\textsuperscript{31} in the Code, it is an offence to conspire to commit any of the offences mentioned in the Code and is punishable under the same. To conspire, to overawe, by means of criminal force, or to show of criminal assassination of the then Prime Minister of India, one of the two actual killers and two conspirators were brought to trial. Both the conspirators were away from the scene of the crime. The Supreme Court acquitted one of them. His movements after the incident were not properly proved. The document recovered from his custody did not indicate any agreement between him and the other accused. They tried to prove the agitated State of mind, which wanted revenge. This was not sufficient to establish case against him. On the other hand Kehar Singh\textsuperscript{32}, was shown to be was having secret talks with one of the actual killers and saying that they were trying to keep themselves away from their wives, children and other family members all the time and on being asked what they were talking about, they remained mysterious. These facts were sufficient to show that they were planning something secret.

4.2.4 The Preventive Detention Act, 1950-The Preventive Detention Act IV, 1950

The Preventive Detention Act, 1950 was originally passed for one year but was extended periodically up to 1969. During this period the Act was challenged in Supreme Court for its validity and Parliament continued to amend it. Again in 1971, need was felt to frame another Preventive Detention At with the object to “maintain

\begin{itemize}
\item \textsuperscript{29} K. D. Gaur, A Textbook on The Penal Code, 3rd Edition (2004), Delhi, Universal Law Publication, at 176.
\item \textsuperscript{30} Act XXVII of 1870.
\item \textsuperscript{31} Section 121A Conspiracy to commit offences punishable by Section 121: - Whoever within or without India conspires to commit any of the offences punishable by Section 121, or conspires to overawe, by means of criminal force or the show of criminal force, the Central Government or any State Government, shall be punished with imprisonment for life, or with imprisonment of either description which may extend to ten years, and shall also be liable to fine. Explanation: -To constitute a conspiracy under this Section, it is not necessary that any act or illegal omission shall take place in pursuance thereof.
\item \textsuperscript{32} AIR 1988 SC 1883; AIR 1989 SC 653
\end{itemize}
internal security”. And this was the infamous Maintenance of Internal Security Act, 1971) which was later grossly misused to settle all political opposition during emergency (1975-1977). The Act gave extraordinary powers to the executive, the misuse of which was observed by the Supreme Court.

“It turned into an engine of oppression posing threat to democratic way of life.”

The total rout of the Congress part, during the March 1977 General Election could be taken as a “measure of public resentment against the misuse of Maintenance of Internal Security Act”. The Janata Party Government fulfilling one of its polls promise repealed Maintenance of Internal Security Act on July 3, 1978. Though Maintenance of Internal Security Act was gone, yet the Conservation Foreign Exchange and Prevention of Smuggling Activities At, 1974 along with Prevention of Black marketing and Maintenance of Supplies of Essential Commodities Act, 1980 continued. Soon the need was felt to frame another Preventive Detention Act, to tackle communalism and extremist activities. The National Security Act (NSA) was formulated in 1980 with the object to cope with situations of communal disharmony, social tension, extremist activities, industrial unrest and increasing tendency on the part of various interested parties to engineer agitations on different issues.

The framers of our Constitution were of the view that in free India, when there will be democratic and representative Government, the need for framing such preventive detention laws will rarely arise and shall be sparingly and cautiously used. But it was right that in 1950 that the Parliament passed the Preventive Detention Act to curb the “violent and terrorist” activities of the communists in Detention Act to curb the “violent and terrorist” activities of the communists in Hyderabad, West Bengal and Madras States. The constitutional validity of the Act was upheld by the Supreme Court in terms of the Parliament’s power to enact was upheld by the Supreme Court in terms of the Parliament’s power to enact such a law but Chief Justice Kania and Justice Mahajan and Mukherjee, observed in A.K. Gopalan v. State of Madras, that preventive detention laws were repugnant to democratic constitutions and did not exist in democratic countries. Gopalan in the Petition under Article 32 (1) of the Constitution of India for a writ of habeas corpus against his detention in the Madras
Jail and he has given various dates showing how he has been under detention since December, 1947. Under the ordinary Criminal Law he was sentenced to terms of imprisonment but those convictions were set aside. While he was thus under detention under one of the orders of the Madras State Government, on the 1st March, 1950, he was served with an order made under Section 3(1) of the Preventive Detention Act, IV of 1950. He challenges the legality of the order as it is contended that Act IV of 1950 contravenes the provisions of article 13, 19 and 21 and the provisions of that Act are not in accordance with article 22 of the Constitution. He has also challenged the validity of the order on the ground that it is issued mala fide. The challenged the validity of the order on the ground that it is issued mala fide. The burden of proving that allegation is on the applicant. Because of the penal provisions of Section 14 of the impugned Act the applicant has not disclosed the grounds, supplied to him, for his detention and the question of mala fides of the order therefore cannot be gone into under this petition.

The question of the validity of Act IV of 1950 was argued before Supreme Court at great length. This is the first case in which the different Articles of the Constitution of India contained in the Chapter on fundamental Rights had come for discussion before Supreme Court. In another case the Chief Justice of the Supreme Court, Patanjali Shastri in Ram Krishnan Bhardwaj v. State of Delhi, Stated:

“Preventive Detention is a serious invasion of personal liberty and such meager safeguards as the Constitution has provided against improper exercise of the power must be zealously watched and safeguarded by the Supreme Court.”

This was a petition under Article 32 of the Constitution for the issue of a writ in the nature of habeas corpus directing the release of the petitioner Dr. Ram Krishan Bhardwaj who is a medical practitioner Delhi and was said to be under unlawful detention.

4.2.5 The Armed Forces (Assam and Manipur) Special Powers Act, 1958

This statute was one of the earliest to be introduced in the post-independent India, which reflected on several emerging development and trends. Primarily, it is a
reflection on Indian Independence which was certainly a landmark step towards the
democratic Government. The North-eastern India has been problematic, as certain parts have been demanding autonomy, if not, cessation from Indian Union. As there were armed rebellions, this became necessary to enact the Armed Forces Special Power Act, 1958 to deal with the problem. It was characterized as “an Act to enable certain special powers to be conferred upon the members of the Armed Forces in disturbed areas in the State of Assam and the Union Territory of Manipur”. It gave powers to the Governor of Assam or the Chief Commissioner of Manipur, that whenever he is of the opinion that the whole or any part of the State of Assam or the Union Territory of Manipur, as the case may be, is in such a disturbed or dangerous condition that the use of Armed Forces in aid of the civil power is necessary, he may, by notification in the official gazette, declare the whole or any part to be disturbed area. This act confers the power to any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the Armed Forces to “Fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or the order, if he is of the opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary”. It also gave the power to these officers for “prohibiting the assembly of five or more persons, or carrying of weapons or the things capable of being used as weapons or fire-arms, ammunition or explosive substance”.

The Act also gives the power to the armed forces to destroy and arms dump or any structure used as a training camp for armed volunteers or utilized as a hide-out by armed groups. The officer can also “arrest without warrant any person who has committed a cognizable offence or against whom a reasonable person who has committed o is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest”. In addition, the armed forces have the power “to enter and search without warrant any premises, to make any arrest, recover any person to be wrongfully restrained to confine or any arms, ammunition or explosive substance, believed to be unlawfully kept in such premises.” In 1972, the Act was extended to other States of Meghalaya, Nagaland and Tripura and Union Territories
of Arunachal Pradesh and Mizoram”. When the constitutional validity of this Act was challenged in Indrajit Barua v. State of Assam33, the Delhi High Court held that the rule of law enunciated in article 21 of the Constitution was available to the greatest number and there was sufficient guideline for the executive regarding the circumstances safeguards and the powers are to be exercised and the Acts provided sufficient safeguards and the powers conferred upon the executive cannot be said to be arbitrary. In the People’s Union of Democratic Rights v. Union of India34, the Gauhati High Court held that if the entire state was declared as ‘disturbed area’ the court would strictly examine the justifiability of declaring the entire State as disturbed area. The High Court directed the State to review whether there was any necessity to make such a declaration.

