

Monograph  
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# Jurisprudence of Anti-Terrorism Laws

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An Indian Perspective

Ramanand Garge



Vivekananda International Foundation

# **Jurisprudence of Anti-Terrorism Laws - An Indian Perspective**



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# Acronyms

Al-Qaeda	AQ
Anti-Terror Squad	ATS
Armed Forces Special Power Act	AFSPA
Arunachal Pradesh Control of Organised Crime Act	APCOCA
Central Bureau of Investigation	CBI
Chhattisgarh Jan Suraksha Adhinyam	CVJSA
Civil Procedure Code	CPC
Code of Criminal Procedure	CrPC
Counter Terrorism Coordination Centre	CTCC
DimaHalamDaogah (Jewel)	DHD (J)
Director General (Police)	DGP
Gujarat Control of Terrorism and Organised Crime	GCTOC
Hizb – ul – Mujahedeen	HM
Intelligence Bureau	IB
Inspector General	IG
Indian Penal Code	IPC
Indian Mujahedeen	IM
Jaish-e-Mohammad	JeM
Karnataka Control of Organised Crime Act	KCOCA
Maharashtra Control of Organised Crime Act	MCOCA
Madhya Pradesh Terrorist and Disruptive Activities and Control of Organised Crimes Bill -	<i>MPTDACOCB</i>
Member of Parliament	MP
Ministry of Home Affairs	MHA



National Counter Terrorism Centre	NCTC
National Investigation Agency Act	NIA Act
National Investigation Agency	NIA
Non-Governmental Organisation	NGO
Prevention of Terrorism Act	POTA
Lashkar-e-Taiba	LeT
Press Trust of India	PTI
Popular Front of India	PFI
Students Islamic Movement of India	SIMI
South Asian Association for Regional Cooperation	SAARC
Terrorist and Disruptive Activities (Prevention) Act	TADA
United Nations	UN
United States	US
Unlawful Activities (Prevention) Act	UAPA

## Foreword

Counter-terrorism practices cannot be effective in the absence of firm and clear anti-terrorism law. In the last several decades, India has developed wide-ranging counter-terrorism practices and mechanism. Yet, it has neither a comprehensive anti-terrorism law nor a definition of terrorism. Plethora of separate legislations are being used in counter-terrorism practices. The concept of federal crime is also missing. The National Investigation Agency (NIA) set-up in 2008 to investigate into terrorism cases. Increasingly its remit is being diluted as it is being burdened with investigation of other crimes. The efforts to set-up a National Counter-Terrorism Coordination Centre (NCTC) has also not succeeded due to apprehensions of the Indian states.

Mr. Ramanand Garge, in his monograph, titled *Jurisprudence of Anti-terror Laws: An Indian Perspective*, explores the legal aspects of counter-terrorism practices in India. He traces the evolution of anti-terror legislations in the country and delves into the provisions of various legislations that have used for investigation and prosecution of terrorism cases. Identifying the gaps, the author makes several recommendations for improving counter-terrorism practices in the country.

The monograph provides useful insights into the complexities of India federal structure and how they impact the efficacy of counter-terrorism practices. It is hoped that the monograph would stimulate discussions on counter-terrorism issues relevant to India.

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# Introduction

## Terrorism in India: A Brief Background

Terrorism is undoubtedly an extremely complex issue due to its diverse origin and expanse, ideologies and motivations. It gets further complicated by some organisations and states using terror as a policy-tool for achieving their political and strategic objectives. The impact and reach of terror has increased multi-fold in the contemporary era of globalisation where the speed of communication is enormously wide and fast. The short travel span and rising interdependence within environments have led global affairs towards convergence. In some regions of the world, it has turned into a rationale for the flash point which amplifies as an international conflict to overwhelm the conventional mechanism of governance. Dealing with terrorism in all its facets, has also thus become an extremely complex subject, engaging the attention of experts around the world.

In South Asia, India has been facing and combating terrorism in one form or another, since independence and continues to be a significant target of terrorist groups even today. It has been aptly stated that India lives in a region which is the 'epicentre of global terrorism'. Unfortunately, it also carries the rather dubious distinction, not of its own making, of having been victim of terror for the longest period of time. This situation is quite unlikely to abate in the foreseeable future.

It is difficult to get official data or compilation of information cataloguing all the terrorist groups operating in the country. However, some analysts and research-oriented think tanks in the field of tracking terror, list out around 39 terror outfits currently operating in different parts of the country including groups operating from Pakistan and Bangladesh (Sharma and Anshuman 2014). Besides, there are other emerging threat from Daesh and Al Qaeda which claim to have set up separate cells for the Indian sub-continent, taking advantage of the obtaining socio-political situation in the region.

Resultantly, the Indian state has, over the years, acquired vast experience in dealing with various conflict situations, their linkages with terror models and their unique and diverse characteristics. This is reflected in its policies and responses to the most potent threat it faces in the form of externally sponsored terrorism creeping in through its porous borders as well as internal terror modules largely on account of governance deficiency.

In the complex pattern of governance, India's federal political system leaves most of the policing responsibilities with the states, which usually possess their own counter-terrorism and intelligence units. Unfortunately, these entities, especially the local police, are often inadequately trained and mostly ill-equipped to effectively meet the new emerging challenges of this nature. India's police and internal security infrastructure is highly fragmented and often poorly coordinated (Pradhan and Balchandran 2008).

In such circumstances, the foreign-backed threats coalesce with a troubled internal security environment and some level of domestic radicalisation, to create a fairly vulnerable situation. Twenty-seven youth from the state of Kerala have gone to fight with Daesh in Syria and Iraq supports strongly to the evolving critical situation in India (Philip 2016).

While serious and systematic attempts to understand and analyse the concept of terrorism in its entirety started in India in the 90's and has, since then, progressively intensified, the international community woke up to the reality of global terror only after the 9/11 attack which became the defining watershed in the international discourse on terror. It brought home the point that such acts of terror subvert the fundamental rules of law as well as deny the rights of the citizens. They endanger the social fabric of the society and threaten its political as well as economic stability. It also brought in its wake the basic realisation that all states, far or near, must endeavour at all times to proactively study the subject in all its manifestations to empower themselves to deal effectively with all forms of terror without making any distinction. The fundamental argument that there was no distinction between regional terror groups and the newly-coined terminology of global terrorist groups started gaining wider acceptance. Post-9/11, for the first time one started finding formulations like '*War against Global Terrorism*' or, better still '*Global War against Terrorism*'

entering the new lexicon. There appeared a new determination to deal with the threats and challenges posed by terror in all its manifestations. Legal brains in the world over started re-visiting the existing legal mechanisms to handle this new phenomenon. Search began for new enabling legal enactments of comprehensive counter-terrorism legislations and mechanics for their determined implementation, without impacting on the basic democratic framework and values of governance.

