Chapter-5

JUDICIAL RESPONSE TOWARDS TERRORISM

Terrorism is one of the dreadful phenomena of the present time. The dangerous trends towards an expansion of its scope hard turned in to a real threat to mankind. Terrorism and more particularly the counter measures which one takes to meet this menace is a matter of great concern and relevance today. It has been the subject of a huge debate over the years. It is common knowledge that human rights violations for larger periods of time are often the root cause of conflicts when there is tyranny and widespread neglect of human rights, people are denied hope of better future and this became a fertile ground for breeding terrorism.

The existence of social economic and political disparities in a large measure contributes to the emption of conflicts within the state and beyond. The neglect of economic, social and cultural rights give rise to conflicts and emerging forms of terrorism, which threaten the democratizes societies worldwide.

In various for a at different points of time, the issues of terrorism, the need for civil societies world over to adopt counter-terrorism measures, the extent to which such measures can go or the extent of departure from ordinary laws-substantive or procedural, the effect they have on basic human rights have been discussed endlessly.

Much has been said as to what are the possible causes of this dark facet that refuses to go away. We need not dwell much on the issue as to what exactly is the root cause of terrorism in our respective parts of the world since that concerns State policy and would rather be left to the domain of the Executive or Legislative wing of our respective Governments. As members of the legal fraternity the questions that beg to be addressed by us revolve around the conflict, consequential to counter –terrorism efforts, between human rights and the concerns for defence of the State of which we are part. The conflict stems from the necessity felt for entrusting the law-enforcement agencies with extraordinary powers to meet what is genuinely perceived as an
extraordinary situation. The irony is that the first and foremost impact of such measures is felt by law-abiding citizens on account of inroads they make into individual liberties. Civilized people do not expect their governments to enact laws that turn into mere “scarecrow” for “birds of prey” to use as their “perch”, as Shakespeare would put it. In this scenario, the role and attitude of the judicial apparatus assumes great importance, in which context we have certain responsibilities.

India is weeded to the concept of rule of law. State power is divided amongst the three chief organs, the Legislature, the Executive and the Judiciary. The role and responsibility of each has been properly defined and circumscribed, the Judiciary being given the prime place, and planted as the instrumentality of the Constitution to test the validity of acts of each organ through the concept of judicial review; the foremost reason for this scheme of things being the view that rule of law is the sole raison deter for the survival of human rights which India is determined to conserve and preserve. Fortunately when founding fathers of the Constitution of India were several models of the rights-based regime including the principles enshrined in Magna Carta, the corner-stone of liberty and the principles against arbitrary and unjust rule; the UK Bill of Rights, 1989; US Bill of Rights, 1791; the Declaration of the Rights of Man and of the Citizen, adopted in 1789, by the National Constituent Assembly of France; Universal Declaration of Human Rights, 1948 etc. India borrowed wisdom from these various instruments, but charted its own course developing a full-fledged elaborate chapter on ‘Fundamental Rights’.

The Constitution of India guarantees, to all persons, citizens and aliens alike, amongst others, equality before law; equal protection of the laws; guarantee against discrimination; freedom of speech & expression; freedom of peaceable assembly; freedom to form association; freedom of movement; freedom of fair procedure; protection of life & personal liberty; freedom against exploitation; freedom of conscience; freedom to profess practice & propagate religion and so on & so forth. The Constitution facilitates a State action to be invalided should it be found to be
inconsistent with or imbued with the trait of abridging the fundamental rights. The Supreme Court of India is the guarantor and vested with the responsibility of securing enforcement of fundamental rights through wide-ranging powers.

Preventive Detention laws are repugnant to democratic Constitution and they are not found in any of the democratic countries of the world. No country in the world has made these laws integral part of the Constitution as been done in India. There is no such law in U.S.A. It was resorted to in England only during war time. In England for the first time, during the First World War, certain regulations framed under the Defence of Realm Act provided for preventive detention at the satisfaction of Home Secretary as a war measure and they ceased to have effect at the conclusion of hostilities. The same thing happened during the Second World War. These regulations were upheld by British Court. Indian Constitution, however, recognizes preventive detention in normal times also. In A.K. Gopalan v. State of Madras Patanjali Shastri, J., explaining the necessity of this provision said: “The sinister looking feature, so strangely out of place in democratic Constitution, which invests personal liberty with the sacrosanctity of a fundamental right, and so incompatible with the promises of its preamble, is doubtless designed to prevent the abuse of freedom by anti-social and subversive elements which might imperil the national welfare of the infant republic.”

The first Preventive Detention Act was enacted by the Parliament on 26th February, 1950. The object of Act was to provide for detention with a view to preventing any person from acting in a manner prejudicial to the defence of India, the relation of India with foreign powers, the Security of India or a State or the maintenance of public order, the maintenance of supplies and services essential to the community.

In A.K. Roy v. Union of India, popularly known as the NSA case, the Supreme Court by 4:1 majority upheld the constitutional validity of the NSA and the Ordinance which preceded the Act. The Court held that Act was neither vague nor arbitrary in its provisions providing for detention of persons on certain grounds, as acting in a

1 AIR 1982 SC 710.
manner prejudicial to the ‘defence of India,’ ‘security of the State,’ and to ‘relations with foreign power’. While upholding the validity of the NSA and Ordinance preceding it, the Court issued a number of direction with a view to safeguarding the interests of detenues detained under the NSA. The Court directed: (1) that immediately after detention his kith and kin must be informed in writing about his detention and his place of detention; (2) the detenu must be detained in a place where he habitually resides unless exceptional circumstances require detention at some other place; (3) that detenu is entitled to his book and writing materials, his own food, visits from friends and relatives; (4) he must be kept separate from those convicted; (5) no treatment of a punitive character should be meted out to him and he should be treated according to the civilized norms of human dignity.

The majority, though disapproved the delay on behalf of the Government in not bringing into force the 44th amendment but held that it could do nothing. It said that the power to amend Constitution is different form that of bringing the concerned amendment into force. The 44th Amendment had itself left it to the Central Government to bring the amendment into force by a notification. Since it has not been brought into force it does not form the part of the Constitution and therefore the NSA is valid even though it does not provide for the setting up of the Advisory Board in accordance with the amendment. Gupta and Tulzapurkar, JJ., dissented form the majority on this point and issued a mandamus to the Union Government to bring the amendment into force. It is submitted that the minority view on this point is correct. The amendment must be brought into operation within a reasonable time by the Government. It would appear to be anomalous that Parliament can pass an amendment which cannot be brought into operation at all. Section 3 of the 44th amendment was intended to be a safeguard against misuse of the power of preventive detention by the Government and provided for the setting up of Advisory Bodies which would be a much more independent and impartial body. By not bringing into force the provisions of the 44th Amendment, the Central Government had not performed ‘its’ constitutional duty and the majority have abdicated its power to issue
mandatory direction to the Government to bring the amendment into force. Thus the petitioner was denied a very important right, that is, the right to have his representation considered by the Board as set up in accordance with the provisions of the 44th Amendment.

Terrorist and Disruptive (Prevention) Act, 1987 (TADA).- TADA was primarily passed with a view to dealing with specific situations of terrorism in Punjab, Kashmir and even parts of the north-east. The Act vests sweeping powers in the State Governments which in effect means local politiciations and the Police-which is likely to be misused. There were widespread complaints of misuse of the provisions of the Act.

The Supreme Court of India has, in D.K. Basu's Case, held “State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to terrorism, that would be bad for the State, the community and above all for the rule of law. The State must, therefore, ensure that the various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves.

In Kartar Singh v. State of Punjab\(^2\) the Supreme Court has considerably narrowed down the scope and ambit of the TADA and held that unless the crime alleged against an accused could be classified as a “terrorist act” in letter and spirit he should not be charged under the Act and should be tried under ordinary penal laws by the regular courts. The Court held that Section 3 of the Act operates when a person not only intends to overawe the government or create a terror in people etc. but also when he sues the arms and ammunition which results in death or likely to cause deaths and damages the property. In other words, the court held that “a person becomes a terrorist or is guilty of terrorist activity when his intention, action and consequence all the three ingredients are found to exist together.”

\(^2\) (1994) 3 SCC 569.
Thus an activity which is sought to be punished under Section 3 (1) of TADA has to be such which cannot be classified as a mere law and order problem and cannot be tackled under the ordinary penal law. The validity of the Act was challenged by more than 500 under-trials.

Another safeguard laid down by the court against the misuse of the Act was that of speedy trial of accused which is an essential part of the fundamental right to life and liberty under Art. 21 of the constitution. The court also struck down Section 22 of the act as violative of Art. 21 of the Constitution. Section 22 permitted identification of an accused on the basis of his photograph.

Referring to violation of human rights by the state law enforcing agencies the court said that these acts were in utter disregard and in all breaches of humanitarian law and universal human rights as well as in total negation of the constitutional guarantee and human decency.

The Court held that the Act did not provide a blanket power of unlimited detention without trial and a citizen should be entitled to bail in case the police fail to complete the investigations within 6 months, extendable to maximum of one year with the permission of designated court.

In a significant judgment in Hilendra Vishnu Thakur v. State of Maharashtra\(^3\), a case relating to TADA, the Supreme Court has held that the designated court has no power to remand a TADA accused to custody if the police fails to complete investigation within six months to one year. Irrespective of the gravity of offence the accused has, under Section 167 (2) of Cr.P.C. and Section (20)(4) (b) of the TADA, indefeasible right to be released on bail if the police fails to complete the investigation within 180 days or with the permission of the Court in one year. Art. 22(4) of the Constitution as well as the Cr. P.C. expects that an arrested person shall not be kept in custody for any unreasonable time and the investigation must be completed as far as possible within 24 hours. But realising that if may not be possible to complete the investigation in

\(^3\) (1994) 4 SCC 602
every case within 24 hours Parliament enacted the proviso to Section 167 (2) of the Cr. P.C. prescribing the outer limit. Section 167 (2) was amend by amending Act 1993, substitution “180 days” for “one year” and providing for extension to one year when public prosecutor demands for specific reasons. The Court held that if the period of 180 days prescribed by clause (b) of Section 20 (4) of YADA has expired and the Court does not grant an extension on the report of the public prosecutor seeking extension of time to complete investigation the Court shall release the accused on bail.