4.2.6 The Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983

This Act was also similar to the earlier Act, except that it enlarged the scope of the power such as “any property reasonably suspected to be stolen property” and added an additional provision “stop, search and seize any vehicle or vessel reasonably suspected to be carrying any person who is a proclaimed offender, or any person who has committed a non-cognizable offence or against whom a reasonable suspicion exits that he has committed or is about to commit a non-cognizable offence or any person who is carrying any arms, ammunition or explosive substance believed to be unlawfully held by him and may for that purpose use such force as may be necessary to effect such a stoppage, search or seizure as the case may be.”

4.2.7 The Armed Forces (Jammu & Kashmir) Special Powers Act, 1990

This Act, was also similar the earlier Acts. It had enlarged the disturbed areas and dangerous conditions so as to include “activities involving terrorist act directed towards overthrowing the Government as by law established or striking terror in the people or any section of the people or alienating any section of the people or adversely affecting the harmony amongst different sections of the people” and further enlarged it by adding activities “directed towards disclaiming, questioning or

33 AIR 1983 Del 513
disrupting the sovereignty and territorial integrity of India or bringing about secession of a part of the territory of India from the union or causing insult to the Indian National Flag, the Indian National Anthem and the Constitution of India.”.

4.2.8 Terrorist and Disruptive Activities (Prevention) Act, 1987

In the Statement of Objects and Reasons of TADA Act, 1987, it was stated that the 1985 Act was in the background of escalation of terrorist activities, and it was expected that it would be possible to control the situation within a period of two years and, therefore, the life of the said Act was restricted to a period of two years from the date of commencement. However, the statement admitted that on account of various factors such as stray incidents in the beginning was becoming a continuing menace especially in the State like Punjab. It was further stated that “on the basis of experience, it was felt that in order to combat and cope with terrorist and disruptive activities effectively, it is not only necessary to continue the said law but also to strengthen it further.” It, was, therefore, enacted that “persons in possession of certain arms and ammunition specified in the Arms Rules, 1962 or other explosive substance unauthorisedly in an area to be notified by the State Government shall be punishable with imprisonment for a term which shall not be less than five years, but which may extend to imprisonment for life and with fine.”

The word ‘terrorism’ has not precisely been defined. In the case of Hitendra Vishnu Thakur35, the Supreme Court said that “it is use of violence when its most important result is not merely the physical and mental damage of the victim, but the prolonged psychological effect it produced or has the potential of producing on the society as a whole. If the object of the activity is to disturb the harmony of the society or to terrorize people, it will undoubtedly be held to be terrorist act. But in the case of Sanjay Dutt,36 a five-Judge Bench of the Supreme Court did not prefer to adopt the above definition of terrorism and held that the Hintendra Vishnu Thakur, case has wrongly applied the provisions of section 167, Cr.P.C. and the right of the accused to

get bail was ‘indefeasible right only from the time of default till the filing of challan and it does not survive on the challan being field. In the case of Uday Mohan Lal Acharya v. State of Maharashtra\textsuperscript{37}, a three Judge Bench of the Supreme Court considered the scope of section 167 (1) of Cr. P.C. Two Judges, while explaining the five Judge Bench decision in Sanjay Dutt, recorded their conclusion that the expression “if not already availed of filed an application and is prepared to offer bail on being directed. In People’s Union for Civil Liberties v. Union of India\textsuperscript{38}, the Supreme Court observed:

“It may also be that under these conditions, certain additional and unusual powers have to be given to the police to deal with terrorism. It may be necessary to fight terrorism with a strong hand which may involve vesting of good amount of discretion in the police officers or other paramilitary forces engaged in fighting them. If the versions of the police with respect to the incident in question were true there could have been no question of any interference by court. Nobody can say that the police should wait till they are shot at. It is for the force on the spot to decide when to act, how to act and where to act. It is not for the court to say how the terrorists should be fought. Court cannot be blind to the fact that even after fifty years of our independence, our territorial integrity is not fully secure. There are several types of separatist and terrorist activities in several parts of the country. They have to be subdued. Whether they should be fought politically or be dealt with by force is a matter or policy for the Government to determine. The court may not be the appropriate forum to determine those questions.

In People’s Union for Civil Liberties v. Union of India\textsuperscript{39}, the Supreme Court discussed the appoint that to face the terrorism, “we need new approaches, techniques, weapons, expertise and, of course, new laws. In the above said circumstance, the Parliament felt that a new anti-terrorism law is necessary for a better future, this parliamentary resolve is epitomized in POTA.

\textsuperscript{37} 2001 AIR SCW 1500; (2001) 5 SCC 453: AIR 2001 SC 1910
TADA Act, 1987 further enacted that confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or any mechanical device shall be admissible in the trial of such a person for an offence under the proposed legislation or any rules made there under. It was also provide that the designated court shall presume, unless the contrary was proved, that the accused has committed an offence. It further provided that in the case of a person declared as a proclaimed offender in a terrorist case, the evidence regarding his identification by witnesses on the basis of his photograph shall have the same value as the evidence regarding his identification by witnesses on the basis of his photograph shall have the same value as the evidence of a test identification parade. This Act was extended to the whole of India and to its citizens both within and outside India. While earlier, the duration of the Act was two years, which was extended to as many as eight years.

So far as the punishment was concerned, the Act stated that “if such an act has resulted in the death of a person, it may be punishable with death or imprisonment for life and shall also be liable to fine”. In other cases, “it is punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.”

The Act did not stop with the offenders but extended to “whoever conspires or attempts to commit or advocates, abets, advises or incites or knowingly facilitates the commission of a terrorist act or and act preparatory to a terrorist act shall also be punishable in the same manner and with the same quantum of punishment.”

The Act also included disruptive activities which were catalogued in a different way from the terrorist activities. The disruption is defined as “Any action taken, whether by speech or through any other media or in any other manner whatsoever, which questions, disrupts or is intended to disrupt, whether directly or indirectly, the sovereignty and territorial integrity of India or which is intended to bring about or supports any claims, whether directly or indirectly, for the secession of any part of India.”
With respect to conferment of powers, the Act provided that the Central Government can confer on any officer of the Central Government powers exercisable by a police officer such as arrest, investigation and prosecution of persons before any court. The Act mandates that all officers of police be required to assist the officers of the Central Government. The officer was empowered “that he has reason to believe that any property derived or obtained from the commission of any terrorist act and includes proceeds of terrorism, he shall, with the approval of Superintendent of Police, make an order seizing such property or attach the property.”

Where there was no evidence that the gun found with the accused was in working condition and the cartridges were live one, the court held that the conviction of the accused under section 25 of the Arms Act, 1959 and section 5 of TADA could not be upheld.40 Where the accused had the knowledge that the two guns and the cartridges were kept at a particular place but mere knowledge of that cannot amount to conscious possession of those things. It was, therefore, obvious that on the basis of the said answer it was not proper to convict the appellant under section 5 of the TADA Act.41 In another case the Supreme Court found that the trial court believed on the prosecution witness and that the appellant was in conscious possession of the explosive articles recovered from the room taken on lease, it was held that he was rightly convicted.42 In the case of Ahmad Umar Sheikh v. State of Uttar Pradesh43, when the FIR was recorded no prior approval of the Superintends of Police was obtained as required under section 20-A(1) but, as noticed above, the FIR was recorded not only for offences under TADA but also for offences under the I.P.C. for the commission of which the police officer concerned was competent to lodge and FIR without such approval. The absence of approval of district S.P. as required under section 20-A(1) of TADA, at that stage only disentitled the investigating agency to investigate into the offences relating to TADA but it had a statutory right to investigate into the other offences alleged in the FIR.