In this monograph, spread over 4 chapters, an attempt is made to examine a variety of issues relating to the problems faced in pursuing different aspects of cases concerning terrorism. The basic purpose of the study is to try to understand issues that lead to inordinate delays in investigation, confusion caused by lack of clarity on investigative jurisdiction, the law and order approach versus terrorism, multiplicity of legislations, procedures to be followed in the course of investigation and trial, misuse of provisions relating to arrest and bail, frequent recourse to judicial intervention in terms of reviews and appeals, admissibility of evidence etc. The study also seeks to address some of the aspects related to dealing with terrorism including the need for better handling intelligence and the concept of *National Counter Terrorism Centre (NCTC)* etc.



## CHAPTER-I

# Evolution of Anti-Terror Legislations

Our examination of the above-mentioned issues is mostly based on judicial pronouncements and ideas and suggestions from the actual practitioners on the ground. They threw up some relevant issues such as evolution of anti-terror legislations, multiplicity of federal and state legislations, difficulties faced in application of relevant laws, jurisdictional issues, multiplicity of investigating agencies, contradictory judicial verdicts, admissibility of evidence, powers of arrest and detention etc. Some of these need closer scrutiny and are discussed in this and the subsequent chapters. For reasons of sequential study, we begin the discussion with the topic of Evolution of Anti-Terror Legislation in India.

### Study Conducted by VIDHI Law Centre

However, before proceeding further in our examination of the issues constituting the Jurisprudence of terror in India, we would like to acknowledge the excellent research work undertaken by *Vidhi- Centre for Legal Policy* in June 2015 which prominently focused on certain key issues like federalism, issues that affects the centre state synergy, laws governing terrorism related cases, judicial interpretation of anti-terror laws and certain procedural issues. Their findings were:

- 1) The basic statutory approach to terrorism has not changed since TADA, resulting in the language and structure of subsequent status largely being based on this law formulated in the 1980s. This is in spite of the fact that the nature of terrorism, and counter terrorism efforts have undergone changes in supervening decades.
- 2) The haste in legislating anti-terror laws led to a significant amount of incoherence, without substantial thought being given to the (un)intended consequences of the slight tweaks in language. Thus, these problems in the language of statutes contribute to delay in the disposal terrorism trials,



- 3) Anti-terrorism laws have been made without studying the (mis)use and impact of TADA and POTA, thus increasing the chances their misuse,
- 4) Similarly, Special courts set up under various anti-terror laws have been unable to expedite the trial of the accused under these laws, and in many cases, have instead undermined due process and fair trial.
- 5) Counter terrorism efforts have also often had to negotiate the complexities of Indian federalism. Challenges to Central or State counter-terror efforts are a reflection of the fundamental difficulties faced in characterizing terrorism.
- 6) However, the 'extraordinariness' of anti-terror laws has been insufficiently explored in judicial reasoning in India and has resulted in a situation where the undermining of civil liberties is slowly becoming the norm, instead of the exception (Sen, et al. 2015).

### **The Indian Approach**

In India, for years, adequate attention was not paid to enactment of specific enabling domestic legislations that could effectively deny operating space and manoeuvrability to terrorist groups and their support structures that would deter them from executing any acts of terror. Consistent and effective anti-terror policies and counter terror-mechanism demanded strong national consensus and commitment as basic prerequisites. In the earlier stages, incidents of terrorism in India were generally dealt with as law and order issues and therefore investigation and prosecution in such cases largely followed the penal provisions enshrined in major laws such as the IPC, Indian Explosives Act, Indian Arms Act, and such others, while procedurally, the provisions of the Criminal Procedure Code were followed.

Over the years, as acts of terror became more frequent, intense and geographically widespread, aided and abated by external forces, the inadequacies of the general laws of the country as well as the traditional approach of treating them as law and order matters, started getting exposed. Need for special enactments to meet the special requirements of the time was observed. Regrettably, then and

even till date, a strong national will on dealing with terror is missing in public discourse. Not surprisingly, all such debates also tend to acquire political and communal overtones.

These were the basic reasons for the first two specific anti-terror legislations, namely Terrorists and Disruptive Activities (Prevention) Act 1985, 1987, (TADA) and Prevention of Terrorism Act, 2002 (POTA) being eventually deleted from the statute books primarily for political expediency and lack of national will. Thus, started the disappointing history of anti-terror legislations and discourse in India, and regrettably, the resultant weakening of efforts to deal with the problems. Strong political will and stable leadership are paramount requirements for drafting and implementing effective counter-terrorism mechanism. In this context the stated '*zero tolerance policy*' approach of the present government can be seen as a promising step in this direction (R. Singh 2015).

In 1985, in the aftermath of the assassination of Prime Minister Indira Gandhi, the government enacted the Terrorist and Disruptive Activities (Prevention) Act (TADA) in the hope that this would act as an effective omnibus law to deal with the issues nationally. This however did not happen for various reasons and eventually TADA had to be allowed to lapse in 1995, in the face of serious political campaign emerging largely out of its abuse and misuse.

However, as the country continued to reel under exponential rise in terrorist violence in different parts of the country, the government of India went for enactment of a modified version of TADA called the Prevention of Terrorist Act (POTA) in 2002. This was direct fallout of the December 2001 brazen attack on the Parliament by externally sponsored terrorists. But, POTA too was short-lived and was repealed in 2004 almost on grounds similar to that of TADA.

There was a long gap of four years when India did not have any special federal legislation to deal with acts of terror forcing the state governments to enact alternate enabling laws, still largely drawing from the provisions of the two repealed legislations of TADA & POTA. Since then, Maharashtra enacted MCOCA, followed by the states of Karnataka and Chhattisgarh,

and others. The state of Gujarat too attempted a special legislation which did not see the light of the day since, possibly for political reasons it failed to receive Central government's approval.

As a result, while acts of terror continued multiplying in numerical terms, becoming more serious and brutal in their impact, the investigating agencies remained largely dependent, once again, on basic laws like the IPC and others mentioned earlier. The question that naturally kept daunting the security establishments was whether India should still continue to deal with cases of terrorism in an ad hoc manner as outlined above or time was right for the enactment of a comprehensive and overriding anti-terror legislation with all India jurisdictions, dealing in an inclusive manner all aspects of investigation and prosecution in terrorism related cases? In this context, it is pertinent to mention that many major countries around the world, perhaps less affected by terror acts than India, have already put in place special legislations to deal with cases of terrorism. These include the USA, UK, European Union, Israel and the global entity the UN.

While discussing the jurisprudence of anti-terror legislation in the Indian context, it is observed that, apart from the high profile publicly known cases of Ajmal Kasab (26/11 Mumbai attack) and Afzal Guru (13/12 Parliament attack), majority of terror related cases remained largely unheard, un-debated and therefore, unnoticed in public discourse. It further signposts that very few attempts were made to study this subject systematically to determine the lines along which terrorism cases were executed, investigated and prosecuted in India. This, in a way, endorsed a disturbing trend of how the legal processes deviated from the requirements of the due process and constitutional guarantees (U. Singh 2007).