Accordingly, the Court held that the petitioner, Hitendra Vishnu Thakur, an MLA of Maharashtra Legislative Assembly, an accused under TADA, was entitled to be released on bail as the police had failed to complete the investigation within the prescribed period.

Section 167 read with Section 20 (4) of TADA is not a provision for “grant of bail” but deals with the maximum period during which an accused person may be kept in custody. However, an accused person seeking bail under the provision of TADA has to make an application to the designated court for grant of bail an ground of default of the prosecution.

The court held that the amendment of 1993 were of procedural nature and therefore retrospective in nature and also apply for pending cases. In Habeas Corpus Case, the constitutional validity of Section 16-A of the MISA (now repealed) was challenged. It was contended on behalf of the detenu that it was violative of Article 226 inasmuch as it prevented the High Court from exercising the jurisdiction under the Article to issue writ of habeas satisfaction of executive authority or not. The Court by 4 :1 majority, (Khanna, J., not expressing any opinion on the question) held that Section 16-A, was constitutionally valid. The Court held that it was a rule of evidence and it was not open either to the detenu or to the Court to ask for grounds of detention”. Section 16-A did not affect the jurisdiction of High Court under Art. 226. The jurisdiction to

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4 A.D.M. Jabalpur V. Shukla, AIR 1976 SC 1207.
issue writs was neither abrogated nor abridged. It is a rule of evidence. Therefore, when detaining authority was bound by Section 16-A and forbade absolutely from disclosing grounds of arrests no questions could arise for adverse inference against the authority that the power was exercised mala fide or not on subjective satisfaction. Even if a detenu makes out a prima facie case that the detention was mala fide the affidavit of the authority will be the answer and judicial inquiry will be closed. The Courts cannot insist on the production of the file or hold that the case of detenu stands unrebutted by reason of non-disclosure of grounds of arrest.

The effect of the decision in Habeas Corpus case was that courts were barred from examining the question of mala fide of the order of detention or ultra vires character of the orders of detention or that the order was not passed on the subjective satisfaction of the detaining authority. The decision of the Supreme Court overrules impliedly a number of earlier decision in which it had claimed that it could examine the validity of the detention order on the ground either that the order was not passed on the subjective satisfaction of the detaining authority or the detention was made mala fide or the detention was made not for the purposes of the preventive detention laws.⁵

It is interesting to note that Section 14 of the Preventive Detention Act, 1951 which was similar to the present Section 16-A of the MISA, was struck down as unconstitutional by the Supreme Court in the case of A. K. Gopalan v. State of Madras,⁶ on the ground that it foreclosed the judicial inquiry of the legality of the detention under the said Act. The recent spurt in terrorist incidents across the world, especially the 9/11 attacks, and the growing recognition of a burgeoning danger have prompted a number of countries to pass anti-terror laws to meet new contingencies. The spurt in anti-terror legislation appears to reflect a measure of surprise among governments around the world at the magnitude and character of the new wave of terrorist activities. A natural corollary to this legislation and to new curbs that some of

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⁶ AIR 1950 SC27.
this legislation places on what are believed to be integral rights and freedoms, is the question: Do we really need new anti-terror laws to check this menace? At least some cynics have suggested that, far from being a necessary part of an effective and efficient response to terrorism, such legislation actually represents a knee-jerk and substantially misdirected reaction to the more dramatic incidents of terrorism.

There are always questions of morality when new laws are enacted, especially when these relate to basic human rights and freedoms. Roscoe Pound clarifies the need for new laws in a very succinct way in terms of two ‘needs’ that determine philosophical thinking on the subject:

“On the one hand, the paramount social interest in the general security, which as an interest in peace and order dictated the very beginnings of law, has led men to seek some fixed basis of a certain ordering of human action which should restrain magisterial as well as individual willfulness and assure a firm and stable social order. On the other hand, the pressure of less immediate social interests, and the need of reconciling them with the exigencies of the general security and of making new compromises because of continual changes in society have called for readjustment at least of the social order. They have called continually for overhauling of legal precepts and for refitting them to unexpected situations”.

Much of the reluctance in accepting the need for special anti-terrorism legislation is based on the fallacy of equating ‘terrorism’ with other forms of violence, and the consequent argument that the prevailing or ‘ordinary’ laws that have been enacted to deal with the latter are sufficient to take care of the former. Thus, Walter Laqueur describes how it was widely believed that terrorism was a response to injustice and

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8 "For five years, the Indian 'intellectual', jurist and policy maker has failed to see the obvious, failed to understand the threat to national stability and democracy, and failed – indeed, stubbornly refused and resisted all attempts – to evolve legal instruments to confront and eliminate the threat while this can still be done at a relatively smaller price..." Vijendra Singh Jafa, “Ten O'clock to Bed Insouciance in the face of Terror”, Faultlines: Writings on Conflict &Resolution, vol. 5, May 2000, Delhi, p. 27.
that the terrorists were people driven to desperate actions by intolerable conditions, be it poverty, hopelessness, or political or social oppression. Following this reasoning, the only way to remove or at least to reduce terrorism is to tackle its sources, to deal with the grievances and frustrations of the terrorists, rather than simply trying to suppress terrorism by brute force.\footnote{Francis Fukuyama, "History and September 11," in Booth and Dunne, World In Collision, p. 34.}

This reasoning is, however, substantially flawed and ignores the unique social, political and ideological factors that contribute to, and are exploited by, the processes of terrorist mobilization. There is, further, little empirical evidence of a direct linkage between specific socio-economic conditions and the emergence of terrorist movements. There is, moreover, an element of defeatism in this perspective, to the extent that it insists that the issues of violence cannot, or should not, be addressed until the last possible grievance has been resolved – a task, in any world outside the realm of pure fantasy, that would necessarily remain perpetually unfulfilled. Essentially, the core issue of terrorist violence and criminality is, here, not being addressed, and the focus has been shifted to the purported ‘causes’ that are believed to have led to terrorists taking up arms. Further, the very idea that terrorism grows out of legitimate social grievances and upheavals cedes, without evidence or argument, the moral high ground to the terrorist: society can never be perfect and, consequently, there will always be ‘just cause’ for terrorism to survive. Worse, the terrorists are entirely exempted from all norms of morality, even as the most unrealistically exacting morality is applied to ‘society’ and the ‘state’. It is precisely this thinking that has obstructed, stalled, diluted and constantly opposed specific anti-terrorism legislation over the years, and continues to stifle and hamper prosecutions under such laws by putting forward vague and disconcerting objections.

A clear distinction between ‘ordinary crime’ and terrorism is, consequently, important as is well illustrated by the Supreme Court’s observations in 

\textit{Hitendra Vishnu Thakur vs. State of Maharashtra} that,
“‘terrorism’ has not been defined under Terrorist and Disruptive Activities (Prevention) Act (TADA) nor is it possible to give a precise definition of ‘terrorism’ or lay down what constitutes ‘terrorism’. It may be possible to describe it as 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 produces or has the potential of producing on the society as a whole. There may be death, injury, or destruction of property or even deprivation of individual liberty in the process but the extent and reach of the intended terrorist activity travels beyond the effect of an ordinary crime capable of being punished under the ordinary penal law of the land and its main objective is to overawe the Government or disturb harmony of the society or ‘terrorise’ people and the society and not only those directly assaulted, with a view to disturb even tempo, peace and tranquillity of the society and create a sense of fear and insecurity. A terrorist activity does not merely arise by causing disturbance of law and order or of public order. The fallout of the intended activity must be such that it travels beyond the capacity of the ordinary law enforcement agencies to tackle it under the ordinary penal law”10.

The Court added further that, what distinguishes ‘terrorism’ from other forms of violence therefore appears to be the deliberate and systematic use of coercive intimidation. It is therefore essential to treat such a criminal and deal with him differently than an ordinary criminal capable of being tried by the ordinary courts under the penal law of the land.11

The saddening part in this war against terrorism has been the absence of a proper legal apparatus in the country, which could provide a mechanism for the conviction and legal punishment of the terrorists arrested in counter-terrorism operations. The difficulties in taking a terrorist up to the point of conviction have been pointed out by Veeranna Aivalli, Commissioner of Security (Civil Aviation), Bureau of Civil

10 (1994) 4 SCC 602
11 (1994) 4 SCC 602
Aviation Security, in a letter to the Law Commission of India, dated February 12, 2000, where he stated,

“There is another difficulty and that is the collection of evidence in cases where the search, seizure and arrest in areas where there is no habitation and many a time these have been by security forces. In such a case, the arrested persons’ confession to the security forces leading to the recovery of arms and ammunition and explosives is the only thing, which can be brought on record. Even the security force personnel do not come forward for tendering evidence because they keep on moving from place to place for performance of their duties not only within Jammu & Kashmir (J&K) but even outside J&K and sometimes outside India. The security force personnel are reluctant to depose in any case as they feel that they are not attuned for this kind of exercise. In the last 15 years of militancy in J&K, thousands of people have been arrested, lakhs of weapons seized and millions of rounds collected and quintals of explosive material seized. These figures are real eye openers and the fact that not a single case has ended in conviction nor has there been any recording of evidence and even this itself is very disturbing…..”

The enactment of the two anti-terrorist laws in India, TADA and the more recent POTA, was intended to patch over this chink in the state’s armour in the battle against terrorism. Regrettably, their impact has been far from what was needed.