The Act further empowers the designated court that “in the case of those persons who are convicted of any offence under this Act,” it could, in addition to the punishment, order for declaring any property forfeited to the Government. The reliance on the evidence of identification of the accused in the court by prosecution witness before the designated court was an erroneous way of dealing with the evidence of identification of the accused in the court by the two eye-witnesses and had caused failure of justice. Since conviction of the appellants has been recorded by the Designated Court on wholly unreliable evidence, the same was set aside by the Supreme Court.44 If the trial has been stayed by the court or by operation of law, the period shall be excluded at the time of closing prosecution evidence.45

This Act also made a major departure from the established practice with regard to the admissibility of evidence. The Act states “notwithstanding anything contained in the Code or in the Indian Evidence Act, 1872, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer in writing or on any mechanical device like cassettes, tapes or sound tracks out of which sounds of images can be reproduced shall be admissible in the trial of such person for such an offence under this Act.” In the normal criminal law, the accused is innocent until the guilt is proved, whereas in this Act it states, “the designated court shall presume, unless the contrary is proved, that the accused had committed such offence”. It also provides for impunity when it says that: “no suit, prosecution or other legal proceeding shall lie against the Central Government or the State Government or any officer or authority of the Central Government or the State Government or any other authority on whom powers have been conferred under this Act or any rules made there under, for anything which is in good faith done or purported to be done in pursuance of this Act”. A confession, if usable under section 15 of the TADA, would not become unusable merely because the case is different or the crime is different. It would be admissible in evidence.46

The Central Government was empowered to make such rules that provide for “regulating the conduct of persons in respect of areas, the control of which is considered necessary or expedient and the removal of such persons from such areas and also the entry into and search of any vehicle, vessel or aircraft or any place”.

4.2.9 Indian problems after TADA

India has been facing the problems of terrorism and insurgency for nearly three decades and the aftermath of 9/11 event in USA, 7/7 event in London Metro in U.K. and Madrid Train event in Spain were not novel experiences. In the mid nineties, India had passed the TADA law to control terrorism and insurgency and had conferred stringent powers on the Police and executive to arrest and detain persons. The NHRC has opposed it as the long detention without trial affected the liberty of many. The Supreme Court tried to mitigate the rigour by reading down some stringent provisions and directed that certain category of detainees be released and a review committee be set-up.47 The Law Commission of India has recommended the enactment of Prevention of Terrorism Bill, 2000, which contained stringent provisions like TADA, but the NHRC has opposed such enactment. The NHRC was of the opinion that it may also be rethink over it and the bill was allowed to lapse. But the later event of 9/11 terrorism in USA, the requirement of stringent law to combat terrorism gained momentum In India. However, the NHRC opposed it by its letter dated 19th November, 2001 to the Government. The NHRC relied on the resolution No. 1373 dated 28th September, 2001 of the UN Security Council in which the Security Council called upon the States to take “appropriate measures in conformity with the relevant provisions of National and International Law, including standards of human rights”. However, the then global mood prevailed and a law known as POTA was promulgated with number of stringent provisions.

4.2.10 The Prevention of Terrorism Act, 2002

In the introduction to the Act there was a statement of objects and reason which reflected the context and the conditions leading to the prevailing state of affairs. The

statement pointed out that the country was facing “multifarious challenges to the management of its internal security. There is an upsurge of terrorist activities, intensification of cross-border terrorist activities, and insurgent groups in different parts of the country. Very often, organized crime and terrorist activities are closely inter-linked. Terrorism has now acquired global dimensions and has become a challenge for the entire world. The search and methods adopted by terrorist groups and organizations take advantage of modern means of communication and technology using high-tech facilities available in the form of communication system, transport, sophisticated arms and people at will. The exiting criminal justice system is not designed and equipped to deal with the type of heinous crime which the proposed law deals with.”

The Act was extended to the whole of India. “The provisions of this Act were made applicable to citizens of India, outside India, persons in the service of the Government, wherever they may be, and persons on ships and aircrafts, wherever they may be”.

(i) **Scope and applicability of Act**

If the weapon falls in section 4(b), then irrespective of whether it falls in section 4(a) or not, it would not be excluded from the purview of section 4(b) of the POTA, 2002. Further under section 4(b). In S.K. Shukla v. State of Uttar Pradesh, the facts were that huge cache of arms and explosives were recovered from the house of the accused, including an AK 47 rifle. The Supreme Court held that the very fact of keeping huge quantity of explosives in the house without a licence, on face of it was hazardous. These explosives were capable of creating havoc if used to prepare a bomb, and the same cannot be played down simply because bomb disposal squad report said that they were of intensity. Hence the recovery of substances clearly showed that case of accused was covered by section 4(b), though not section 4(a), as on said date, area concerned was not notified. Further, possession of AK 56 rifle in unauthorized manner, said rifle being capable of mass destruction, is itself an offence under section 3(3) and 4(b).

The Act carried the same provisions and similar tone and tenor of the TADA in the case of punishment for and measures for dealing with the terrorist activities. The Act enlarged the scope of offence by including those acts that “cause damage or destruction of any property or equipment used or intended to use for the defence of India or in connection with any other purpose of the Government of India, any State Government or any of their agencies”. When the constitutional validity of section 14 of the POTA was challenged in People’s union for Civil Liberties v. Union of India⁴⁹, the Supreme Court held that the Act was not violative of articles 14, 19, 20(3) and 21. Section 14 gave powers to the investigating officer to ask for furnishing information that would be useful for or relevant to the purpose of Act.

(ii) Constitutional validity of section 20, 21 and 22 of POTA

Where the petitioners challenged section 20, 21 and 22 of the POTA on the ground that these sections do not require mensrea for offences and the same were liable to be misused, therefore, they may be declared unconstitutional. It was pointed out that section 21 and its various sub-sections are penal provisions and should be strictly construed both in their interpretation and application; that a true interpretation of section 21, would not cover any expression or activity which did not have the element or consequence of furthering or encouraging terrorist activity or facilitating its commission. The mere expression of sympathy or arrangement of a meeting which is not intended or designed and which does not have the effect to further the activities of any terrorist organization or the commissions of terrorist acts are not within the mischief of section 21 and hence are valid. Here the only point to be considered is whether these sections exclude mens rea element for constituting offences or not. At the outset it has to be noted that section 20, 21 and 22 of POTA are similar to that of Sections 11, 12 and 15 of the Terrorism Act, 2000 of U.K. Such provisions are found to be quite necessary all over the world in anti terrorism efforts. Sections 20, 21 and 22 are penal in nature that demands strict Construction. These provisions are a departure from the ordinary law since the said law was found to be inadequate and not sufficiently effective to deal with the threat of terrorism. Moreover, the crime referred

to under POTA is aggravated in nature. Hence, special provisions were contemplated to combat the new threat of terrorism. Support, either verbal or monetary, with a view to nurture terrorism and terrorist activities is causing new challenges. Therefore, Parliament finds that such support to terrorist organization or terrorist activities need to be made punishable. Viewing the legislation in its totality it cannot be said that these provisions are obnoxious. Mens rea by necessary implication could be excluded from a statute only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated. The prominent method of understanding the legislative intention, in a matter o this nature, is to see whether the substantive provision of the Act requires mensrea element as a constituent ingredient for an offence. Offence under section 3(1) of POTA will be constituted only if it is done with ‘intent’. If Parliament stipulates that the ‘terrorist act’ itself has to be committed with the criminal intention, can it be said that a person who profess (as under section 20) or ‘invites support’ or ‘arranges, manages, or assist in arranging or managing a meeting or addresses a meeting (as under section 21) has committed the offence if he does not have any intention or design to further the activities of any terrorist organization or the commission of terrorist act? It is clear that it is not. Therefore, it is obvious that the offence under section 20 or 21 or 22 needs positive inference that a person has acted with intent of furthering or encouraging terrorist activity or facilitating its commission. In other words, these sections are limited only to those activities that have the intent of encouraging or furthering or promoting or facilitating the commission of terrorist activities. If these sections are understood in this way, there cannot be any misuse. With this clarification the Supreme Court upheld the constitutional validity of sections 20, 21, and 22.50