Thus, it is indispensable to study the legal issues restraining the execution of the anti-terror legislation, its judicial interpretation in courts and issues affecting the smooth coordination between union and state governments in the evolving context of concurrent nature. This is particularly needed to ascertain operability of the investigating agencies which fall under the ambit of State as well as the union governments. The limited domain study of anti-terror laws in India related to investigation and prosecution of acts of terror

in the framework of Indian Criminal Procedure Code encompassing the wide spectrum of Union legislations such as *Unlawful Activities* (Prevention) Act of 1967 (UAPA), and various state laws such as *Maharashtra Control of Organised Crime Act*, 1999 (MCOCA) and *other* similar legislations enacted by some of the affected states.

## Overview of Operation of Anti-Terrorism Laws in India

A broad-based overview of India's anti-terrorism laws, derived primarily from the trial of terror cases, can be considered as a beginning point to understand various operational aspects of the laws in greater details. Such an overview should cover central and state legislations that administer substantive offences and related procedures to deal with terror cases. Based on the judicial guidelines and recommendations by the courts, some Union and State legislations were enacted along with suitable amendments in the existing laws tackle terrorism and related issues. It must, however be acknowledged that the primary laws of the country namely the *Indian Penal Code* [IPC] and the *Code of Criminal Procedure* [Cr.PC] do have substantive provisions to investigate and prosecute terrorism related cases covering even offences like waging war against the state [IPC Section 121- punishable with death or life imprisonment and fine], or the law of sedition which cover words, visible representation of signs, slogans, projecting hatred or contempt of government or court orders exciting disaffection towards the government in India<sup>1</sup>. The question remained whether these laws were adequate enough to effectively deal with the existing and evolving threat emanating from terrorism at domestic as well as global level. This study accordingly seeks to ascertain the need for Indian society for more specific and stringent legislations including special judicial processes to add the proverbial 'bite' to India's war against terror.

It may be noted that even in the judicial trials of high profile cases of terror, such as the Parliament Attack of December 2001 (The Supreme Court of India, Verdict of the Case no 373-375 of 2004 State Vs Navjot Sandhu Afsan Guru 2005), or Mumbai Terror Attack of November 2008 trial (The Supreme Court

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1 *Section 124 A-punishable with imprisonment for maximum three years or with fine or with both*

of India 2012) and Malegaon Blast case<sup>2</sup> the charge sheets were filed under the provisions of the omnibus provisions of the Indian Penal Code.

As mentioned earlier, over the period of time, based on the gravity of the case, specific legislations were enacted. The much criticised TADA enacted by the Parliament in 1985 in the backdrop of the 1984 assassination of then Prime Minister Indira Gandhi, remained in force till 1995 when it was allowed to lapse due to grave and widespread of allegation of misuse. Similarly, the Prevention of Terrorism Act (POTA), enacted in 2002 after the attack on Indian Parliament in 2001, also remained the political punching bag and faced severe criticism for alleged widespread human right abuses. POTA was repealed in 2004 after a very short span of legal existence (Editorial, The Hindu 2012).

The classic character of this law is that, in a way, it still remains relevant even today since the repeal of this act did not affect the pending investigations and legal proceedings initiated under this Act (Ministry of Law 2004). After the repeal of POTA, no court was permitted to take cognizance of any offence under POTA after one year of the expiry of this Act (Ministry of Law 2004). The landmark case of Mulund Blasts of 2003 is known for commencement of the judicial trial under POTA in July 2014, nearly 11 years after the incident took place (Hafeez 2014). It was the recommendation of the POTA review committee, that made provisions to review all the cases registered under POTA within a period of one year from the commencement of the repealing Act. The committee further ordered closure of all proceedings where no prima facie case was made out against the accused (Ministry of Law 2004).

Thus, currently, the only law which can be said to be exclusively an anti-terrorism legislation in force in India is the *Unlawful Activities Prevention Act* (UAPA). The Law had, it may be recalled, come into existence way back in 1967 when it was passed by the Parliament and was general in nature encompassing unlawful activities. The stringent provisions pertaining to acts of terror were included therein, in 2004, after the Parliament repealed POTA. The subsequent amendment in UAPA in 2008 was considered a landmark event due to incorporation of the *definition of a 'Terrorist Act'* in Section 15,

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2 Pragyasingh Chandrapalsingh Thakur V State of Maharashtra at Special MCOCA court, 2014 (1) Bom Cr (Cri) 135 (Bombay High Court).

followed by listing of specific offences to be henceforth prosecuted as terror offences under this Act (The Parliament of India 2008). In the controversial backdrop of POTA and its alleged misuse, the amendments made in the UAPA in 2008 changed the presumption of innocence into that of guilt, provided certain specific conditions were met (Ginestein 2009).

Further amendment introduced in 2013 in the UAPA catered to the specific need of the hour by incorporating economic and financial offences. These offences are considered as decisive aspects of the terrorism in present days (Ministry of Law and Justice, The Gazette of India - The Unlawful Activities (Prevention) Amendment Act 2012 2013). This helped in running the prosecution of the Mumbai Terror strike case which was very much trans-national in nature. The 2013 amendment in UAPA enabled prosecution of offences punishable under this Act even if committed outside India<sup>3</sup>. The amendment further strengthened the legal framework by enabling the transnational acts as well as the act of using foreign territory and resources for planning and funding for conducting such activities which will challenge the unity, integrity, security in all aspects and sovereignty of India. These acts were clearly defined as a 'terrorist act' under Section 15 of the amended UAPA. Similarly, in view of the involvement of Indian citizens based in India or abroad, a provision for prosecution was made in section 1(5) of the Act and extended to the personnel in ships and aircrafts registered in India as well as wherever they may be.

In support of the UAPA enacted by the Union government, some state governments also initiated state specific legislations for maintenance of public order and security. This included the much-debated *Armed Forces Special Power Act* [AFSPA] enacted by the Parliament in view of the rise in insurgency in certain areas. This law classified those areas as 'disturbed areas', providing special operational, legal cover along with certain additional powers to the armed forces<sup>4</sup>. The jurisdiction of the law was further extended to the state of

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3 The UAPA Act, Section 1(4) – available at - <http://indiacode.nic.in/acts-in-pdf/032013.pdf>

4 The AFSPA 1958 includes the states of Assam, Manipur, Meghalaya, Nagaland, Tripura and the Union Territories of Arunachal Pradesh and Mizoram as per section 1(2) of the Act.

Jammu and Kashmir in 1990 (Ministry of Law and Justice 1990). In classical terms however, AFSPA should not be seen as an anti-terror specific legislation but more as an enabling provision for the armed forces to deal with situations in the disturbed areas.

### Special Legislations Enacted by the States

Apart from the insurgency affected states, other states in India have also enacted legislation to address the ‘*law and order*’ challenges. Most debated amongst all is the *Maharashtra Control of Organised Crime Act* [MCOCA] with its area of jurisdiction limited to the state of Maharashtra and Delhi (Pandey 2002)<sup>5</sup>. The *Karnataka Control of Organised Crime Act, 2000* (KCOCA), followed by Naxal affected state of Chhattisgarh initiated *Chhattisgarh Jan Suraksha Adhiniyam, 2005* [Chhattisgarh Special Public Safety Act, (CVJSA)] (Government of Chhattisgarh, Notification of the Chhattisgarh Special Public Safety Act 2005 2007) and certain other laws enacted recently are examples of such state-specific legislations.