Both anti-terror laws have come under sustained and substantial criticism on different grounds. Primarily, they have been attacked as being ‘draconian’, oppressive, unconstitutional and against the principles of natural justice. As a result from time to time, the Indian judiciary, especially the Supreme Court has been petitioned to assess whether their various provisions are within the bounds of the Constitutional framework and the principles of natural justice. Some of the most important provisions that have come under judicial review include the following:

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In 1994, the Supreme Court, in the landmark judgement of Kartar Singh vs. State of Punjab dealt with various provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987 and upheld the constitutional validity of the Act. From the very outset, the Court, looked into the matter in a broad perspective. Acknowledging the fact that the existing situation in the country was peculiar, the Court observed that, “Deplorably, determined youths lured by hardcore criminals and underground extremists and attracted by the ideology of terrorism are indulging in committing serious crimes against humanity. In spite of the drastic actions taken and intense vigilance activated, the terrorists and the militants do not desist from triggering lawlessness if it suits their purpose.” 13

Further, realising the severity of the situation, the Court noted: "No one can deny these stark facts and naked truth by adopting an ostrich like attitude completely ignoring the impending danger." 14

Apart from this danger of physical violence, there is the further complication of existing prison realities. Prisons in India are overwhelmingly populated by undertrials. According to statistics compiled by the Custodial Justice Cell of the National Human Rights Commission, 225,817 of 304,893 or 74.06 per cent of the total prison population is comprised of those awaiting trial. The total jail capacity in India is for 232,412 prisoners, which makes the total prison population 31 per cent higher than capacity, clearly emphasizing the urgent need for a speedier justice mechanism. 15

The right to speedy trial is not incorporated in any provision of the constitution, yet it is an inherent principle of any criminal justice system. A delayed trial harms the prosecution as well as the accused. Delayed prosecution means weakened prosecution, as witnesses are hard to find and memories become hazy as time goes by; there are also increasing probabilities of witnesses turning hostile if the trial is

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13 (1994) 3 SCC 569, p. 621
14 (1994) 3 SCC 569, p. 621
prolonged. For the accused, the delay in the trial means no end to incarceration in one of the numerous and pitiable jails in the country.

The Supreme Court in *Kedra Pehadiya vs. State of Bihar* had observed, "It is a crying shame upon our adjudicatory system which keeps men in jail for years on end without a trial." The Court added further:

"... no one shall be allowed to be confined in jail for more than a reasonable period of time, which we think cannot and should not exceed one year for a session trial... we fail to understand why our justice system has become so dehumanised that lawyers and judges do not feel a sense of revolt at caging people in jail for years without trial." 

Justice Bhagwati in the *Hussainara khatoon vs. Home Secretary, State of Bihar* also observed:

“No procedure which does not ensure a reasonably quick trial can be regarded as ‘reasonable, fair or just’ and it would be foul of Article 21. There can, therefore, be no doubt that speedy trial and by speedy trial we mean reasonably expeditious trial, is an integral part of the fundamental right to life and liberty enshrined in Article 21”.

This principle of providing speedy trial was reiterated and reaffirmed in the Kartar Singh case, even as the question of enactment of new procedures for speedy trial of terrorists under TADA was challenged.
The provisions prescribing special procedures aiming at speedy disposal of cases, departing from the procedures prescribed under the ordinary procedural law are evidently for the reasons that the prevalent ordinary procedural law was found to be inadequate and not sufficiently effective to deal with the offenders indulging in terrorist and disruptive activities.

Under the TADA Act, designated courts were to be established with special powers to deal exclusively with cases relating to terrorism. Further, Section 14 of the Act laid down the procedure and powers of the designated courts, which included the speedy disposal of cases. The Act also provided for the discharge of the accused by the designated court even before the evidence stage, if a prima facie case was not made out by the prosecution. The Prevention of Terrorism Act (POTA) Act also provides for trial in absentia, with Clause (5) of Section 30 declaring,

Notwithstanding anything contained in the Code, but subject to the provisions of 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 or his pleader and record the evidence of any witness, subject to the right of the accused to recall the witness for cross-examination.

This provision was incorporated with the objective of enhancing speedy trial in the event of the failure of the police to apprehend the accused, which is often the case in terrorist crimes.

The incorporation of these provisions to initiate speedier trial by establishing special courts and special procedures was challenged on the grounds that terrorists were being treated differently from ordinary criminals, and that this was discriminatory. But in Kartar Singh, the Court rejected this position, explaining that

“…the rule of differentiation is that in enacting laws differentiating between different persons or things in different circumstances which govern one set of persons or objects such laws may not necessarily be the same as those governing another set of
persons or objects so that the question of unequal treatment does not really arise between persons governed by different conditions and different set of circumstances”.

Further, “…the persons who are to be tried for offences specified under the provisions of TADA Act are a distinct class of persons and the procedure prescribed for trying them for the aggravated and incensed nature of offences are under different classification distinguishable from ordinary criminals and procedure”.

Moreover the establishment of special courts and special laws was entirely in keeping with Constitutional provisions, since Article 247 of the Constitution empowers Parliament to establish courts. Indeed, a Constitutional Amendment was passed for the creation of Special Debt Recovery Tribunals across the country under the Recovery of Debts Due to Banks and Financial Institution Act, 1993. Speeding up the debt recovery mechanism is, no doubt, an important, but far less urgent imperative than the containment of terrorism which threatens the very foundations of democracy. There is, clearly, no illegality involved in establishing special courts to tackle special situations, and terrorism certainly qualifies as such.

One of the matters of great concern for human rights activists with regard to POTA is the provision relating to the admissibility of ‘confessional statements’ as evidence under the Act. The National Human Rights Commission (NHRC) has expressed the view that the validation of confessions made to police officers would increase the possibility of coercion and torture in securing confessions, and would consequently be inconsistent with Article 14 (3) (f) of the International Covenant on Civil and Political Rights (ICCPR) which requires universal entitlement to the guarantee of not being compelled to testify against oneself or to confess guilt.19

Earlier, Section 15 of TADA had laid down:

19 http://www.nhrc.nic.in/. This view is apparently based on Justice Sahai’s minority opinion in Kartar Singh’s case where the Hon’ble Judge pointed out that there is a basic difference between the approach of a police officer and a judicial officer. A judicial officer is trained and tuned to reach the final goal by a fair procedure. The basis of a civilised jurisprudence is that the procedure by which a person is sent behind the bars should be fair, honest and just. A police officer is trained to achieve the result irrespective of the means and methods that are employed to achieve it. So long as the goal is achieved the means are irrelevant and this philosophy does not change by the hierarchy of the officer.
“...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 either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under this Act or rules made thereunder...”

Clause (2) of the section laid down further that,

“...the police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily.”

This provision was one of the main grounds of a legal and constitutional attack against TADA launched by former Law Minister Ram Jethmalani. Concerns were primarily raised on the methods that would be employed by the police to gain confessions from the accused. However, this procedure to record confessions was streamlined by the Supreme Court in Kartar Singh, where six safeguards were defined, which was to be employed while recording a confession. POTA incorporated these safeguards in its Section 32, which required that,

- A police officer shall, before recording any confession made by an accused under sub-section (1) of Section 32, explain to such person in writing that he is not bound to make a confession and that if he does so, it may be used against him.

20 Section 15, TADA, 1987. Justice S. Ratnavel Pandian delivering the majority view in the Kartar Singh case upheld the validity of section 15 of the TADA and laid down certain guidelines to be followed by the police officer while recording a confession. In the case of Lal Singh vs. the State of Gujarat (2001 3 SCC 221) when it was pointed out that the guidelines laid down in the Kartar Singh case were not followed, the Supreme Court held that confession recorded by a police officer without following the guidelines is still admissible. In the case of S.N. Dube vs. N.B. Boir (2000 SCC Cr. 343) the Supreme Court ruled that it is sufficient if the court is able to conclude that the requirements have been substantially complied with by a police officer.

21 Section 15 (2) TADA, 198.
Further, provided that, where such person prefers to remain silent, the police officer shall not compel or induce him to make any confession.

Under clause (3) of the same section it is laid down that the confession shall be recorded in an atmosphere free from threat or inducement and shall be in the same language in which the person makes it.

Under clause (4) the person from whom a confession has been recorded under sub-section (1), shall be produced before the Court of a Chief Metropolitan Magistrate or the Court of a Chief Judicial Magistrate along with the original statement of confession, written or recorded on mechanical or electronic device within forty-eight hours.

Further, under clause (5), the Chief Metropolitan Magistrate or the Chief Judicial Magistrate, shall, record the statement, if any, made by the person so produced and get his signature or thumb impression and if there is any complaint of torture, such person shall be directed to be produced for medical examination before a Medical Officer not lower in rank than an Assistant Civil Surgeon and thereafter, he shall be sent to judicial custody.

Another significant departure from TADA is that if the detainee's confession is not recorded before a magistrate within 48 hours, such confession fails to carry credence.

These substantial changes with regard to the admissibility of and safeguards relating to confessions under POTA have been appreciated by earlier critics of TADA. Ram Jethmalani, who had vigorously denounced TADA, stated, "I would have opposed POTA, but it must be said to the credit of the Government that all six safeguards suggested by the majority of the judges have been introduced." He noted that the "amazing degree of dangerous sophistication which has been achieved by ruthless terrorists certainly is a material change from the situation in which TADA operated."

22 "Legal eagles unimpressed by POTO safeguards", The Times of India, Delhi, November 22, 2001.
Interestingly, confessional statements made by the accused are also held to be admissible as evidence under various other acts: under Section 12, Railway Protection Force Act, 1957; Section 8 and 9 of the Railway Property (Unlawful Possession) Act, 1966; Section 108 of the Customs Act, 1962; and Section 40 of the now defunct Foreign Exchange Regulation Act (FERA), 1973. In Kartar Singh, the Court observed that

“…while a confession by an accused before a specified officer, either under the Railway Protection Force Act or Railway Property (Unlawful Possession) Act or Customs Act or FERA is made admissible, the special procedure prescribed under this Act making a confession of a person indicted under TADA Act given to a police officer admissible cannot be questioned as a misnomer because all the officials empowered to record statements under those special acts are not police officers as per the judicial pronouncements of this court."^{23}

Therefore, although the provision with regard to confessional statement may be a departure from ordinary penal laws, the safeguards provided by the new POTA considerably reduce the scope of its misuse.