Article 21 of the Constitution guarantees the life with dignity. Undoubtedly, National Security is of paramount importance. Without protecting the safety and security of the nation, individual rights cannot be protected. However, worth of nation is the worth of the individuals constituting it. Both national integrity as well as individual dignity are core values of the Constitution. It is, therefore, obligatory on the part of the court to

exercise its judicial discretion guided by law and desirable that the application for
grant of bail is disposed of on principles, but not merely on assumptions and
presumptions much less on apprehensions without sufficient materials to constitute
the offence charged.51

(iii) Power of Special Court to Extend Period of Detention

Considering the provisions of law contained in section 49 of the POTA, 2002 and
various decisions cited it was apparent that the investigation had to be primarily
completed within the first 90 days period from the date of arrest of the accused under
POTA, in case the investigating agency is not able to complete such investigation
within the period of 90 days and if it needs for continuation of the detention of the
accused in custody beyond the said period of ninety days it is necessary for the
Investigating Agency to submit a report in that regard through the Public Prosecutor
to the Special Court. Such a report necessarily should disclose the progress of ninety
days. Apparently it should indicate the satisfaction of the Public Prosecutor in that
regard and thereupon the Special Court can extend the period of 90 days to further 90
days i.e.in total for a period of 180 days. The provisions of section 49 did not on the
face of it discloses any provision for opportunity of being heard to be given to the
accused before any such order of extension of period is passed by the court. However,
time and again the apex Court as well as the Bombay court has held that while
exercising the powers relating to curtailment of the personal liberty, the provisions
contained in article 20 of the Constitution are never to be forgotten and any
deposition of personal liberty has to be in accordance with the provisions of law and
in conformity with the mandate of article 20 of the Constitution and without ignoring
the basic principles of natural justice. Therefore, the provisions for opportunity of
being heard has to be read in the proviso to section 49 when the Special court chooses
to curtail the liberty of the accused for further period of ninety days on expiry of the
initial period of ninety days. The law settled by the apex Court in the matter of similar
provisions under TADA, will apply the provisions in POTA in spite of the fact that
there is no specific provisions for hearing to be given to the accused before extending

51 Madurai Ganesan v. State of Tamil Nadu, 2004 (1) CTC 298 (304) (Mad)
the period. Hence, it is to be held that while exercising the power to extend the period pursuant to the report of the public prosecutor, the special Court will have to issue notice to the accused before passing any such order of extension of period. The maximum period prescribed under section 49(2) of POTA for detention of the accused for the purposes of investigations is ninety days. However, the extension does not depend upon happening of any even as such nor it is a deeming provision. The extension of the period has to be by a judicial order in that regard in view of the proviso added to section 167 of the Code of Criminal Procedure. Undoubtedly, the grounds for extension of period, as well as for remand of the accused may be the same, and both the orders can even be simultaneously passed. The reason for the same is that the court can remand the accused to custody beyond such period of ninety days only after expiry of the said period as provided under proviso to section 167(2) of the Code of Criminal Procedure. In view of the provisions of law contained in section 49 of POTA, unless the period of ninety days, the Special court is not empowered to remand the accused to custody even though the investigation incomplete. Considering the facts and circumstance of case, therefore, the appellants are justified in contending that they had acquired indefeasible right for being released on bail on expiry of the period of ninety days and that has been illegally refused to them by rejecting their bail applications, by the court below. It was held that if the accused applies for bail after the expiry of period, he has to be released on bail forthwith and the accused so released on bail mail by arrested and committed to the custody according to the provisions of the Code of Criminal Procedure. However, before such orders being passed, if the charge-sheet is submitted by the Investigating Agency, such a right can be interfered with by following the procedure applicable in cases of cancellation of bail and not in any other manner.52

In absence of any terrorist activity attributed to any of the accused persons, except delivering some speeches, it will be difficult to order the accused person to remain behind the bars for more than seventeen months. In spite of the long span of more than one year during which the accused persons have been delivering the speeches, there has not been any action against them except the present one. Considering the

52 Kamlkar v. State of Maharashtra, 2004 (1) All India Cr LR 122 (128-131) (Bom).
circumstances of the case the accused were granted bail subject to certain conditions.\textsuperscript{53}

(iv) **Entitlement to Bail**

An appeal is a proceeding taken to rectify an erroneous decision of a court by submitting the question to a higher court and in view of express language used in section 34(1) of POTA the appeal would lie both on facts and on law. Therefore, even an order granting bail can be examined on merits by the High Court without any kind of fetters on its powers and it can come to an independent conclusion whether the accused deserves to be released on bail on the merits of the case. The consideration which are generally relevant in the matter of cancellation of bail under sub-section (2) of section 439 of the Code of Criminal Procedure will not come in the way of the High Court in setting aside an order of the Special Court granting bail. It is, therefore, evident that the provisions of POTA are in clear contradiction with that of Code of Criminal Procedure where no appeal is provided against an order granting bail. The appeal can lie only against an order of the Special Court and 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 reproaching the High Court. Section 49 cannot be read in isolation, but must be read keeping in mind the scope of section 34 where under an accused can obtain bail from the High Court by preferring an appeal against the order of Special Court refusing bail.\textsuperscript{54}

In Kirtibhai Madhavlal Joshi v. State of Gujarat\textsuperscript{55}, the allegation on the appellant’s firm was that it received huge amounts from Dubai through hawala transaction and with full knowledge of the fact that the money received by them and handed over to the recipients was being used for terrorist activities. Case was mainly depended upon the confessions of the appellants considering the confessions, the reports of the review committees and the provisions of section 49 of POTA, 2002 the clarification provided

\textsuperscript{53} P. Nedumaan v. State rep. by Superintendent of Police, 2004 (1) CTC 721 (737, 740) (Mad)
\textsuperscript{55} (2006) 4 SCC 680.
in PUCL v. Union of India, the Supreme Court held that the case was made out for the grant of bail to the appellants.

The more striking feature of this Act was inclusion not only of Power of Declaration of an organization as a Terrorist organization but there was a schedule listing the organization. The Central Government has been given the power to add or remove an organization from the schedule. There was a clause that the organizations can approach the Central Government for the removal. This was considered by a review committee which could identify an organization.

(v) **Role of Review Committee**

The role given to the review committee under section 60(4) of POTA, 2002 was very limited and it was only to see whether there was a prima facie case for proceeding against the accused under the Act or not and it could not enter into the merits that whether ultimately the conviction will entail or not or the evidence was so weak that it could not be connected with the other accused persons. If the prima facie case connect the accused on the basis of the material with the prosecution then it is not for the Review Committee to dilate on that as if they are trying the cases under the Act. If the review committee has said about the sufficiency of evidence, it will be deemed to have travelled beyond its scope. Nor it is the job of the review committee to see whether confession was admissible or not.

The clause on burden of proof was completely contrary to the normal standards. The Act provided that a person shall be deemed to have committed an offence “if he belongs to or professes to be belong to a terrorist organization, and that a person committed and intends that it should be used, or has reasonable cause to suspect that it may be used for the purpose of terrorism.”