A broad-based analysis of these legislations reveals that these enactments are possibly intended to tackle less serious offences such as organised crime and gang violence. Though, the statutes do cover a wide range of otherwise serious criminal activities undertaken or initiated by individuals or organisations and not limited to the terrorist offences. Despite the broad architecture of these laws, the concerned states consider them as stringent anti-terrorism laws. Further, an attempt was made by the state of Karnataka to include ‘*terrorist act*’ as an organised crime, thereby extending death penalty for such acts. The law did receive endorsement of both the houses of the state legislature; but, did not receive Presidential assent. This highlights the fact that in both types of provisions pertaining to the unlawful activities and act of terror reflects a thin line separating criminal activities with that of act of terror.

The above laws need to be read in conjunction with relevant/specific provisions of various other Union legislations such as the *Arms Act* of 1956, *The Explosive*

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5 Notification of Ministry of Home Affairs, Government of India, and Notification No: GSR 6(E) dated January 02, 2002 under the section of 2 of Union Territories (Laws) Act, 1950.

*Substance Act, 1908, Explosives Act 1884* and such others that strengthen and supplement the impact of those legislations. Thus, the Pakistani terrorist Ajmal Kasab (Mumbai Attack 2008) was also charged for illegal possession, use and manufacture of arms and explosives in the cases of 26/11 Mumbai Terrorist (The Supreme Court of India 2012) Ajmal Kasab was prosecuted and eventually convicted under nine sections under the IPC namely, Section 302 (murder), Section 120-B (criminal conspiracy), Section 121 (waging of war against Union of India), Section 122 (collecting arms with intention of waging war), Section 392 (robbery), two provisions of UAPA namely Section 16 (commission of terror act), Section 13 (commission of unlawful activity), Section 25(1B), (a) and 25 (A) of Arms Act 1959 (carrying arms), Sections 9 B (1), (a), (b) of Explosives Act 1884 (importing, possessing and using the explosives), Section 3(b) of Explosive Substance Act of 1908 (fatal injury caused due to use of explosive substances and section 151 of Railways Act of 1989 for causing severe damage to the railway property (Justice Chandramauli 2012).

Similar was the situation in the Parliament Attack Case of 2001 (The Supreme Court of India, Page No: 3, Criminal Appellate Jurisdiction, 2005, Appeal (crl.) 373-375 of 2004 2005) in which charges were framed under various sections of *Indian Penal Code* and the *Prevention of Terrorism Act, 2002* ('POTA') and the *Explosive Substances Act* by the designated Court.

These are only illustrative of the standard practice adopted by the investigating agencies not only at the time of registration of FIRs but also through the processes that follow i.e. investigation, recording of evidence, search and recovery, arrest of accused, etc. leading up to the filing of charge sheet, trial and appeals and the final sentencing. The whole process involves a mix of the provisions of various substantive laws and special laws. In the succeeding paragraphs, an attempt is made to discuss these issues in greater details to draw up a comprehensive picture of the strengths and deficiencies of the procedures and related processes.

The 'mother' law providing the guiding principles of investigations and trials in India revolve around the Code of Criminal Procedure (Cr.PC) just as the Indian Penal Code (IPC) forms the backbone of all forms of offences committed by individuals or groups of individuals and punishments. However, with the



grave nature of the terrorism, certain special powers and enabling procedures have to be incorporated in the legal system including trial by special courts and possibly even different yard sticks for admissibility of evidence etc. Such special provisions are required to facilitate speedy and effective dispensation of justice. Some such provisions are enumerated below;

a) **Investigation**

As mentioned above, the basic framework of investigation of any offence is woven around the Cr. PC which provides for registration of a cognizable offence in the jurisdictional Police Station. Thereafter, depending on the severity of the crime and the expanse of its foot print, other specialised agencies could be entrusted with the task of detailed investigation either in the initial stage itself or at any time subsequently as determined by the authorities or even by the courts as being frequently witnessed in the recent times.

In a landmark development, following the 26/11 Mumbai terror attack, the government of India enacted the *National Investigation Agency Act, 2008* (NIAA) to address the complex legal challenges faced by the investigative authorities and local police in dealing with investigation and prosecution of the sole surviving terrorist captured during the Mumbai terror strike. The NIA Act established the National Investigation Agency (NIA) with certain special powers to investigate and prosecute offences of grave national security, integrity and directly or indirectly challenging the sovereignty of the state (M. G. National Investigation Agency, *The Legal Framework of NIA 2008*). Along with the establishment of the NIA, certain major amendments were initiated in the vintage *Unlawful Activities (Prevention) Act* of 1967. The new establishment came up along with the creation of special courts for the trial of Scheduled offences to be prosecuted under this act. The jurisdiction of NIA extends over offences enlisted under the UAPA, SAARC Convention (Suppression of Terrorism) Act of 1993 (SAARC Secretariat, *The legal framework of NIA 1993*), Chapter VI of IPC which lists out offences classified as against the State, including Sedition and Waging War against India etc.. These listed offences, are as Scheduled offences under Section 3(2) of the NIA Act

(M. G. National Investigation Agency, The Legal Framework of NIA 2008). This legal mechanism empowers NIA to investigate such grave offences throughout India and in so doing, exercise all the powers of the Police.

The procedures laid down under Section 6(1) and (2) of NIA Act, establishes the legal mechanism for recording of FIRs based on information on commission of any of the Scheduled offences; police [State police] forwarding the report to the State Government which in turn is expected to forward it to the Union Government at the earliest. It further mandates the Union Government to ascertain within the stipulated time frame of 15 days from the date of receipt of the report from the State Government to determine if the offence reported was fit for investigation by the NIA<sup>6</sup>. The Union Government can also issue *Suo Moto* directives to the NIA to investigate any offence only after it is fully convinced that the act reported by the State police was in the Scheduled list. Thus, the State Government is obliged under this Act to report potential terrorism related crimes and bring it to the notice of the Union Government. Further, it is completely the prerogative of the Union Government to decide whether to direct the investigation to NIA or allow it to be dealt with by the local investigation agencies.

Once the case is handed over or assigned to the NIA for investigation, the local investigating authorities and the state government are required to stop their investigations and handover all the relevant records, inputs collected by them till date to the NIA. Based on the requirements and facts established, the NIA can request the State Government to continue to assist in the investigations and remain associated with the case; or, in certain cases, may handover the case back to the State Government with prior approval from the Union Government<sup>7</sup>.