The bail provisions under anti-terror laws have also been criticised for their unwarranted stringency and apparent harshness. Under POTA, bail is to be decided on a prima facie finding that the accused is not guilty. Section 49, Clause (6) states:

Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond unless the Court gives the Public Prosecutor an opportunity of being heard. Section 49, Clause (7) adds, Where the Public Prosecutor opposes the application of the accused to release on bail, no person accused of an offence punishable under this Act

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^{23} Kartar, p. 671. Under the Railway Protection Force Act, 1957, the Railway Property (Unlawful Possession) Act, 1966, the Customs Act, 1962 and the Foreign Exchange Regulation Act, 1973, a Gazetted officer was empowered to summon any person whose attendance he considers necessary either to give evidence or to produce a document during the course of any investigation or proceeding under the Acts. Further, every such investigation or proceeding was deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code.
or any rule made there under shall be released on bail until the Court is satisfied that there are grounds for believing that he is not guilty of committing such offence:

Provided that after the expiry of a period of one year from the date of detention of the accused for an offence under this Act, the provisions of sub-section (6) of this section shall apply. Section 49, Clause (8) further adds,

The restrictions on granting of bail specified in sub-sections (6) and (7) are in addition to the restrictions under the Code or any other law for the time being in force on granting of bail. Finally, Section 49, Clause (9) states, Notwithstanding anything contained in sub-sections (6), (7) and (8), 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 unauthorisedly or illegally except in very exceptional circumstances and for reasons to be recorded in writing.24

These provisions are definitely different and harsher than the existing bail provisions under the Code of Criminal Procedure. On the other hand, however we are faced with the fact that under ordinary bail provisions, it has been relatively easy for terrorists to get bail and return to the killing fields to inflict greater harm. As the former Director-General of Punjab Police, K.P.S. Gill, notes

In the Punjab, it was virtually impossible to detain any terrorist for any length of time, irrespective of charges. Terrorists were arrested again and again for the most heinous crimes, and were let out on bail ‘pending trail’. In many cases, they committed other crimes while on bail, were arrested, and then bailed out again. Since the average criminal trial takes several years, it is unsurprising that the fear of conviction was the least of the terrorist’ concern. In any event, witnesses could easily be intimidated or eliminated, and there was little possibility even of eventual conviction. In all this, the judiciary distanced itself from the consequences of its actions, claiming to be bound strictly be the law to release the accused on bail, even where the accused had, in the past, jumped bail and committed other crimes.

24 Section 49, POTA Act.
In Bimal Kaur vs State of Punjab, the Punjab High Court opined that. The persons charged with the commission of terrorist act fall in the category which is distinct from the class of persons charged with commission of offences under the penal code and the offences created by other statutes….The enforcing agencies find it difficult to lay their hands on them. Unless the police is able to secure clue as to who are the persons behind this movement, how it is organised, who are its active members and how they operate, it cannot hope to put an end to this movement and restore public order. The police can secure this knowledge only from the arrested terrorists after effective interrogation. If the real offenders apprehending arrest is able to secure anticipatory bail then the police shall virtually be denied the said opportunity.25

The Forty First report of the Law Commission rightly questioned the application of bail provisions of the Code of Criminal Procedure to cases of terrorism: "Can it be said with certainty that terrorists and disruptionists, who create terrorism and disruption and inject sense of insecurity, are not likely to abscond or misuse their liberty if released on anticipatory bail?

Further, the Supreme Court in Kartar Singh had pointed out that the language of subsection (8) of section 20 of TADA (which is related to ‘bail’) was in substance no different from the language employed in section 437(1) of the Code of Criminal Procedure, section 35 of the Foreign Exchange Regulation Act, 1976, and section 104 of the Customs Act, 1962. The Supreme Court had, accordingly, upheld the validity of Sub-section (8) of section 20 of TADA, holding that the respective provisions contained therein were not violative of Article 21 of the Constitution, which declares that, "No man shall be deprived of his life or personal liberty except according to the procedure established by law."

Nevertheless, in order to streamline the procedure of granting bail to the accused under anti-terror laws, Justice Sujata V. Manohar in Shaheen Welfare Association vs.

Union of India & Ors, categorised TADA detenues in four groups with regard to their entitlement to bail:

a) Hardcore under trials whose release would prejudice the prosecution case and whose liberty may prove to be a menace to society in general and to the complainant and prosecution witnesses in particular;

b) Other under trials whose overt acts or involvement directly attract sections 3 and/or 4 of the TADA act;

c) Under trials who are roped in, not because of any activity directly attracting sections 3 and 4, but by virtue of section 120B or 147, IPC and;

d) Those undertrials who are found possessing incriminating articles in notified areas and are booked under section 5 of TADA.  

Adopting these criteria, the Court was of the opinion that undertrials falling within group (a) cannot receive liberal treatment. Cases of undertrials falling in group (b) would have to be dealt with differently, in that, if they have been in prison for five years or more and their trial is not likely to be completed within the next six months, they can be released on bail unless the Court comes to the conclusion that their antecedents are such that releasing them may be harmful to the lives of the complainant, the family members of the complainant or witnesses. Cases of undertrials falling in groups (c) and (d) can be dealt with leniently and they can be released if they have been in jail for three years and two years respectively.

By establishing these criteria, the Court has gone a long way in rationalizing the approach to the grant of bail in cases of terrorism, rightly distinguishing between various levels of the gravity of offence, and the threat to witnesses and society at large. This approach also underlines the fact that, while bail is definitely a matter of right, its grant must also be weighed against a possibility of greater public harm which may be afflicted by too easy and mechanical a process for grant of bail in cases of

26 JT 1996 (2) SC 719.
terrorism. Justice Manohar’s directions in this regard, are of crucial importance in the jurisprudence governing the subject.

Further, a majority of terrorists go unpunished due to the unavailability of witnesses. As criminal prosecution hinges on witnesses and the availability of a witness to any crime is the sole test to establish the soundness of the prosecution – particularly in the Indian system, where technical and forensic evidence is usually weak, and in cases of terrorism, often worse that it would be in other cases – a provision which aims at protecting witnesses by concealing their identities is crucial, but is bound to create strong opposition among those who have a vested interest in a weak prosecution. Characteristically, in the prosecution of crimes involving bodily harm, witnesses are hard to come by, as there is always a lurking fear in their minds of the possible consequences of deposition.

Provisions for the protection of witnesses are envisaged under Section 16 (2) of TADA and Section 30 of POTA. Section 30 (2) lays down that, A Special Court, if on an application made by a witness in any proceeding before it or by the Public Prosecutor in relation to such witness or on its own motion, 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.\(^\text{27}\)

Under this provision, the right of cross-examination of witnesses is not denied to the defence, but the identity and addresses of the witnesses can be withheld.

Generally in trials involving ordinary crimes, when the accused persons are known to be trouble-mongers, it is seen that witnesses are unwilling to come forward to depose against such persons fearing harassment at the hands of those accused. This proclivity is even more noticeable in cases involving organised criminal gangs. Clearly, when it comes to the trial of terrorists and disruptionists, witnesses would be far more reluctant to depose at the risk of their lives.

\(^{27}\) Section 30 (2) POTA Act.
Doubts have, however, been cast on this provision and its jurisprudence. Whatever the reasons for non-disclosure of the identity of witnesses, it is argued, the accused persons, who are liable to severe punishments under these special laws, are placed at a disadvantage with regard to the possibility of effective cross-examination and exposing the previous conduct and character of the witnesses. In general, consequently, in order to ensure the purpose and object of the cross-examination, the argument continues, the identity, names and addresses of witnesses should be disclosed before the trial commences. However, it is reasonable that this principle should be subject to an exception where the court, in extraordinary circumstances, may in its wisdom decide to withhold the identity and addresses of witnesses, especially in cases of potential witnesses whose life may be in danger. As such, section 30 of POTA gives discretion to the court to decide whether the identity of the witnesses should be protected, creating ample scope for safeguards that would prevent any prejudice against the accused.

Given the difficulty of securing witnesses to provide concrete evidence against an accused terrorist, there is a need for greater reliance on technical evidence. Section 27 of POTA, consequently, provides that the court may, on the request of the police officer, direct the accused to give samples of hand-writing, finger-prints, foot-prints, photographs, blood, saliva, semen, hair and voice of any accused person, reasonably suspected to be involved in the commission of the offence under this Act. Human rights groups have argued that this amounts to forcing the accused to incriminate themselves, and thus violates Article 20, Clause 3, of the Constitution, which states, "No person accused of any offence shall be compelled to be a witness against himself." This, however, is entirely unsustainable logic. The courts have repeatedly held that "to be a witness’ is not equivalent to ‘furnishing evidence’ in its widest sense.”

The right against self-incrimination is established only where the possibility of coercion and abuse of the human rights of the accused are involved, and does not extend to the withholding of evidence. Securing scientific evidence to prove a crime
does not inflict any violence on the accused, go against any human rights and this section is not a departure against the established mode of proving the guilt of an accused under the Evidence Act, which contains provisions with regard to forensic reports and handwriting reports, which have been employed even in ordinary crimes. It has, further, been held that giving thumb-impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression ‘to be a witness’. Excluding new technologies of gathering such scientific evidence, such as DNA, blood, saliva and other such bio-profiling techniques on the grounds that these techniques have not been used before misses the spirit of the law, and cannot be considered reasonable. It is useful to note, moreover, that these techniques have all been admitted into evidence in the more advanced Western countries, including those whose concerns for the protection of human rights are no less serious than ours. Indeed, Indian jurisprudence has, in this regard, tended to lag far behind technological developments and progressive international norms.

It is certainly the case that the powers of investigating officers as well as of the police in general are significantly increased by various provisions under anti-terrorist laws. The possibility of abuse of such enhanced powers cannot be ruled out. As the Supreme Court observed in Kartar Singh, “We are aware that the police are still not totally free from adopting questionable practices while interrogating accused persons, but one cannot possibly deny that the greater vigilance now exercised by the public and the Press, growing awareness of citizens about their individual rights under the law and the increasing earnestness and commitment of the senior levels of command in the police structure to put down such malpractices have all tended to reduce the prevalence of such practices in the police to a lesser degree than before.”