There was also a clause for recording evidence in absence of the accused wherein the court was competent to try or commit for trial such person for the offence complained of.

---

57 (2006) 4 SCC 680
of, may, in his absence, examine the witnesses produced on behalf of the prosecution and record their depositions and any such deposition, may on the arrest of such person, be given in evidence against him on the inquiry into or trial for, the offence with which he was charged. The higher courts can direct any magistrate of the first class to hold an inquiry and examine any witnesses who could give evidence concerning the offence and any deposition so taken may be given in evidence against any person who is subsequent accused of the offence.

That POTA is more stringent than the TADA. The Act gives the power of interception. A police officer not below the rank of SP supervising the investigation of any terrorist act under this Act may submit an application in writing to the competent authority for an order authorizing or approving the interception of wire, electronic or oral communication by the investigating authority when he believes that such interception may provide or has provided some clues to any offence involving a terrorist act. The Act also authorized the concerned authorities to direct that a provider of wire or electronic communication service, landlord, custodian or other person shall furnish to the police forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference of the services that such a service provider, landlord custodian is providing to the person whose communications are to be intercepted”.

The Act also provides for protection of information. Law enforcing agency is required to preserve the contents of the communication intercepted without any alteration or editing.

The Act also incorporates a provision that the information gathered through interception is admissible as evidence against the accused in the court during the trial of a case. The Judge can waive the ten days condition, if he is convinced that it was not possible to furnish the information to the accused during this period. There is the provision for a Review Committee which should be furnished the details of the interception and be satisfied that the interception was necessary, reasonable and justified. The Review Committee has the power to approve or disapprove the orders of the competent authority authorizing the interception. In cases where it is not
admissible for evidence; it has to be destroyed. There is also a clause which makes the interception violative of the Act punishable.

The Act empowers that if the investigating officer fails to complete the investigation in a period of ninety days, the special court shall extend the said period unto one hundred and eighty days on the report of the Public Prosecutor indicating the progress of the accused beyond the said period of ninety days. The normal rules under Cr.P.C. for arrest do not apply in these trials, as no person accused of an offence punishable under this Act in custody be released on bail or on his own bond unless the court gives the Public Prosecutor an opportunity of being heard and if the latter opposed the bail, the accused cannot be released until the court is satisfied that here are reasons to believe that the accused might have not committed the offence.

The Act further requires that whenever any person is arrested, information of his arrest shall be immediately communicated by the police officer to a family member or relative and the arrested person be permitted to meet the legal practitioner representing him during the course of interrogation of the accused person. As was the case with TADA, even in POTA the presumption of offence as the special court is called upon to draw an adverse inference from any evidence that is brought to its notice. It also provides immunity to the officer as it provides for protection of the action of officer in good faith. For it provides that no suit, prosecution or other legal proceedings shall lie against any officer or authority on whom powers have been conferred under this Act for anything done in good faith or purported to be done in pursuance of the provisions contained in this Act. However, any police officer who exercises power corruptly or maliciously, knowing that there are no reasonable grounds for proceeding under this Act, the court may award such compensation as it deems fit to the person. The Act also has a provision for impounding the passport and arms licence of person charge-sheeted under this Act. As was the case with TADA, the Act also provides for power for regulating the conduct of persons and the removal of such persons from the area and also the entry into vehicle, vessel or aircraft or any place whatsoever.
(vi) **Act cannot be used for Political Ends**

In S.K. Shukla v. State of Uttar Pradesh\(^59\), the Supreme Court held that the use of OTA for personal benefit of the political parties has to be condemned in no uncertain terms, as this Act cannot be used for political ends, it is meant for the benefit of the nation so that terrorist activities do not disturb the sovereignty or integrity of the nation.

It is clear that extra-ordinary powers have been given to the states and it vests the individual officer with wide discretionary powers, and its implementation depends much on the quality and approach of the concerned officers. Form a human rights point of view what is important is whether the officer take the limits imposed on procedures laid down seriously or not. We can better understood it further, if we take a look at the international thinking on terrorism and human rights and humanitarian concerns.

4.2.11 **The National Investigating Agency Act, 2008**

Whenever, terrorists committed the act of terrorism, the concerned State Police used to investigate the crime. The State Police Officers did not have any information about the persons who committed the crime, where they run away, in which State they are hiding, who are the managing persons over the terrorist and from which State they are managing. Many States and the Union Government felt that there was a necessity of constituting an ‘Investigation Agency at the National Level’ to investigate and prosecute offences affecting the terrorism, sovereignty, security and integrity of India, security of State, friendly relations with foreign States and offences under Acts enacted to implement international treaties, agreements, conventions and resolutions of the United Nations, its agencies and other international organizations and for matters connected therewith or incidental thereto. The Parliament therefore enacted the National Investigating Agency Act, 2008, which received the assent of the President on 31\(^{st}\) December, 2008.

---

(1) Extent and Application

According to section 1, the National Investigation Agency Act, 2008, was extended to the whole of India. It applies also (a) to citizens of India outside India; (b) to person in the service of the Government wherever they may be; and (c) to person on ships and aircrafts registered in India wherever they may be.

(i) Analysis of Measures taken in India during the last 60 years in Totally Containing Terrorism

A simple analysis of the measures taken during the six decades after independence shows that no legal measure or no quantum of power in terms of use of force and the severity of punishment has been helpful in totally containing terrorism. On the contrary, its spread and intensity has been admitted by the States and the Union time and again. It was in the decade of seventies that the problem took the form of ‘disturbed areas’ and ‘terrorism’, calling for far more comprehensive measures. In the decades of eighties of twentieth century and first decade of twenty-first century the legislations like TADA and POA have been introduced. However, the essence of experience of six decades with social turmoil indicates that he use of force and severity of punishment was necessary from the point of the States and Union but that they were not sufficient is so self-evident that it does not need any further evidence or substantiation. As there has been growing problem emanating from the so-called terrorism, correspondingly there has been growing human rights consciousness. There has been substantial documentation of these violations of rights by human rights groups in Punjab, Kashmir, the North-East, Andhra Pradesh, Bihar, Gujarat, Orissa, Maharashtra, Rajasthan, Tamil Nadu, Uttar Pradesh, West Bengal and other problem States of India. There has also been documentation of such violations by the International human rights agencies like Amnesty International, Asia Watch, and so on. The violations are also recorded by the Enquiry Commissions appointed from time-to-time by the Governments themselves and also State and National Human Rights Commissions. There are also Judicial Pronouncements as a testimony to the blatant violations of the rights of the citizen. The media, with all its limitations,
played no less significant role in exposing these excessive actions of the State agencies.

After the Jaipur blats on 13th May, 2008, the National Security Advisor and the Cabinet Secretary have criticized the Cabinet Committee on security on the roll of intelligence agencies, and that there was inadequate co-ordination between the Central and State intelligence agencies.

(ii) **Necessity of a Central Investigation Agency to Combat Terrorism**

Prime Minister Man Mohan Singh raised an issue in November, 2009 that there was a necessity of Police power with the Centre to combat terrorism. At present ‘Police’ exclusively is a State subject. A constitutional amendment to invest the Union with power in this field would require the ratification by the legislatures of one half of the States. The CBI falls in the Union list, but the CBI can only investigate into offences in any territory within the Union and can also be extended to an area within the State. The State’s consent was an indispensable prerequisite. If withdraw, the CBI cannot function in that State. In fact the task of combating terrorism cannot be “effectively discharged by single agency of any particular State”, therefore there was a necessity of accepting terror act as the “federal crime” or Union crime” and establishment of a separate agency to investigate crimes of terrorism. At present State police investigates into violations of central as well as State laws and a single hierarchy of courts try all such offences. In USA, in contrast, the FBI investigates offences created by federal laws or federal crimes and only federal court can try such cases. The stark reality is that terrorism has truly become globalized. The menace can be fought only if intelligence is received in time, analyzed by professionals free from political pressures and the police force is given clear tasks to perform. Obviously all this requires single agency, which the States cannot tackle the problem by themselves. They have neither the power nor the means to acquire intelligence from abroad.