The much debated case of Malegaon bombings of 2006<sup>8</sup> was a classic example of transfer of investigation to the NIA from Mumbai Police, which

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6 Section 6(3),(4) and (6) of NIA Act 2008 available at - [http://www.nia.gov.in/writereaddata/Portal/LawReference/5\\_1\\_NIA\\_Act-2015.pdf](http://www.nia.gov.in/writereaddata/Portal/LawReference/5_1_NIA_Act-2015.pdf)

7 Section 7 of NIA Act 2008.

8 Pragyasingh Chandrapalsingh Thakur V State of Maharashtra, 2014 (1) Bom CR (Cri) 135 (Bombay High Court)

had initially registered the case. Even though the act of terror took place in the year 2006, way before the NIA was established, it was handed over in 2011 by the Union Home Ministry along with the investigations of the Delhi High Court blast case of 2011 and the Samjhauta Express blast case of 2007 (M. G. National Investigation Agency 2010). Similarly, MCOCA, CVJSA and KCOCA which are special legislations of different states, also carry provisions to transfer investigations of offences under these laws to the local police. It can be then referred as the initial point for conducting investigations<sup>9</sup> in such cases (G. Ministry of Home Affairs, 1999). The Act further prescribes the minimum rank of police officers who can handle investigations pertaining to the act of crime/terror or organized crime.

#### b) The Courts

Setting up of Special Courts has been a recent trend in India to address terrorism specific incidents. Such provisions were first introduced in TADA and POTA. However, when POTA was repealed, its substantive provision pertaining to establishment of Special Courts was retained through an amendment in the UAPA. Provision of Special Courts was also incorporated in the NIA Act of 2008. The NIA Act enables state as well as Union government to set up Special Courts for trials of the Scheduled Offences. Thus, it exiles the jurisdiction of other courts pertaining to the cases investigated by NIA; however, regular Sessions Court may also try such cases as provided for under Section 2(1) (d) of UAPA. Similar provisions are also made in the MCOCA and KCOCA bestowing such powers on the state government.

Under the provisions of NIA Act, 37 Special Courts have been established [30 in different states and 7 in Union Territories] (M. G. National Investigation Agency, NIA Special Courts 2016). Once a case is handed over to the NIA, the Supreme Court has held that only a Special Court can remand the accused to the police or decide whether the accused be kept under judicial custody. However, if a Special Court is not constituted, similar powers can be exercised by the jurisdictional Court of Sessions.

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9 Section 23(1)(b) of MCOCA, Section 24(1)(a); CVJSA, Section 16(3) of KCOCA

Similarly, the much-debated issue of grant of bail under Section 437 of Cr.PC in non-bailable offences, and not under Section 439, which deals with the special powers bestowed on High Court or Sessions Courts in granting bail<sup>10</sup>, was settled in that Special Court is a court of original jurisdiction and cannot be treated or regarded as a Sessions Court except for certain discrete provisions mentioned under NIA Act. Thus, if an accused is not satisfied with the Special Court's verdict, he may appeal to the High Court in accordance with the Section 21(4) of the NIA Act of 2008. One unique provision of NIA Act is that the aggrieved cannot approach the High Court directly, which was the common practice under the Section 439 of the Cr. PC (Gauhati High Court 2015).

Special Courts and their procedures pertaining to terrorism cases have come under great deal of criticism from Human Rights activists and NGOs, who frequently argue that some of the provisions relating to grant of bail and appeal against orders are in violation of the fundamental rights of the detainee and therefore need a rethink (Setty 2010). Nonetheless, the Supreme Court has upheld the necessity of the Special Courts with a view to expediting the trial of terror offences. It will further ensure speedy trial and execution of punishment as mentioned in the verdict.

Another major argument against establishment of Special Courts relates to award of death penalty by these Courts (Times News Network 2013). The pronouncement of the final verdict in little less than four years in the landmark case of Ajmal Kasab is considered to be the quickest trial-to-execution in the judicial history of India (Lakshmi 2009). On the other hand, it is pointed out that the trial of Mohd. Afzal Guru (Parliament Attack) by a Special Court established under POTA, took nearly 12 years to pronounce its verdict and execution of death sentence. Further, questions have also been raised on the efficiency of the Special Courts which were set up to ensure speedy justice. One of the major observations pertains to the Special Courts sharing the same infrastructure, manned by the same personnel as the regular Sessions Court, thus making the adjective 'Special' a mere play of word.

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10 Redaul Hussain Khan v NIA, (2010) 1 SCC 521

Along with the establishment of Special Courts, another prominent provision which has attracted sever criticism is the mechanism of Review Committees established under POTA, introduced through an amendment in *Section 60* of the Act, for its basic rationale and vast powers entailed. In certain cases, there was conflict between the procedures of the Special Courts and the decision of the Review Committee. The Mohamadhusen Abdulrahim Kalota Vs Union of India is cited as a classic example in this regard where the Review Committee had reached the conclusion that there was no prima facie ground to proceed against the accused. It was in contrast with the decision made by the Supreme Court. Hence, the case was deemed as withdrawn<sup>11</sup>. Such circumstances led to the repealing of the POTA in 2004. Yet, the Review Committee was directed to review all the cases under the act and ascertain whether prima facie there was any ground to proceed against the accused person under this act. The committee was supposed to review all the cases by 2005. Till it could complete the review all the cases, more than 400 persons remained detained. Three Review Committees which were constituted had reviewed 263 cases involving 1529 accused. The committee further determined that, prima facie there was no credible rationale or ground, which can be used as concrete evidence to initiate trial under POTA against nearly 1006 people accused.

### c) Procedures under Cr.PC

One of the unique features of these special legislations is that they have inbuilt provisions for the Cr. PC to be generally applicable alongside their own special provisions as seen in the laws under TADA, POTA and the currently in force UAPA. *Section 43(C)* of the UAPA clearly states that all the provisions of Cr. PC are explicitly applicable to all arrests made under UAPA with the enabling powers of search and seizures. Similarly, it is pointed out that *Section 7(2)* of Explosives Act of 1884 and *Section 24(3)* of the Arms Act of 1959 provide for applicability of all provisions of Cr.PC. In addition, Special legislations like MCOCA and UAPA also carry improvised features such as modified period of detention from that under the conventional Cr.PC. *Sections 43(D) (2); Section 22(2)* of KCOCA

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11 Mohmadhusen Abdulrahim Kalota Shaikh V Union of India, (2009) 2 SCC 47

and Section 21(2) of MCOCA provide the specificities and establish the legality of these special laws. This highlights the legal fact that where Cr. PC provisions are unambiguously overruled by any special law; in such situation the provisions of the special law shall prevail.

One of the major provisions relating to admissibility of bail to the accused plays a significant role in these criminal proceedings. In UAPA, Section 43D (5) clearly states that, if any person is prosecuted for the scheduled offences listed in UAPA, he is not entitled to be released on bail if the charges framed against him find factual ground *prima facie*. The trial of the accused in the 2007 Hyderabad blasts case, witnessed such a situation where, the Judges constituting the Sessions cum-NIA Special Court, concluded that there were concrete grounds to believe that the accusation against the two accused persons under UAPA along with various supporting Acts, were *prima facie* true. Nevertheless, the Court still granted them bail by citing Section 437 of the Cr.PC. However, the government filed an appeal against the order and the High Court up held the grant of bail in this case. Such situation seems well explained in the Section 43D (6) of UAPA, which elaborates that the restrictions on granting bail are in addition to the restrictions under the Cr. PC or any other law.