Moreover, the possibility of abuse cannot be grounds for striking down or diluting a law. In *State of Rajasthan vs. Union of India*, the Supreme Court noted:

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28 Kartar, p. 679
“It must be remembered that merely because power may sometimes be abused, it is no ground for denying the existence of power. The wisdom of man has not yet been able to conceive of a government with power sufficient to answer all its legitimate needs and at the same time incapable of mischief”.

Similarly, in *Collector of Customs vs. Nathella Sampathu Chetty*, the Court observed that, "the possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity." In *Kesavananda Bharati vs. State of Kerala*, Justice Khanna noted, In exercising the power of judicial review, the Courts cannot be oblivious of the practical needs of the government. The door has to be left open for trial and error. Constitutional law like other mortal contrivances has to take some chances. Opportunity must be allowed for vindicating reasonable belief by experience.

However, the possibility of malicious action by police officers has been explicitly recognized under POTA and, as a safeguard, Section 58 of the Act lays down that any police officer who exercises power corruptly or maliciously, knowing that there are no reasonable grounds for proceeding under this Act, shall be punishable with imprisonment which may extend to two years, or with fine, or with both. Further, if the special court is of the opinion that any person has been corruptly or maliciously proceeded against under this Act, the court may award such compensation as it deems fit to the person so proceeded against, and it shall be paid by the officer, person, authority or government, as may be specified in the order. This section ensures that police officers will not easily abuse their powers under the Act, and would not falsely accuse a person of committing a terrorist crime, knowing fully well that such an officer may be held personally accountable for malicious prosecution.

POTA, according to some critics, also threatens the freedom of the Press, and "the provisions in POTA for making it obligatory to reveal the source of information, the provisions making the mere act of receiving a mail, even if unsolicited, a crime, aim

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29 1978 1 SCR, p. 77
30 AIR 1962 SC 316
31 1973 Supp SCR p. 1
at taming the media."\(^{32}\) The Press has complained vociferously against Section 14 of POTA, which according to them, violates Article 19(1)(a) of the Constitution of India, which guarantees the right to freedom of speech and expression, from which the freedom of the Press derives. Section 14 of POTA imposes an obligation on any individual, including journalists, to furnish information that may be useful for the purposes of the Act, that is, information that relates to possible crimes that fall under its mischief, failing which the individual shall be punishable with imprisonment for a term that may extend to three years.

Once again, these concerns are based on a misunderstanding of the character of the Press and the scope of constitutional protection. The right to freedom of speech and expression, and concomitantly the freedom of the Press, is not unfettered, and is subject to ‘reasonable restrictions.’ At a practical level, it is useful to note, further, that the information that journalists ordinarily possess with regard to terrorists or their activities seldom have any operational value. In almost all legitimate interactions that a journalist may have with a terrorist, operational strategies are not discussed and neither is the journalist given any idea of the hideouts or movements of the terrorist. Furthermore, the Police would incline to be extremely circumspect in their use of this clause, and would avoid trying to rub the Fourth Estate the wrong way to the greatest extent possible. Few individuals and institutions of governance have been impervious to the power of the Press in India, and even those at the highest echelons of power tend to treat the Press with a high measure of deference. The Police is not, and has seldom been, an exception to this rule.

There are, moreover, legitimate limits to the freedom of the Press. "The liberty of the Press," said Lord Mansfield, "consists in printing without any previous license, subject to the consequences of the law."\(^{33}\) Closer home, the Supreme Court in C.G. Janardhan vs T.K.G.Nair, stated that "The freedom of the journalist is an ordinary part

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of the freedom of the subject and to whatever lengths the subject in general may go, so also may the journalist, but apart from the statute law, his privilege is no other and no higher."

The easy availability and movement of finances has been another major contributory element in the support of terrorism. The easy availability of funds and the concomitant free flow of these funds across international borders through ubiquitous ‘hawala’ channels has enormously empowered the terrorists, made the sponsorship of terrorism easy, and its control immensely difficult. After September 11, 2001, most of the discussion about the darker side of the globalisation of financial markets turned away from its distributional effects and tendencies towards periodic instability, and began focus on the manner in which it facilitated the transfer of funds that enabled global terrorism. The new challenge of financial market globalisation was how to track and freeze the financial assets of global terrorist networks. The UN Security Council through Resolution 1373 decided that all States should prevent and suppress the financing of terrorism, as well as criminalize the wilful provision or collection of funds for such acts. The funds, financial assets and economic resources of those who commit or attempt to commit terrorist acts or participate in or facilitate the commission of terrorist acts and of persons and entities acting on behalf of terrorists should also be frozen without delay.

In India there have been no attempts on the part of the lawmakers or enforcers to address the issues raised by UN Security Council, prior to POTA. Before the passing of the Act, Hawala crimes were prosecuted under the Foreign Exchange Management Act, 1999, which describes Hawala as a civil offence and imposes a maximum penalty of payment of three times the money involved.

However, under Section 6 of POTA, no person shall hold or be in possession of any proceeds of terrorism and if the property acquired is through proceeds of terrorism, under Section 7 of the Act, an officer (not below the rank of Superintendent of Police)

investigating an offence committed under this Act, shall, with the prior approval in writing of the Director General of the Police of the State in which such property is situated, make an order seizing such property and where it is not practicable to seize such property, make an order of attachment directing that such property shall not be transferred. This provision is a far cry from the earlier provisions, which allowed the terrorist to bring in money into India and be let off by paying fine. Already the functioning of this provision has had considerable impact, even as countries like USA and UK have clamped down on terrorist finances by freezing their assets. In India, however, a clear functioning of this clause has not been witnessed as in many cases the funds collected for and by terrorists are often transferred and are unaccounted for, which gives an added headache to the investigation agencies, as tracing these funds often leads to a dead end. The Indian Hawala market is one of the largest in the world and, therefore, needs stricter laws for its eradication. It is only when funds stop flowing into the pockets of terrorists that terrorism will be contained. Section 7 and 8 of the POTA are mere infant steps towards the annihilation of the process of transfer of funds for terrorist activities.

Adherence to the constitutional principle of ‘substantive due processes must be an essential part of our collective response to terrorism. Any dilution of the right to a fair trial for all individuals, however heinous their crimes may be, will be a moral loss against those who preach hatred and violence. From our recent experience, we have learnt that terrorist attacks against innocent and unsuspecting civilians threaten the preservation of the rule of law as well as human rights; and terrorism can broadly be identified with the use of violent methods in place of the ordinary tools of civic engagement and political participation. It has become an increasingly recurrent strategy for insurgent movements as well as identity-based groups to make their voice heard through armed attacks and bomb blasts in place of public dialogue. Independent India is no stranger to the problem of tackling armed terrorists and has faced long-running insurgencies as well as sporadic attacks in many parts of the country.
However, in the age of easy international travel and advanced communications, terrorist networks have also assumed cross-border dimensions. In many instances, attacks are planned by individuals located in different countries who use modern technology to collaborate for the transfer of funds and procurement of advanced weapons. This clearly means that terrorism is an international problem and requires effective multilateral engagement between various nations. In recent years, the most prominent example of this ‘slippery slope’ for the curtailment of individual rights is the treatment of the detainees in Guantanamo Bay who were arrested by U.S. authorities in the wake of the 9/11 attacks.

It is alleged that they have detained hundreds of suspects for long periods, often without the filing of charges or access to independent judicial remedies. For its part, the U.S. administration has defended these practices by asserting that the detainees at Guantanamo Bay have safeguards such as appeals before military commissions, administrative review boards and combatant status review tribunals. A follow up to this in *Hamdan Case* led to the ruling that the terror suspects could not be denied the right of habeas corpus and should be granted access to civilian courts. The rationale for this was that the various military tribunals did not possess the requisite degree of independence to try suspects who had been apprehended and detained by the military authorities themselves.

Even in the United Kingdom, the House of Lords in the *Belmarsh decision*[^35] ruled against a provision in the Anti-Terrorism, Crime and Security Act, 2001, which allowed the indefinite detention of foreign terror suspects. This ruling prompted the enactment of the Prevention of Terrorism Act, 2005, which was fiercely debated. The British Parliament accepted a 42-day period as the maximum permissible for detention without charges, subject to judicial checks. Evidently, the judiciary in these two countries has played a moderating role in checking the excesses that have crept into the response against terrorism. In some circles, it is argued that the judiciary...

[^35]: (A v. Secretary of State for the Home Department, [2004] UKHL 56)
places unnecessary curbs on the power of the investigating agencies to tackle terrorism.

**Maneka Gandhi Case**

This case is a landmark judgement which played the most significant role towards the transformation of the judicial view on Article 21 of the Constitution of India so as to imply many more fundamental rights from article 21. This case is always read and linked with A.K. Gopalan v. State of Madras case, because this case revolves around the concept of “personal liberty” which first came up for consideration in the A.K. Gopalan’s case. Maneka Gandhi was issued a passport on 1/06/1976 under the Passport Act 1967. The regional passport officer, New Delhi, issued a letter dated 2/7/1977 addressed to Maneka Gandhi, in which she was asked to surrender her passport under section 10(3)(c) of the Act in public interest, within 7 days from the date of receipt of the letter.

Maneka Gandhi immediately wrote a letter to the Regional Passport officer, New Delhi seeking in return a copy of the statement of reasons for such order. However, the government of India, Ministry of External Affairs refused to produce any such reason in the interest of general public.

Later, a **writ petition** was filed by Maneka Gandhi under Article 32 of the Constitution in the Supreme Court challenging the order of the government of India as violating her fundamental rights guaranteed under Article 21 of the Constitution. One of the significant interpretation in this case is the discovery of inter connections between the three Articles- Article 14, 19 and 21. This a law which prescribes a procedure for depriving a person of “personal liberty” has to fulfill the requirements of Articles 14 and 19 also. It was finally held by the court that the right to travel and go outside the country is included in the right to personal liberty guaranteed under

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36 1978 AIR 597, 1978 SCR (2) 621
Article 21. The Court ruled that the mere existence of an enabling law was not enough to restrain personal liberty. Such a law must also be “just, fair and reasonable”.  