In the Constitution of India, the entry on ‘police’ in the State’s list is qualified by a proviso: ‘Subject to the provisions of entry 2A of List I’. Entry 2A was inserted in the Union list by 42nd amendment in 1976 to empower the Centre to deploy the armed
forces or the paramilitary forces in any State in aid of the civil power. By article 355 the centre is charged with power ‘to every State against external aggression and internal disturbance….if a State is enable to quell the disturbances. This can be amended to include an ‘act of terrorism’ also.

The term ‘defence of India’ includes defence against the new forms of attack on the nation i.e by international terrorism. If the Indian Penal Code is amended by the Parliament to create the offence of international terrorism and a special squad is set up to fight that menace, the Supreme Court might hold that ‘defence of India’ includes defence against the new forms of aggression such an international terrorism.

(2) Definitions-

(1) In this Act unless the context otherwise requires-

a) “Agency” means the National Investigation Agency constituted under section 3
b) “Code” means the Code of Criminal Procedure 1973 (2 of 1974);
c) “High Court” means the High Court within whose jurisdiction the Special Court is situated;
d) “Prescribed” means prescribed by rules;
e) “Public Prosecutor” means a Public Prosecutor or an Additional Public Prosecutor or a Special Public Prosecutor to this Act;
f) “Schedule” means the Schedule to this Act;
g) “Scheduled offence” means an offence specified in the Schedule;
h) “Special Court” means a Special Court constituted under section 11 or, as the case may be under section 22;
i) Words and expressions used but not defined in this Act and defined in the Code shall have the meaning respectively assigned to them in the Code.

(2) Any reference in this Act to any enactment or any provision thereof shall, in relation to an area in which such enactment or such provision is not in force, to
construed as a reference to the corresponding law or the relevant provision of the corresponding law, in force in that area.

(3) **Constitutions of National Investigation Agency**-Section 3

(1) Says that notwithstanding anything in the Police Act, 1861 (5 of 1861), the Central Government may Constitute a special agency to be called the National Investigation Agency for investigation and prosecution of offences under the Acts specified in the Schedule.

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

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

(4) **Superintendence of National Investigation Agency**-

(1) The superintendence of the Agency shall vest in the Central Government.

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

(5) **Manner of Constitution of Agency and conditions of services of member**-

Subject to the provisions of this Act the Agency shall be constituted in such manner as may be prescribed and the conditions of services of persons employed in the Agency shall be such as may be prescribed.

**Investigation by the National Investigation Agency**

(6) **Investigation of Scheduled Offences**

(1) On receipt of information and recording thereof under section 154 of the Code relating to any Scheduled Offence, the officer-in-charge of the police station shall forward the report to the State Government forthwith.

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

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

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

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

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

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

(7) **Power to transfer investigation to State Government**- While investigating any offence under this Act the Agency, having regard to the gravity of the offence and other relevant factors, may-

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

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

(8) **Power to investigate connected offences**- While investigating any Schedule Offence, the Agency may also investigate any other offence which the accused is alleged to have committed if the offence is connected with the Scheduled offence.

(9) **State Government to extend assistance to National Investigation Agency**- The State Government shall extend all assistance and co-operation to the Agency for investigation of the Scheduled Offence.

(10) **Power of State Government to investigate Scheduled offences**- Save as otherwise provided in this Act nothing contained in this Act shall affect the
power of the State Government and persecute and scheduled offence or other
offences under any law for the time being in force.

SPECIAL COURTS

(11) Power of Central Government to constitute Special Court –

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

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

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

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

(5) On receipt of an application under sub-section (4), the Chief Justice
shall, as soon as possible and not later than seven days, recommend the
name of a judge for being appointed to preside over the Special Court.

(6) The Central Government may, if required, appoint an additional judge
or additional judges to the Special Court, on the recommendation of
the Chief Justice of the High Court.

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

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

(12) **Place of sitting**-A Special Court may, on its own motion, or on an application made by the Public Prosecutor and if it considers it expedient or desirable so to do, sit for any of its proceedings at any place other than its ordinary place of sitting.

(13) **Jurisdiction of Special Courts**-

(1) Notwithstanding anything contained in the Code, every Scheduled Offence investigated by the Agency shall be tried only by the Special Court within whose local jurisdiction it was committed.

(2) If, having regard to the exigencies of the situation prevailing in a State if,-

(a) It is not possible to have a fair, impartial or speedy trial; or
(b) It is not feasible to have the trial without occasioning the breach of peace or grave risk to the safety of the accused, the witnesses, the Public Prosecutor or a judge of the Special Court or any of them; or

(c) It is not otherwise in the interests of justice;

The Supreme Court may transfer any case pending before a Special Court to any other Special Court within that State or in any other State and the High Court may transfer any case pending before a Special Court situated in that State to any other Special Court within the State. (3) The Supreme Court or the High Court, as the case may be, may act under this section either on the application of the Central Government or a party interested and any such application shall be made by motion, which shall, except when the application is the Attorney-General for India, be supported by an affidavit or affirmation.

(14) **Powers of Special Courts with respect to other offences**-

(1) When trying any offence, a Special Court may also try any other offence with which the accused may, under the Code be charged, at the same trial if the offence is connected with such other offence.

(2) If, in the course of any trial under this Act of any offence, it is found that the accused person has committed any other offence under this Act or under any other law, the Special Court may convict such person of such other offence and pass any sentence or award punishment authorized by this Act or, as the case may be, under such other law.

(15) **Public Prosecutor**-

(1) The Central Government shall appoint a person to be the public prosecutor and may appoint one or more persons to be Additional Public Prosecutor or Additional Public Prosecutor: Provided that the Central Government may also appoint for any case or class or group of cases a Special Public Prosecutor.
(2) A person shall not be qualified to be appointed as a Public Prosecutor or an Additional Public Prosecutor or a Special Public Prosecutor under this section unless he has been in practice as an Advocate for not less than seven years or has held any post, for a period of not less than seven years, under the Union or a State requiring special knowledge of law.

(3) Every person appointed as a Public Prosecutor or an Additional Public Prosecutor or a Special Public Prosecutor under this section shall be deemed to be a Public Prosecutor within the meaning of clause (u) of section 2 of the Code, and the provisions of the Code shall have effect accordingly.

(16) Procedure and powers of Special courts-

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

(2) Where an offence triable by a Special Court is punishable with imprisonment for a term not exceeding three years or with fine or with both, the Special court may, notwithstanding anything contained in sub-section (1) of section 260 or section 262 of the Code, try the offence in a summary way in accordance with the procedure prescribed in the Code and the provisions of sections 263 to 265 of the Code shall, so far as may be, apply to such trial:

Provided that when, in the course of a summary trial under this sub-section, it appears to the Special Court that the nature of the case is such that it is desirable to try it in a summary way, the Special Court shall recall any witnesses who may have been examined and proceed to re-hear the case in the manner provided by the provisions of the Code for the trial of such offence and the said provisions shall apply to,
and in relation to, a Special Court as they apply to and in relation to a magistrate:

Provided further that in the case of any conviction in a summary trial under this section, it shall be lawful for a Special Court to pass a Sentence of imprisonment for a term not exceeding one year and with fine which may extend to five lakh rupees.