## Conclusions

The above deliberations clearly signify that, in India, various legislations constitute the response of the Union and State governments to acts of terrorism. However, the interface of application of these multiple laws and investigating agencies exposes a strong possibility of conflicts.

As has been discussed above, we live in a region which is the epicentre of global terrorism with Pakistan as its fulcrum. Prime Minister Modi recently referred to Pakistan as the 'mothership of terrorism'. Our representative at the UN General Assembly, minced no words, when, referring to Pakistan, stating that "the land of Taxila, one of the greatest learning centres of ancient times, is now host to the Ivy League of terrorism." She further observed that "what we see in Pakistan is a terrorist state which channelises billions of dollars, much of it diverted from international aid to training, financing and supporting terrorist

groups as militant proxies against its neighbours. “This then is the ground reality which for the first time is being publicly stated by our Government.

What needs to be examined is whether India has an effective investigative, legal and judicial architecture in place to deal with this menace emanating from Pakistan. So long as the terror organisations based in Pakistan such as LeT and JeM do not pose any threat to countries other than India, it is highly unlikely that the West or even Russia would openly condemn/penalize Pakistan. It may be added that even after Osama bin Laden was discovered and neutralized by the American forces within Pakistan territory, no worthwhile sanctions were imposed on that country. This is primarily due to the US thinking that Pakistan was an essential component of their foreign policy priorities in so far as it related to Afghanistan. It is, therefore, meaningless for India to provide to the world community, proof of Pakistan’s involvement after every terrorist attack. It must however be mentioned here that of late, under the present US administration of President Donald Trump, some significant forward movement is noticeable in terms demanding Pakistan to deliver on terrorism related issues or be held accountable. It must, however, be mentioned that the recent terror attack on the CRPF convoy at Pulwama of February 14, 2019, and the subsequent developments, just when this study was being finalised, did generate exceptionally high level of international condemnation of terror emanating from Pakistan and support for India to take appropriate action in response. This is a welcome development that needs to be resolutely pursued.

In the wake of 9/11, the US overhauled their CT infrastructure by creating a Department of Homeland Security and the National Counter Terrorism Centre (NCTC) and its effectiveness speaks for itself. They created a holding centre in their Naval Base in Guantanamo Bay and held terrorists, indefinitely, who posed a threat to their National Security, ensuring that rights enshrined in their constitution were not applicable to them.

We in India have suffered repeated terror attacks on our soil but are yet to get our act together. The presence of multiple laws, at the federal and state levels and in the absence of a single agency to spearhead investigations relating to terror cases, exposes a weakness in our efforts to deal effectively with this menace.

We all witnessed the Mumbai terror attack of 2008, which played itself out over 3 days and was covered live by all electronic channels. Our media did not care for the disastrous consequences of this live coverage for our security forces. They were only interested in building up their TRP ratings. As a result, the LeT controllers who were directing the operations from Karachi, were able to keep the terrorists updated on the actions of our security forces, thanks to the live coverage by our media.

If the country is to tackle the menace of terrorism effectively, then national security must get precedence over all other considerations including those related to federalism. A national will to fight terrorism is needed, cutting across party lines. An effective Counter terror infrastructure needs to rest on a 'tripod' which must incorporate three main elements- an omnibus law governing all aspects of terrorism; a single investigative agency to single-minded pursuit of terrorism cases in a time-bound manner and an agency to collate, analyse and disseminate intelligence inputs relating to terrorism. The NIA is now effectively in place and is doing commendable work relating to investigation of terror cases. This needs to be further evolved and strengthened in every which way. But what about the other two strands of the 'tripod'?

When these issues were informally raised with some eminent lawyers, a series of observations were received, highlighting the enormity of the problems being faced. Broadly, these are summarised below:-

- (i) It was of foremost importance to arrive at a national consensus that the jurisprudence of terrorism has to be isolated from the general criminal jurisprudence prevalent in the country as regards offences other than terrorism.
- (ii) What must be identified at the threshold is why India has not been able to address the issue of terrorism – internal as well as cross border- despite three legislative attempts. What also needs to be first addressed are the reasons for the failure of earlier legislations and their mischiefs.
- (iii) India first enacted the Unlawful Activities (Prevention) Act, 1967 [UAPA]; however later a need was felt for a special enactment to deal with terrorism and thus TADA was enacted.



- (iv) Subsequently with the lapse of TADA, POTA was promulgated and later was enforced as an enactment. POTA again collapsed in 2004 and amendments were brought in the UAPA to make the Act a special enactment on terrorism.
- (v) UAPA has been amended in 2004, 2008 and 2012 to make the laws more stringent and terrorism specific and also to make the investigation, trials etc. in the cases of terror to be on a different footing than other crimes thereby making certain deviations from the general provisions of Cr.PC.
- (vi) Though UAPA makes certain deviations from Cr.PC, an important exercise that needs to be conducted is how UAPA is not a complete code and does not address the issue of cross-border terrorism as is the need of the hour. The said exercise is important as UAPA is the primary anti-terrorism legislation in the country. Once the said exercise is conducted, a strong foundation is laid for the enactment of an all comprehensive code/ Act on the issue of terrorism while overriding all existing legislations.
- (vii) A study on the regional legislations like AFSPA, MCOCA etc. would also reveal that these laws deal with organised crime and are not terrorism specific enactments. An issue that needs to be addressed would also be the applicability of the new enactment vis-à-vis these regional legislations. Taking into consideration the various prosecutions of terrorism cases that have taken place in the country, the lapses that may be clearly identified would be into gathering of evidence, lack of a dedicated and trained police force to combat and investigate terrorism cases, frequent handovers, evidentiary value of confessions (most convictions in India in terror cases has been on confessions), lack of special courts etc.; which all cumulatively have led to inordinate delays in investigations, commencement and conclusion of trials, pendency of appeals etc. The jurisdictional issues owing to the federal structure of the country have played a vital role in an inefficient and ineffective machinery to combat terrorism.
- (viii) Investigation Agency: The country lacks a dedicated and trained special task force to deal with and investigate the cases of terrorism. The need of the hour is a specialised and centralised agency to investigate the

terrorism cases. No doubt we have a National Investigation Agency established under the Act of 2008; however, the discretion to get the case investigated from NIA vests with the Central Government. An insight into the functioning of NIA shall further help identify the mischiefs and incorporate provisions to rectify the same in the new legislation.