The case is considered a landmark case in that it gave a new and highly varied interpretation to the meaning of ‘life and personal liberty’ under Article 21 of the Constitution. Also, it expanded the horizons of freedom of speech and expression to the effect that the right is no longer restricted by the territorial boundaries of the country. In fact, it extends to almost the entire world. Thus the case saw a high degree of judicial activism, and ushered in a new era of expanding horizons of fundamental rights in general, and Article 21 in particular.  

This guarantee was read into the conception of ‘personal liberty’ under article 21 of the Constitution of India by our Supreme Court. This idea of ‘substantive due process’ was incorporated through the decision in *Maneka Gandhi v. Union of India*, The necessary implication of this is that all governmental action, even in exceptional times, must meet the standards of reasonableness, non-arbitrariness, and non-discrimination.  

**Kartar Singh Case**  

The Supreme Court decision in *Kartar Singh v. State of Punjab*, where it upheld the validity of anti-terrorist laws describing them as the need of the State. Such laws were held to be the need of the hour in light of the social situation prevalent in the country and thus held valid by a five judge bench headed by J. Pandian in the case.  

The judgment given by the Court in this case was erroneous. In the name of the security of the State, legislation cannot compromise the rights of the individuals. All along the case, the Court has stressed that the situation in the Country demands the

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37 http://www.lawn.com/case-study-maneka-gandhi-union-india-25th-january-1  
38 http://lawfarm.in/a-case-analysis-of-the-maneka-gandhi-case  
39 AIR 1978 SC 597  
40 1994 SCC (4) 569
need for strict measures and even if they violate the rights in part III, they are justified.

We must not forget that we are a democracy, in fact, the world’s largest democracy. When a government is made for the people and by the people, it must protect the rights of everyone and not just a majority. Terrorisms greatest victory would be the shackling of the very foundations that we have stood for the past many years. This was also emphasized in the UN Resolutions with regard to terrorism, where it was stated that in the prevention of terrorism the fundamental human rights of the individual must not be compromised.41

**Indira Gandhi Assassination Case** 42

Indira Gandhi, the 4th Prime Minister of India, was assassinated at 09:20 on 31 October 1984, at her Safdarjung Road, New Delhi residence. She was killed by two of her bodyguards, Satwant Singh and Beant Singh, in the aftermath of Operation Blue Star, the Indian Army's June 1984 assault on the Golden Temple in Amritsar which left the Sikh temple heavily damaged.43

The Apex Court confirmed the death sentence awarded by the Trail Court and maintained by the High Court to the three Appellants: Kehar Singh Balbir Singh Satwant Singh, for entering into conspiracy and committing murder of Smt. Indira Gandhi under section 302 (murder), 120B (criminal conspiracy), 34 (Act done by several persons in furtherance of common intention), 107 (abetment) and 109 (punishment for abetment where no express provision is made) of the Indian Penal Code. The Court held that the murder of Mrs. Gandhi by the security guards is one of the rarest of the rare cases in which extreme penalty of death is called for assassin and

41 GA Resolution, 1373/2001, Adopted during the 4385th meeting of the United Nations on 28th September 2001
42 Kehar Singh v. Delhi administration (AIR 1988 SC 1883)
his conspirators. It is a gruesome murder committed by accused who were employed as security guards to protect the Prime Minister.\(^44\)

**Kehar Singh vs Delhi Administration\(^45\)**

It is alleged all the four accused Beant Singh(Killed), Kehar Singh, Balbir Singh, Satwant Singh expressed their resentment and held Mrs. Gandhi responsible for operation 'BLUE STAR' at Amritsar. To avenge they entered into a conspiracy to kill Mrs. Gandhi in pursuance of the aforesaid conspiracy, Beant Singh and Satwant Singh, security guards who had prior knowledge that Smt. Gandhi was scheduled to go on the adjoining Akbar Road at 9:00 AM via TMC gate for an interview with Irish Television Team, got manipulated their duties in such a way that Beant Singh would be present at the TMC gate and Satwant Singh at the TMC sentry booth on 31-10-1984 between 7:00 am to 10:00 am. While Mrs. Gandhi was approaching to TMC gate towards her office, Beant Singh fired 5 rounds and Satwant Singh 25 shots at her from their respective weapons. Smt. Gandhi sustained injuries and fell down and succumbed to her death the same day at AIIMS- All India Institute of Medical Sciences, New Delhi.

**Rajeev Gandhi Assassination Case\(^46\)**

Former Prime Minister Rajiv Gandhi was assassinated on May 21, 1991, at Sriperumbudur near Chennai by Dhanu, a belt-bomb assassin belonging to the Liberation Tigers of Tamil Eelam (LTTE). After a meticulous investigation, the Special Investigation Team (SIT) of the Central Bureau of Investigation (CBI) headed by D.R. Karthikeyan charge-sheeted 41 people in the case. The SIT said the LTTE was behind the assassination. The charge absconding and could not be tried. They were the LTTE chief V. Prabakaran, its intelligence wing chief Pottu Amman, and deputy chief of the LTTE women's intelligence wing, Akila. Among the 41 twelve

\(^46\) 1999 (5) SCC 253
people died, and so charges against those twelve people abated. The remaining accused face trial in the designated court at Poonamallee near Chennai. In this case, all remaining twenty six accused found guilty under Section 102-B (murder) read with Section 302 (murder) of the Indian Penal Code and provisions of the Terrorist and Disruptive Activities (Prevention) Act, or TADA. The charge on May 11, 1999, Justices K.T. Thomas, D.P. Wadhwa and Syed Shah Mohammed Quadri confirmed the death sentences awarded to Nalini, Murugan, Santhan and Perarivalan but “altered” the death sentences awarded to Robert Payas, Jayakumar and Ravichandran to life imprisonment. Justice Thomas disagreed with Justices Wadhwa and Quadri on confirming the death sentence awarded to Nalini. In his dissenting judgment, Justice Thomas said, “She became an obedient participant without doing dominant role.

Although the judges confirmed the sentences awarded to them by the lower court under the Arms Act, the Explosive Substances Act, the Passport Act, and so on, they were freed because they had already served out their terms. S. Shanmugavadivelu, who was charged only under TADA, was acquitted. Nalini, Murugan, Santhan and Perarivalan filed petitions in the Supreme Court, seeking a review of the death sentences awarded to them. The Supreme Court dismissed the plea of S Nalini, undergoing life imprisonment in the Rajiv Gandhi assassination case, challenging the law mandating the Centre's approval for her release and that of six other convicts." Sorry, we are not interested," a bench comprising Chief Justice HL Dattu and justices MB Lokur and AK Sikri said. Nalini had challenged Section 435(1) of the Criminal Procedure Code which mandates the state government to consult the Centre before premature release of a convict if the case was investigated by the CBI.47

On October 8, 1999, Justices Thomas, Wadhwa and Quadri reconfirmed the death sentences. Justice Thomas, who gave the dissenting judgment with regard to Nalini, said her review petition “should be allowed and her sentence should be altered to imprisonment for life”. After the Supreme Court ruling in October 1999, Fathima Beevi accepted the recommendation of the Karunanidhi Cabinet in April 2000 to

47 https://timesofindia.indiatimes.com/.../Rajiv-Gandhi-assassination-case.../44946
commute the death sentence awarded to Nalini to imprisonment for life. Congress president Sonia Gandhi met President K.R. Narayanan and conveyed her family's view that Nalini's life should be spared. “It is my personal feeling, keeping in mind a child's need for a mother,” Sonia Gandhi said. Fathima Beevi rejected the petitions of Murugan, Santhan and Perarivalan.

**Sanjay Dutt’s case**

The Supreme Court has handed a five-year jail sentence to actor Sanjay Dutt in the 1993 Bombay blasts case. It also upheld the death sentence for Yakub Memon and commuted the death sentence of 10 others accused to life terms. Sanjay Dutt, son of late actor and Congress politician Sunil Dutt, and actress Nargis, will be sent back to jail. He has to surrender within the next four weeks.

Mr. Dutt has previously spent 18 months in jail in connection with this case. Now, he will have to spend three-and-a-half years more in prison. The apex court said that the circumstances and nature of offence was so serious that Mr. Dutt cannot be released on probation. It said evidence and materials perused by a TADA court in arriving at the decision against Mr. Dutt was correct. In July 2007, the actor was sentenced to six years in jail by a TADA court. He was found guilty of illegally keeping arms, including an AK-56 rifle. The actor was acquitted of graver charges under TADA or the Terrorist and Disruptive Activities (Prevention) Act. The expression possession though that of section 5 of TADA has been stated to mean a conscious possession introducing thereby involvement of a mental element i.e. conscious possession & not mere custody without awareness of nature of such possession and as regards unauthorized means a nd regards without any authority of law. The CBI did not challenged his acquittal.

Underworld don Dawood Ibrahim, Tiger Memon and his brother Ayub Memon are alleged to be the conspirators behind the Bombay serial blasts of 1993 and have been declared proclaimed offenders. Today, the Supreme Court said that the "management

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48 1994 SCC 410 Sanjay Dutt v. State through C.B.I
and conspiracy of the blasts was done by Dawood Ibrahim." It also said that Pakistan's intelligence agency ISI was involved in the blasts.

A TADA court had convicted 100 people; 11 of them were sentenced to death, another 20 given life terms. Twelve coordinated blasts within two hours on March 12, 1993 ravaged Mumbai, India's financial capital, killing 257 people and injuring more than 700. Among the targets were the Bombay Stock Exchange, Air India Building at Nariman Point and hotels Sea Rock and Juhu Centaur. Property worth crores was destroyed in the explosions in which the deadly RDX explosive was used for the first time in the country. The serial blasts were alleged to be a revenge attack for the demolition of the Babri mosque in Ayodhya in December 1992.

**Vaiko’s case**

The MDMK, which was born in May 1994 as a breakaway group of the Dravida Munnetra Kazhagam (DMK), is a constituent of the National Democratic Alliance (NDA) government at the Centre and has two members in the Union Ministry - M. Kannappan, Minister of State for Non-Conventional Energy Sources, and Gingee N. Ramachandran, Minister of State for Finance.