(3) Subject to the other provisions of this Act a Special Court shall, for the purpose of trial or may offence, have all the powers of a Court of Sessions and shall try such offence as if it were a court of Session so far as may be in accordance with the procedure prescribed in the Code for the trial before a court of Sessions.

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

(5) Notwithstanding anything contained in the Code, but subject to the provisions section 299 of the Code, a Special Court may, if it thinks fit and for reasons to be recorded by it, proceed with the trial in the absence of the accused to recall the witness for cross-examination.

(17) Protection of witness-

(1) Notwithstanding anything contained in the Code, the proceedings under this Act may, for reasons to be recorded in writing, be held in camera if the Special Court so desires.

(2) On an application a made by a witness in any proceedings before it or by the Public Prosecutor in relation to such witness or on its own motion, if the Special Court is satisfied that the life of such witness is in danger, it may, for reasons to be recorded in writing, take such
measures as it deems fit for keeping the identity and address of such witness secret.

(3) In particular, and without prejudice to the generality of the provisions of sub-section (2), the measures which a Special Court may take under that sub-section may include-

(a) The holding of the proceedings at a place to be decided by the Special Court;

(b) The avoiding of the mention of the names and addresses of the witnesses in its orders or judgments or in any records of the case accessible to public;

(c) The issuing of any directions for securing that the identity and address of the witnesses are not disclosed; and

(d) A decision that it is in the public interest to order that all or any of the proceedings pending before such a court shall not be published in any manner.

(18) **Sanction for prosecution**- No prosecution, suit or other legal proceedings shall be instituted in any court of law, except with the previous sanction of the Central Government, against any member of the Agency or any person acting on his behalf in respect of anything done or purported to be done in exercise of the powers conferred by this Act.

(19) **Trial by Special court to have precedence**- The trial under this Act of any offence by a Special Court shall be held on day-to-day basis on all working days and have precedence over the trial or any other case against the accused in any other court (not being a Special Court) and shall be concluded in preference to the trial of such other case and accordingly the trial of such other case shall, if necessary, remain in abeyance.
(20) **Power to transfer case to regular courts**- Where, after taking cognizance of any offence, a Special Court is of the opinion that the offence is not triable by it, it shall notwithstanding that it has no jurisdiction to try such offence, transfer the case for the trial of such offence to any court having jurisdiction under the Code and the court to which the case is transferred may proceed with the trial of the offence as if it had taken cognizance of the offence.

(21) **Appeals**-

1. Notwithstanding anything contained in the Code, an appeal shall lie from any judgment, sentence or order, not being an interlocutory order, of a Special Court to the High court both on facts and on law.

2. Every appeal under sub-section (1) shall be heard by a Bench of two Judges of the High Court and shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal.

3. Except as aforesaid, no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Special Court.

4. Notwithstanding anything contained in sub-section (3) of section 378 of the Code, an appeal shall lie to the High Court against an order of the Special Court granting or refusing bail.

5. Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment, sentence or order appealed from: Provided that the High court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not referring the appeal within the period of thirty days: Provided further that no appeal shall be entertained after the expiry of period of ninety days.
(22) **Power of State Government to constitute Special Court**-

(1) The State Government may constitute one or more Special courts for the trial of offences under any or all the enactments specified in the Schedule.

(2) The provisions of this Chapter shall apply to the Special Courts constituted by the State Government under sub-section (1) and shall have effect subject to the following modifications, namely-

(i) References to “Central Government” in sections 11 and 15 shall be construed as references to State Government;

(ii) Reference to “Agency” in sub-section (1) of section 11 and 15 shall be construed as a reference to the “investigation agency of the State Government”;

(iii) Reference to “Attorney-General for India” in sub-section (3) of section 13 shall be construed as reference to “Advocate-General of State”.

(3) The jurisdiction conferred by this Act on a Special Court shall, until a Special Court is constituted by the State Government under sub-section (1) in the case of any offence punishable under this Act, notwithstanding anything contained in the Code, be exercised by the court of Session of the division in which such offence has been committed and it shall have all the powers and follow the procedure provided under this Chapter.

(4) On and from the date when the Special Court is constituted by the State Government the trial of an offence investigation by the State Government under the provisions of this Act, which would have been required to be held before the Special Court, shall stand transferred to that court on the date on which it is constituted.
4.2.12 The Unlawful Activities (Prevention) Act, 1968

In 2008, by an amendment No. 35, the following new Preamble was inserted in the Unlawful Activities (Prevention) Act, 1967, which remind the resolutions of the Security Council of the United Nations to combat international terrorism:


International terrorism;

2. And whereas Resolutions 1367(1999), 1333(2000), 1363(2001), 1390(2002), 1455(2003), 1526(2004), 1566(2004), 1617(2005), 1735(2006) and 1822(2008) of the Security Council of United Nations require the States to take action against certain terrorists and terrorist organizations, to freeze the assets and other economic resources, to prevent the entry into or the transit through their territory, and prevent the direct or indirect supply, sale or transfer of arms and ammunitions to the individuals or entities listed in the Schedule;


4. And whereas it is considered necessary to give effect to the said Resolutions and the Order and to make special provisions for the prevention of, and for coping with terrorist activities and for matters connected therewith or incidental thereto.”

The Unlawful Activities (Prevention) Amendment Act, 2008, has included the terms ‘Special Court’ in section 2(d) and said that it shall be a Court as defined under
section 11 or 21 of the National Investigating Agency Act, 2008. The term ‘property’ means property and assets of every description whether corporeal or incorporeal, movable or immovable, tangible and intangible and legal documents, deeds and instruments in any form including electronic or digital, evidencing title to, or instruments in any form including electronic or digital, evidencing title to, or interest in, such property or assets by means of bank credits, travelers’ Cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit, cash and bank account including fund however acquired.

(2) In the Unlawful Activities (Prevention) Act, 1967, section 15 and 17 have been substituted and new section 16-A 18-A, 18-B, 43A to 43 F, 45(2), 51A, 52(ee) and 53(2) have been inserted, by Amending Act of 2008, as follows:

“15. Terrorist act.-Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India, or in any foreign country,-

(a) by using bombs, dynamite or other explosive substance or inflammable substances or firearms or other lethal weapons or poisonous on noxious gases or other chemical or by any other substance (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause-

a. death or injuries to, any person or person; or
b. loss of, or damage to, or destruction of, property, or
c. disruption of any supplies or services essential to the life of the community in India or in any foreign country; or
d. damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India, or in connection with any other purposes of the Government of India, and State Government or any of their agencies, or
(b) Overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or

(c) Detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or any other person to do or abstain from doing any act, commits a terrorist act.

Explanation:- For the purposes of this section, public functionary means the constitutional authorities and any other functionary notified in the Official Gazette by the Central Government as a public functionary.”

16.A- Punishment for making demands of radioactive substance, nuclear devices, etc.- Whoever intentionally, by use of force or threat of use of force, or any other means, demands any bomb, dynamite or other explosive substance or inflammable substance or firearms or other lethal weapons or poisonous or noxious or other chemicals or any biological, radiological, nuclear material or device, with the intention of aiding, abetting or committing a terrorist act, shall be punishable with imprisonment for a term which may extend to ten years, and shall also be liable to fine.

17.- Punishment for raising funds for terrorist act.- Whoever, in India or in a foreign country, directly or indirectly, raises or collects funds or provides funds to any person or persons or attempts to provide funds to any person or persons, knowing that such funds are likely to be used by such person or persons to commit a terrorist act, notwithstanding whether such funds were actually used or not for commission of such act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.

18A.- Punishment for organizing terrorist camps.- Whoever organizes causes to be organized any camp or camps for imparting training in terrorism shall be punishable for a term which shall not be less than five years, but which may extend to imprisonment for life and shall also be liable to fine.
18B.- Punishment for recruiting of any person or person for terrorist act.-Whoever recruits or causes to be recruited any person or person for commission of a terrorist act shall be punishable with imprisonment for a term which shall not be less than five years, but which may extend to imprisonment for life and shall also be liable to fine.