- (ix) Subtle ways can also be devised to involve other existing institutions like IB, RAW etc. A study of the NCTC proposed earlier and its fallout due to objections raised by the States can also help rectify the flaws in the previous attempt to establish NCTC.
- (x) Investigation and Evidence procedures: Special provisions and procedures can be devised to be made applicable on the investigation of terrorism cases and also the mode, method of evidence collection as also the evidentiary value of the evidence so collected when put to proof in courts of law. Special focus be made on the issue of gathering of evidence located abroad in cases of cross-border terrorism. Interception of communications would also need a special focus.
- (xi) Trial procedure and the Prosecuting Agency: Special Courts may be designated to try the cases related to terror. Apart from the designation of a Sessions Court to try cases, Magistrates may also be notified under the Act to exercise powers as regards recording of confessional statements *paripassu* with the statement under Section 164 Cr.PC. Special Public Prosecutors may also be designated to conduct the trial diligently. Provisions of pardon may also be incorporated in the new legislation as also the provision for the court to grant pardon and immunity from prosecution in certain situations. Stringent provisions as regards search, seizure etc. also need be enacted.
- (xii) Apart from the above broad heads, focus must also be on:-
  - (a) Sentencing policy;
  - (b) Preventive steps for terrorism like protection of whistle blowers, rewards for reporting terrorist activities, mandate of name of the whistle blower being kept under cover etc. ;

- (c) Witness protection;
- (d) Defining “terrorism” discrete distinction being drawn between internal insurgencies and cross-border terrorism while defining the two terms and also while devising procedures for gathering evidence, trial etc.;
- (d) Lastly, one also needs to look at special provisions relating to procedure, investigation, evidence and trial as regards cyber offences which are progressively going to play greater role in terror related incidents.

The issues are many; the challenges enormous. But options are limited. India has to take the proverbial bull by its horns by devising a new and robust security architecture covering every aspect of its fight against terror. The time for half-hearted measures is over. We propose to take all these in the succeeding chapters. After the above brief overview of some aspects of the various prominent anti-terror legislations in India, this study will examine, explore and discuss various challenges posed due to the Union-State discourse on federalism, especially in the area of counter-terrorism efforts since early years of this century.

### Summary of Chapter I

- 1) *The reactive adhoc approach towards counter terrorism in yester years characterised India as a soft state.*
- 2) *So, the evolution of its statutory approach from Adhocism to zero tolerance will be in line with today's nature of terrorism efforts.*
- 3) *Counter terrorism efforts have undergone transformation in supervening decades. However, the language and structure of supporting anti-terror statutes reflects the legal structure of 1980s, which is not adequate to effectively deal with the terrorism which has transformed with the evolution of technology in various fields.*
- 4) *The transnational nature of the terrorism and its rapid utilisation of technology not only makes it a country specific challenge, but also a global threat. Hence, to effectively deal with the new aspects of terrorism in the field of cyber, weapon*

*technology, recruitment and financing a timely adoption of legal measures is the need of the hour.*

- 5) *Hence it is high time for India to learn from its yester years and underscore a grave need of in-depth analysis of execution and impacts of various provisions of counter terror legislations which has caused significant incoherence. Hence, India needs to formulate comprehensive legislations which are not a mere tweak in language but can be passed after a thorough analysis and deliberations in the Parliament. This timely exercise will enable not only agencies but strengthen the courts of law to reduce delay in the disposal of terrorism related cases.*

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## CHAPTER – II

# Dealing with Terrorism: Complexities of Federal Structure

Anti-terror legislations in India have remained in the limelight since long, primarily facing criticism and frequent legal challenges for violating the constitutionally enshrined principles of federalism in India. Be it the time when TADA and POTA, were enacted by the federal parliament, or the proposed establishment of a *National Counter Terrorism Centre*, such arguments were at the political forefront. Thus, induction of such laws into the legislative system of the Union Government was considered to be the major challenge to the federal structure of the country. It is often alleged that the counter terrorism legislation remained a bone of contention affecting the balance of power between Union and State in India. Despite the enactment of several anti-terrorism legislation at state as well as union government levels, the legislative competence to enact such laws was always questioned due to the consequences of its application that have led to the situation of conflict between the two legitimate entities of the State and the Union. Therefore, it was always a tight ropewalk to decide which law will prevail over the other.

Let's therefore, examine some aspects of jurisprudence of terrorism within the frame-work of principle of federalism. Two prominent parameters under which this issue could be evaluated are:

- (1) in a conflict situation, which anti-terrorism legislation will have overriding priority, and
- (2) what are the challenges faced by the law on ground, when legal competence of the parliament and state legislature is challenged?

## The Legislative Competence of Anti-terror Legislations

An analysis of anti-terrorism jurisprudence in India reveals that an act of terror is codified in multiple entries of the constitution; especially, entries of the Seventh Schedule, where offences pertaining to the Defence of India and offences against the armed forces of the Union of India are listed. The preventive detention related to the defence of the country, foreign affairs and security of India are also mentioned in the entries 1,2 and 9 of the list of the schedule, respectively. The first and second entries of the State List provide the guidelines about issues related to public order and Police which are the prominent functions of the State machinery. The listed entities mentioned about policing and public order are often used to prosecute the offences related to the terrorism. The ambiguous part is, that criminal law, criminal procedure and guidelines about preventive detentions affecting public order are mentioned in the first, second and third entries of the Seventh Schedule, which also define the Concurrent List (The Constitution of India 1950). Consequently, this serious ambiguity is often misused by various entities while challenging the legislative competence of the federal legislature for preventing terrorism at various stages of proceedings in the courts of law. Nonetheless, it is observed that, the Union Government retains the power to enact anti-terrorism legislation.

The landmark case of *Kartar Singh Vs State of Punjab* is a classic example in this regard, wherein the constitutional validity of TADA was challenged in the Supreme Court on the argument that the Parliament did not have the legislative competence to enact an anti-terror legislation like TADA that came into existence in 1985 in the backdrop of insurgency situation in the State of Punjab<sup>1</sup>. Whenever such attempts were made by projecting the argument that the jurisdiction of such legislations falls under the entry one of the State List, the legislative competence of the Parliament was challenged. However, the Supreme Court endorsed the supremacy of the Parliament in enacting anti-terrorism legislations like TADA. In support of its judgement the Court also explained that '*public order*' falling under Entry One of the State List, relates to offences that are considered of lesser gravity.

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1 The citation of the case - 1994 SCC (3) 569, JT 1994 (2) 423



Further, the Court clarified that serious incidents or crimes driven with an objective to challenge the integrity of the country and threaten the security of the nation, should be considered as a whole; thus, can be considered as a part of *Entry One* of the Union List which delineates about the defence of Union of India. It also reminds about the residuary power conferred on the Parliament under *Article 248* added as *Entry 97* of the Union List. Then the Supreme Court pronounced verdict after the detailed analysis of various legal provisions and reached to the conclusion that it upheld the argument in support of the Parliament<sup>2</sup>. It also considered that the offences listed under TADA were grave in nature. It may further lead to the situation where, the security and integrity of the country may be challenged by various non-state actors at the borders or by some anti-national elements within the country, posing greater challenge to the sovereignty of India (The Supreme Court of India 1994).

While upholding the constitutional sanctity and primacy of the parliament in law making, the Supreme Court however, cautioned that terrorism of present day is trans-national in nature and cannot be exclusively classified as a state specific problem. Thus, its ambit was larger, which affects the security and sovereignty of the nation at large. Hence, considering the grave nature of these offences, the court observed that these entirely fell within the ambit of Entry 1 of the Union List and can be associated with the defence of India (The Supreme Court of India 1994).