Vaiko has a long history of obsessive, overt support, for the LTTE, the terrorist organisation whose long list of horrendous crimes includes the killing of former Prime Minister Rajiv Gandhi at Sriperumbudur, near Chennai, in May 1991. Its leader Velupillai Prabakaran is the first accused in the assassination case, and has been declared a proclaimed offender in India. After it assassinated Rajiv Gandhi, the LTTE was banned by the Centre under the Unlawful Activities (Prevention) Act, 1967, in May 1992. The ban has been extended every two years. The LTTE was categorised as a "terrorist organisation" under POTA after the legislation was passed on March 26, 2002, at a joint sitting of the Lok Sabha and the Rajya Sabha. Vaiko the chief of MDMK in Tamil Nadu was arrested under this Section on the basis of certain remarks. He was reported to have been saying that "I was a supporter of LTTE once. I

49 http://www.frontline.in/static/html/fl1915/19150200.htm
was a supporter of LTTE yesterday; I am a supporter of LTTE today and I will be a supporter of LTTE tomorrow." Then, he asked his audience whether the LTTE had engaged in terrorism for the sake of violence or had taken up arms to suppress a culture. Mr. Vaiko, was in detention for 17 months, did not choose to seek bail on a matter of principle. When we looked at various chapters internationally, it was found that as far as membership of a terrorist group is concerned, the British law has an exclusive chapter on banning terrorist organizations. After banning a terrorist organization, membership of a terrorist organisation, ipso facto, becomes a punishable act.

**Devender Pal Singh Case**

On April 12, the Supreme Court of India dismissed death-row convict Devender Pal Singh Bhullar’s writ petition seeking commutation of his sentence on the grounds of inordinate delay in rejecting his mercy petition by the President. The dismissal of the petition by a two-judge Bench comprising Justices G.S. Singhvi and Sudhansu Jyoti Mukhopadhaya has disappointed those who expected the court to expand further the human rights of death-row prisoners. Bhullar was suspected to be responsible for the attack on the cavalcade of the then president of the Youth Congress, Maninderjit Singh Bitta, in Delhi on September 10, 1993. Forty kilograms of RDX was used for the blast, in which nine persons were killed and 17 injured on account of perpetrated acts.

The court said that such terrorist who have no respect for human life and people are killed due to there mindless killing. So any compassion to such person would frustrate the purpose of enactment of Tada and would amount to misplaced and unwarranted sympathy. Thus they should be given death sentence. It was argued that this provision would mean that trade union activity would be affected because whoever disrupts essential supplies would be covered under POTA. However, the opposing view was that trade union leaders are nationalist leaders. Therefore, nobody has ever suggested

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50 Devender Pal Singh Vs. State of N.C.T. of Delhi 2002 (1) SC (Cr.) 209
that when our trade union leaders go on strike, they threaten the unity, integrity, security and sovereignty of India.

The court said that it is entirely to the court trying the offence to decide the question of admissibility or reliability of a confession in its judicial wisdom strictly adhering to law it must while so deciding the question should satisfy itself that there was no trap. No track and no importance seeking evidence during the custodial interrogations and all the conditions required are fulfilled. If the court is satisfied then the confessional statement will be a part of the statement\(^\text{51}\)

Apprehending arrest and possible elimination by the police, Bhullar left for Canada. However, he was taken into custody at the Frankfurt airport and deported to India by Germany. Bhullar was convicted and sentenced to death by a TADA (Terrorist and Disruptive Activities (Prevention) Act) court, and the sentence was confirmed by a three-judge Bench of the Supreme Court in a 2:1 judgment in 2002. Justices Arijit Pasayat and B.N. Agrawal, constituting the majority of the Bench, found no merit in Bhullar’s plea that his confession on the basis of which he was sentenced to death by the trial court was neither voluntary nor true. The presiding judge, Justice M.B. Shah, however, dissented and said that there was nothing on record to corroborate Bhullar’s confessional statement, recorded by a police officer, and that when the co-accused who were named in the confessional statement were not convicted or tried, this would not be a fit case for conviction. Bhullar’s review petition was also dismissed by the same Bench.

Justices Pasayat and Agrawal dismissed Bhullar’s claim for retrial made on the grounds that Justice Shah had found him innocent. Justice Shah, on the other hand, agreed that the finding on Bhullar’s guilt could not be altered because of the majority verdict, but held that his sentence could be commuted to life imprisonment, because his dissent had established that his was not the “rarest of rare” case deserving imposition of the death sentence.

Bhullar submitted a mercy petition to the President on January 14, 2013, for commutation of his sentence. The governments of Germany (which deported him to India from Frankfurt) and Canada had made strong representations for clemency for Bhullar. Germany had pointed out that it had already abolished the death penalty and in terms of Section 34C of the Extradition Act, 1962, the death penalty could not be imposed if the laws of the state which surrendered or returned the accused did not provide for the imposition of the death penalty for such crime.

In addition to these representations, the government had received seven mercy petitions on Bhullar’s behalf from eminent individuals and groups from India and abroad and several representations from foreign diplomatic missions in India and from various Sikh forums from Punjab and the United Kingdom. The Ministry of Home Affairs (MHA) first recommended to the then President, A.P.J. Abdul Kalam, to reject Bhullar’s mercy petition, on July 11, 2005. His petition remained pending at the end of Kalam’s tenure, as he had ignored the MHA’s recommendation because of his disagreement with it. Kalam could have sent it back to the MHA for its reconsideration.

However, had the MHA reiterated it, it would have been binding on Kalam. Therefore, Kalam saw merit in using his pocket veto against the government. Kalam was succeeded by Pratibha Patil as President in 2007. The MHA did not review Bhullar’s case until he approached the Supreme Court in 2011 seeking relief on account of the inordinate delay in disposing of his mercy petition. On April 29, 2011, the government requested the President’s Secretariat to return Bhullar’s file. On May 10, 2011, the then Home Minister, P. Chidambaram, opined that those convicted in cases of terrorism did not deserve any mercy or compassion and thus recommended the rejection of Bhullar’s mercy petition. On June 13, 2011, the then President, Pratibha Patil, rejected his mercy petition accordingly. Bhullar then amended his writ petition, challenging her rejection. Bhullar’s counsel argued before the court that because of prolonged detention Bhullar had become mentally sick, and that the
inordinate delay had rendered the death sentence cruel, inhuman and degrading, and that was nothing short of another punishment inflicted upon him.

The court, however, held that the grounds of inordinate delay could not be invoked in cases where a person was convicted for an offence under TADA or similar statutes. “Such cases stand on an altogether different plane and cannot be compared with murders committed due to personal animosity or over property and personal disputes.” The right to seek commutation of a death sentence on the grounds of inordinate delay in disposing mercy petitions has been granted by the Supreme Court’s five-judge Constitution Bench in *Triveniben v. State of Gujarat*52.

That Bench did not deny this right to those convicted of terrorism-related offences. Therefore, observers wonder how the two-judge Bench could overrule a binding decision, rendered by a five-judge Bench, and disentitle a category of prisoners, convicted under anti-terrorism laws, to their constitutional right to seek commutation of their sentences. Ironically, the Singhvi Bench attributed the inordinate delay in the Bhullar case to the unending spate of petitions on behalf of Bhullar by various persons, although one of the five judges in the Triveniben Bench, Justice G.L. Oza, had clearly held that the time spent on repeated mercy petitions at the instance of the convict should not be considered. The Singhvi Bench also held that the MHA had failed to take appropriate steps to remind the President’s Secretariat about the dire necessity to dispose of the pending petitions.

It found that Bhullar’s file remained pending in the President’s Secretariat for six years between 2005 and 2011, partly because of the immense pressure brought upon the government in the form of representations made by various political and non-political functionaries, organizations, and individuals from other countries. Ironically, while reaching this conclusion, the Singhvi Bench did not provide Bhullar the opportunity to challenge this finding, which was erroneous. The Singhvi Bench found evidence that Bhullar had suffered physically and mentally on account of prolonged

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52 1989 AIR 1335
detention in jail but refused to hold that his mental health had suffered to such an extent that the sentence awarded to him could not be executed. Observers have expressed surprise that the Bench has given such a reasoning to deny relief to Bhullar, because his counsel’s argument was not that mentally ill convicts could not be executed, but whether it was fair to do so.

Mumbai Attacks Case

Mohammed Ajmal Amir Kasab (13 September 1987 – 21 November 2012) was the only Pakistani terrorist captured alive by police in the 2008 Mumbai attacks in India. Kasab clutching his gun at Mumbai railway station became a symbol of the November 2008 attacks that horrified the world. In the immediate aftermath of the attacks, security forces struggled to collect information about the young man. Only after several months did Pakistan admit that he was one of their citizens, from the province of Punjab. He had received little education, the reports said, and had spent his youth alternating between laboring and petty crime. At some point, India says, Kasab came under the influence of the Lashkar-e-Taiba militant group. After training in one of several remote camps, they say, he was hand-picked for the Mumbai operation. He was captured on camera at the Chhatrapati Shivaji Terminus, a slight figure in combat trousers and a blue sweatshirt, clutching an assault rifle. This verdict against Kasab, which came almost 5 years after the terror attack, was welcomed by all. Former Solicitor General Gopal Subramaniam, who had appeared for the Maharashtra government, also welcomed the verdict saying it is "a victory of justice and the Constitution of the country." November 21, 2012: Ajmal Kasab hanged to death at Pune's Yerawada Jail at 7:30 on Wednesday morning (21st November 2012). Kasab had reportedly told them that he had no last will or wish before he was executed, and that the entire procedure had been explained to him before it was carried out.
Afzal Guru Case\textsuperscript{53}

The genesis of this case lies in a macabre incident that took place close to the noon time on 13th December, 2001 in which five heavily armed persons practically stormed the Parliament House complex and inflicted heavy casualties on the security men on duty. This unprecedented event bewildered the entire nation and sent shock waves across the globe. In the gun battle that lasted for 30 minutes or so, these five terrorists who tried to gain entry into the Parliament when it was in session, were killed. Nine persons including eight security personnel and one gardener succumbed to the bullets of the terrorists and 16 persons including 13 security men received injuries. The five terrorists were ultimately killed and their abortive attempt to lay a seize of the Parliament House thus came to an end, triggering off extensive and effective investigations spread over a short span of 17 days which revealed the possible involvement of the four accused persons who are either appellants or respondents herein and some other proclaimed offenders said to be the leaders of the banned militant organization known as "Jaish-E-Mohammed".