43A. Power to arrest, search, etc.-Any officer of the Designated Authority empowered in this behalf, by general or special order of the Central Government or the State Government, as the case may be, knowing of a design to commit any offence under this Act or has reason to believe from person knowledge or information given by any person and taken in writing that any person has committed an offence punishable under this Act or from any document, article or any other thing which may furnish evidence of the commission of such offence or from any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing under this Chapter is kept or concealed in any building, conveyance or place, may authorize any officer subordinate to him to arrest such a person or search such building, conveyance or place whether by day or by night or himself arrest such a person or search a such building, conveyance or place.

43B. Procedure of arrest, seizure, etc.-

(1) Any officer arresting a person under section 43A shall, as soon as may be, inform him of the grounds for such arrest.

(2) Every person arrested and article sized under section 43A shall be forwarded without unnecessary delay to the officer-in-charge of the nearest police station.

(3) The authority or officer to whom any person or article is forwarded under subsection (2) shall, with all convenient dispatch, take such measures as may be necessary in accordance with the provisions of the Code.
43C. Application of provisions of Code.-The provisions of the Code shall apply insofar as they are not inconsistent with the provisions of this Act, to all arrests, searches and seizures made under this Act.

43D. Modified application of certain provisions of the Code.-

(1) Notwithstanding anything contained in the Code or any other law, every offence punishable under this Act shall be deemed to be cognizable offence within the meaning of clause (c) of section 2 of the Code, and ‘cognizable case’ as defined in that clause shall be construed accordingly.

(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2),-

(a) the references to ‘fifteen days’, ‘ninety days’ and ‘sixty days’ wherever they occur, shall be construed as references to ‘thirty days’, ‘ninety days’ and ‘ninety days’ respectively; and

(b) after the proviso, the following provisos shall be inserted, namely:–

“Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may, if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days, extend the said period upto one hundred and eighty days:

Provided also that if the Police Officer making investigation under this Act, requests, for the purposes of investigation, or police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody.”

(3) Section 268 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that-

(a) The reference in sub-section (1) thereof-
(i) To ‘the State Government’ shall be construed as a reference to ‘the Central Government’ or the State Government’.

(ii) To ‘order of the State Government’ shall be construed as a reference to ‘order of the Central Government’ or the State Government’, as the case may be, and

(b) The reference in sub-section (2) thereof to ‘the State Government’ shall be construed as a reference to ‘the Central Government or the State Government as the case may be.

(4) Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person accused of having committed an offence punishable under the Act.

(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:

Provided that such accused person shall not be released on bail or on his own bond, if the court on the perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.

(6) The restrictions on granting of bail specified in sub-section (5), is in addition to the restrictions under the Code or any other law for the time being in force on grounds of bail.

(7) Notwithstanding anything contained in sub-sections (5) and (6), no bail shall be granted to a person accused of an offence punishable under this Act, if he is not an Indian citizen and has entered the country unauthorized or illegally except in very exceptional circumstance and for reasons to be recorded in writing.
43D of Unlawful Activities (Prevention) Act, 1967: Where the case was based on the circumstantial evidence, the Supreme Court held that no ill treatment was given to the appellant. The High court came to the conclusion that the appellant was responsible for the incident of shooting inside the Lal Quila (Red Fort) on the night of 22\textsuperscript{nd} December, 2000, which resulted in the death of three soldiers of Army, including the deceased who was killed in an encounter with police at Batla house. The appellant was held guilty for the offences under the Arms Act and the Explosives substance Act. The court found that in-depth evidence presented to the court, clearly established that the appellant was one of the persons responsible for terrorist attack. Fair opportunity was given to him to defence himself. The Supreme Court found that prejudice on the part of investigation agency or courts below could not be inferred.

43E. Presumption as to offence under section 15.-In a prosecution for an offence under section 15, if it is proved-

(a) That the arms or explosives or any other substance specified in the said section were recovered from the possession of the accused and there is reason to believe that such arms or explosives or other substances of similar nature were used in the commission of such offence; or

(b) That by the evidence of the expert, the finger-prints of the accused or any other definitive evidence suggesting the involvement of he accused in the offence were found at the site of the offence or on anything including arms and vehicles used in connection with the commission of such offence, the court shall presume, unless the contrary is shown, that the accused committed such offence.

43F. Obligation to furnish information.-

(1) Notwithstanding anything contained in any other law, the officer investigating any offence under this Act with the prior approval in writing of an office not below the rank of a Superintendent of Police, may require any officer or authority of the Central Government or a State Government or a local authority or a bank, or a company, or a firm or any other institution,
establishment, organization or any individual to furnish information in his or its possession in relation to such offence, on points or matters, where the investigating officer has reason to believe that such information will be useful for, or relevant to, the purpose of this Act.

(2) The failure to furnish the information called for under sub-section (1), or deliberately furnishing false information shall be punishable with imprisonment for a term which may extend to three years of with fine or with both.

(3) Notwithstanding anything contained in the Code, an offence under sub-section(2) shall be tried as a summary case and the procedure prescribed in Chapter XXI of the said Code except sub-section (2) of section 26(2) shall be applicable thereto.

**Sanction for prosecution:** According to the newly added sub-section (2) in section 45 by amendment in 2008, sanction of prosecution under sub-section (1) of the Unlawful Activities (Prevention) Act, 1967 shall be given within such time as may be prescribed only after considering the report of such authority appointed by the Central Government or, as the case may be, the State Government which shall make an independent review of the evidence gathered in the course of investigation and make a recommendation within such time as may be prescribed, to the Central Government or, as the case may be the State Government”.

51A. Certain powers of the Central Government for prevention and for coping with terrorist activities. –The Central Government shall have power to-

(a) Freeze, seize or attach funds and other financial assets or economic resources held by, on behalf of or at the direction of the individuals or entities listed in the schedule to the Order, or any other person engaged in or suspected to be engaged in terrorism;

(b) Prohibit any individual or entity from making any funds, financial assets or economic resources or related services available for the benefit of the
individuals or entities listed in the Schedule to the Order or any other person engaged in or suspected to be engaged in terrorism;

(c) Prevent the entry into or the result through India of individuals listed in the Schedule to the Order or any other persons engaged in or suspected to be engaged in terrorism.”

In section 53 of the Unlawful Activities (Prevention) Act, 1967, the following sub-section (2) was inserted by amendment in 2008:-

(2) The Order referred to in Entry 33 of the Schedule and every amendment made to that Order shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of 30 days which may be comprised in one session or in two or more successive sessions.

4.2.13 Establishment of National Counter-Terrorism Centre

On 10th January, 2012, the Government of India have decided to set up a specialized anti-terror body, known as National counter-Terrorism Centre (NCTC) which will work as a single window entity to pool together and collate terror related intelligence inputs from all agencies, draw plans to neutralize terror modules and co-ordinate action among different terror agencies to defuse threats. A core team of this body will comprise of a Director and other top officials, which will report to IB Chief and eventually to Home Secretary and Home Minister. The terror related probes will be done by NIA or State cops. The NCTC will have trained personnel to help the State cops. It will depend on IB, RAW, NTRO, MI and State Intelligence Agencies. The NCTC will also co-ordinate with relevant probe and intelligence agencies to ensure that the perpetrators of terror are brought to justice, besides maintain comprehensive database of terrorists, their associates and supporters, it will be exclusively focused on counter-terrorism on the lines of specialized anti-terror agencies in the USA, the UK, Germany, France, Israel, Russia, China and Japan.