After the conclusion of investigation, the investigating agency filed the report under Section 173 Cr.P.C. against the four accused persons on 14.5.2002. Charges were framed under various sections of Indian Penal Code (for short 'IPC'), the Prevention of Terrorism Act, 2002 (hereinafter referred to as 'POTA') and the Explosive Substances Act by the designated Court. The designated Special Court presided over by Shri S.N. Dhingra tried the accused on the charges and the trial concluded within a record period of about six months. 80 witnesses were examined for the prosecution and 10 witnesses were examined on behalf of the accused S.A.R. Gilani. Plethora of documents (about 330 in number) was exhibited. The three accused, namely, Mohd. Afzal, Shaukat Hussain Guru and S.A.R. Gilani were convicted for the offences under Sections 121, 121A, 122, Section 120B read with Sections 302 & 307 read with Section 120- B IPC, sub-Sections (2), (3) & (5) of Section 3 and Section 4(b) of

\textsuperscript{53} (2003) 6 SCC 641
POTA and Sections 3 & 4 of Explosive Substances Act. The accused 1 & 2 were also convicted under Section 3(4) of POTA.

Accused No.4 namely Navjot Sandhu @ Afsan Guru was acquitted of all the charges except the one under Section 123 IPC for which she was convicted and sentenced to undergo R.I. for five years and to pay fine. Death sentences were imposed on the other three accused for the offence under Section 302 read with Section 120-B IPC and Section 3(2) of POTA. They were also sentenced to life imprisonment on as many as eight counts under the provisions of IPC, POTA and Explosive Substances Act in addition to varying amounts of fine. The amount of Rs.10 lakhs, which was recovered from the possession of two of the accused, namely, Mohd. Afzal and Shaukat Hussain, was forfeited to the State under Section 6 of the POTA.

In conformity with the provisions of Cr.P.C. the designated Judge submitted the record of the case to the High Court of Delhi for confirmation of death sentence imposed on the three accused. Each of the four accused filed appeals against the verdict of the learned designated Judge. The State also filed an appeal against the judgment of the designated Judge of the Special Court seeking enhancement of life sentence to the sentence of death in relation to their convictions under Sections 121, 121A and 302 IPC. In addition, the State filed an appeal against the acquittal of the 4th accused on all the charges other than the one under Section 123 IPC. The Division Bench of High Court, speaking through Pradeep Nandrajog, J. by a well-considered judgment pronounced on 29.10.2003 dismissed the appeals of Mohd. Afzal and Shaukat Hussain Guru and confirmed the death sentence imposed on them.

The High Court allowed the appeal of the State in regard to sentence under Section 121 IPC and awarded them death sentence under that Section also. The High Court allowed the appeals of S.A.R. Gilani and Navjot Sandhu @ Afsan Guru and acquitted them of all charges. This judgment of the High Court has given rise to these seven appeals, two appeals preferred by Shaukat Hussain Guru and one appeal preferred by

While justifying the imposition of capital punishment on Guru, Justice Reddi of the supreme court had said the attack on Parliament was "a gravest crime of enormous severity" and was a classic case falling under the "rarest of rare" category." The collective conscience of the society will be satisfied only if the death penalty is awarded to Afzal Guru," the Bench had said.

While taking away his right to life, the court had said the manner in which he conspired to wage war against the nation and the support he extended for carrying out the criminal conspiracy made him a "menace to the society". While justifying the imposition of capital punishment on Guru, Justice Reddi had said the manner in which he conspired to wage war against the nation and the support he extended for carrying out the criminal conspiracy made him a "menace to the society". While justifying the imposition of capital punishment on Guru, Justice Reddi had said the attack on Parliament was "a gravest crime of enormous severity" and was a classic case falling under the "rarest of rare" category." The collective conscience of the society will be satisfied only if the death penalty is awarded to Afzal Guru," the Bench had said.

The Supreme Court observed that mostly, the conspiracies are proved by the circumstantial evidence. It held that the circumstances detailed in the judgment clearly established that Guru was associated with the deceased militants in almost every act done by them in order to achieve the objective of attacking the Parliament House. It also observed that there was sufficient and satisfactory circumstantial evidence to establish that Guru was a partner in this conspired crime of enormous gravity. It has to be noted, that in its judgement of 5 August 2005, the Supreme Court admitted that the evidence against Guru was only circumstantial, and that there was no evidence that he belonged to any terrorist group or organisation. He was subsequently meted out three life sentences and a double death sentence.
In October 2006, Guru's wife Tabasum Guru filed a mercy petition with then President of India A. P. J. Abdul Kalam. In June 2007, Supreme Court dismissed Guru's plea seeking review of his death sentence, saying "there is no merit" in it. In December 2010, Shaukat Hussain Guru was released from Delhi's Tihar Jail due to his good conduct. On 16 November 2012, the president had sent seven cases back to the Ministry of Home Affairs (MHA), including Afzal Guru's. The president requested Sushil Kumar Shinde, home minister, review the opinion of his predecessor, P. Chidambaram. On 10 December, Shinde indicated he would look at the file after the winter session of the Parliament was finished on 20 December. Shinde made his final recommendation to execute Guru on 23 January 2013. On 3 February 2013, Guru's mercy petition was rejected by the President of India. Afzal Guru was hanged six days later on 9 February 2013 at 8 am.54

**International Position** 55

In number of foreign court Judgment the court had stressed on the absolute need for protecting human rights of the suspected terrorists and other such enemy combatants. The President A. Barak, Chief Justice, of the Supreme Court of Israel observes following regarding fighting terrorism:

“The foundation of this approach is not only the pragmatic consequence of a political and normative reality. Its roots lie much deeper. It is an expression of the difference between a democratic state fighting for its life and the aggression of terrorists rising up against it. The state fights in the name of the law and in the name of upholding the law. The terrorists fight against the law and exploit its violation. The war against terror is also the law’s war against those who rise up against it. We established a state that upholds the law – it fulfills its national goals, long the vision of its generations, while upholding human rights and ensuring human dignity. Between these – the vision and the law – there lays only harmony, not conflict.”

55 http://jkmtrust.tripod.com/id4.html
In R (Saifi) vs. Governor Of Brixton Prison\textsuperscript{56} this case the applicant for Habeas Corpus resisted extradition to India on the ground, among others, that the prosecution relied on a statement obtained by torture and since retracted. The Queen’s Bench Division court accepted the Magistrate Judgment that fairness did not call for exclusion of the statement, but was clear that common law and the domestic statute gave effect to the intent of Article 15 of the international convention against torture and other cruel, inhuman or degrading treatment or punishment 1984.

Lam Chi Ming vs. Queen\textsuperscript{57} in this case the privy council summarized rejection of an improperly obtained confession in not dependant only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and the importance that it attaches in a civilized society to proper behavior by the police towards those in their custody.

In Chhehl vs. U.K\textsuperscript{58},

The court held that article 3 enshrines one of the most fundamental values of a democratic society. The court is well aware of the immense difficulties faced by the states in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victims conduct. Article 3 makes no provision for exception and no derogation from it is permissible U/A 15 even in the event of a public emergency threatening the life of a nation.

Gangaram Pandey vs. Suriname\textsuperscript{59}

In this case the court said, that no one may be subjected to arrest or detention for reasons and by methods which although classified as legal could be deemed to be

\textsuperscript{56} (2001) 1 WLR 1134
\textsuperscript{57} (1991) 2 Ac 212, 220.
\textsuperscript{58} (1996) 23 EHRR 413, para 79
\textsuperscript{59} HRLJ 168 (1994)
incompatible with the respect for the fundamental rights of the individual because among other things, they are means unenforceable or lacking in proportionately.

In a landmark judgement European courts talked about the procedural guarantee in case of deprivation of liberty, the European court had indicated that the procedure followed must be in conformity with the applicable Municipal law and the convention including the general principles contained in the latter and should not be arbitrary.\textsuperscript{60}

\textbf{Abbasi and ors vs. Secretary Of State for the Home department}\textsuperscript{61}

The extreme case where judicial review would lie in relation to diplomatic protection would be if the foreign and commonwealth offices were, contrary to its stated practice, to refuse even to consider whether to make diplomatic representations on behalf of a subject whose fundamental rights were being violated. In such unlikely circumstances it would be appropriate for the courts to make a mandatory order to the foreign secretary to give due consideration to the applicants case.

\textbf{Rehman vs. secretary of State for the Home Department.}\textsuperscript{62}

Important decision of the House of Lords. In this case the home secretary had decided that the appellants deportation would be “conducive to the public good” under section 3(5)(b) of the immigration Act 1971. The decision was based on the Home Secretary’s conclusions as to the appellant’s involvement with the terrorist organization operating in the Indian subcontinent (which was seeking the liberation of Kashmir”). The appellant successfully appealed to the Special Immigration Appeals Commission, who could not understand how conduct prejudicial to the national security of the Indian subcontinent could be prejudicial to the national security of the united kingdom. In the House Of Lords, however which granted the Home secretary’s appeal, Lord Hoffmann took the view that SIAC was not entitled to differ from the opinion of the Home Secretary on the question of whether, for

\textsuperscript{60} (1979)
\textsuperscript{61} (2002) EWCA Civ 1598.
\textsuperscript{62} (2001) 3 WLR 877
example, the promotion of terrorism in a foreign country by a UK resident would be contrary to the interests of the UK own national security. In the carrying out of such assessments, the courts should extend the appropriate degree of deference to the executive.

Judicial deference was shown by the courts in the field of National security. In this case the fundamental issue that arose was of discrimination between the Nationals and the Non Nationals. The court of appeal was satisfied that, in international law, nationals have always greater right than foreigners, not least the right to live in the UK. The right of foreign immigrants is essentially the right for the time being not to be removed to a third country for their own safety.

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