Similar challenges were also raised against the validity of the *Armed Forces Special Power Act* [AFSPA], which facilitates basis for operations of the armed forces in the disturbed areas like North Eastern states and Jammu and Kashmir. These areas are disturbed and classified as intense insurgency zones by the government. In view of the extensive presence of the armed forces in the border regions of the country, human right activists have often challenged this Act in the court of law. However, the Supreme Court upheld the validity of AFSPA by citing the rationale that the operational part of the AFSPA falls in the Union List<sup>3</sup> rather than in the State List. Further, the Supreme Court also observed

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2 AIR 2004 SC 456

3 *Entries 2 – Armed forces of the Union and 2A – Deployment of the Armed Forces in any state of the union as an aid to civil authority.*

that Article 248 along with entry 97, describes the residuary powers of the Union and supersedes the Entry 1 of the State List. This also highlights the fact that the State does not have any authority to use the armed forces of the Union under *Aid to the civil authority and maintenance of civil order*. Though *Entry One* refers to 'public order', the expression excludes the use of armed forces of the Union. The Supreme Court brought clarity on this issue by noting that the use of the armed forces of the Union under the charter of *Aid to Civil Authority* does not restrain any of the civil powers of the state and they remained in continuation as defined.

The Supreme Court further clarified that the armed forces cannot override the civil powers of the State administration and shall work in co-ordination with the civil administration to ensure public order (The Supreme Court of India 1997). This makes it clear that AFSPA does not supersede the powers of civil authority and enables the suitable operational mechanism for the armed forces to take cognizance of offences, search, arrest and seizure, destruction of arms, ammunition, shelters, structures, training establishments, hide-out locations of armed anti-national elements and non-state actors. The legal framework of AFSPA clearly relegates the statutory functions like policing, prosecution, courts, jail to be discharged by the criminal justice mechanism established in the State. This landmark verdict clearly established the constitutional validity of AFSPA by clearly demarcating the executive functions to be discharged by the State as well as the Union.

Analogous to that of Union legislations, the competence of States to enact laws relating to terrorism, organised crimes etc. was also challenged in the court of law. The noted case in this context was the *Maharashtra Control of Organised Crime Act* [MCOCA], whose constitutional validity was challenged on the ground that the State of Maharashtra did not have the legislative competence to enact certain provisions of the MCOCA, notably its definition of organised crime in its section 2(1) as "*organised crime means any continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any person or promoting insurgency*" (Government of Maharashtra 1999).

The reference to '*insurgency*' in the above definition was challenged in the Bombay High Court on the supportive ground of '*promoting insurgency*' was not listed in State List [Entry 1 of State List and *Entry One* of Concurrent List); thus, these are to be considered as 'residuary powers' of the parliament. Responding to this argument, the Court noted, "*We may reiterate that the MCOCA is enacted, inter alia, to take care of organised crime syndicate who indulge in organised crime. Though 'promoting insurgency' is one of the facets of terrorism, offence of terrorism as defined in the UAPA as amended in 2004, is not identical to the offences under the MCOCA*" (Principle Bench 2007). The court thereby established relevance of insurgency with the defence of India; hence the overlap between Union and State laws is permissible. Though, the law prominently includes the crime and organised crime syndicates; in reality, such laws are often used while dealing with cases of terrorism.

The rising trend of more and more States enacting their own laws to deal with the issue of terrorism raises a relevant question about the need of States to follow this path especially when a Union legislation like UAPA is already in existence. On this issue, the court brought in clarity by pronouncing a judgment which upholds the competence of the Parliament to enact the laws related to the terrorism affecting the sovereignty and national integrity of India. Consequently, the validity of such special laws would be upheld.

Though, the legislative competence of the Parliament to enact special legislations for dealing with issues like terrorism is now fairly well settled, yet the frequent enactment of anti-terror laws by the States further indicates the need to analyse the competence of the states in greater detail. At times, this has propagated the conflict situation between Union and State, due to the complexities of structure, mechanism and their execution.

### **Union-State Conflict over Anti-Terrorism Legislation**

Having established the competence and legal sanctity of the State Legislature as well as the Parliament to enact anti-terrorism legislation, it is evident that in certain spheres of Union and State government, certain minor overlap is permissible. There are situations of conflict on account of provisions of the two laws making institutions, at times making it impossible to justify incidental

overlap. In such circumstances, the constitution has provided guidelines under Article 254, which says that, whenever such situation of conflict emerged pertaining to the entries in the Concurrent List of the constitution, the Union legislation shall prevail over the State Law. The legislations which have received the Presidential assent are to be treated as an exception.

Such judicial complexities were witnessed after the enactment of MCOCA by the Maharashtra Assembly. The MCOCA received the Presidential assent as per the Article 254(2) of the constitution. Meanwhile, the Parliament also enacted POTA to deal with the issue of rising insurgency and terrorism. After some years, when POTA was repealed, the provision to curb insurgency and terrorism was incorporated by amending the UAPA. It also falls as an *Entry One* of the Concurrent List of the constitution; thus, shall prevail over MCOCA.

In another complex issue, it is observed that Section 2(1) (2) of MCOCA, which enlists '*promoting insurgency*' as one of the facets of terrorism. The offences of terrorism enlisted under UAPA are not identical with those listed under MCOCA. In such a situation, it is evident that the State law is not repugnant to the Union legislature; hence MCOCA cannot be repealed under Article 254. Due to such complex nature of the legislative processes, the issue of overlap between UAPA and MCOCA has not been settled till date. MCOCA is the principal state legislation of Maharashtra dealing with organised crime and related criminal activities. On the other hand, UAPA is a Union legislation dealing with various unlawful activities prominently terrorist activities. This situation was exploited during the landmark trial of *Zameer Ahmed Latifur Rehman Sheikh V State of Maharashtra*, which was tried in the MCOCA Special Court in 2014. The court distinguished between MCOCA and clarified that the syndicate or organized criminal acts foreseen under MCOCA are the ones which are predominantly organized crimes committed mainly for financial benefits.

Contrarily, the UAPA covers acts committed by terrorists, terrorist organisations indulging in various violent activities, posing threat to the unity, integrity and sovereignty of Union of India. It means that, organised crimes and acts of terror cannot be run concurrently. These guidelines were prescribed by the hon'ble judge who pronounced the verdict in the *Pune bomb blasts case*. The court

observed that the offence cannot be classified as organised crime and do not therefore come within the purview of the provisions of MCOCA. Consequently, the accused will be tried under UAPA and IPC (Jaleel 2014); though the MCOCA have received the Presidential assent.

Presidential assent to the state legislation to establish the constitutional validity of the state legislations like the MCOCA has become an established part of the convention. However, the *Arunachal Pradesh Control of Organised Crime Act* (APCOCA) was allowed to lapse in 2004 despite having received the Presidential assent. The state government reintroduced and the legislative assembly duly approved a similar bill in 2006, but this time around, Presidential assent was never granted to the APCOC bill (PTI 2006). Similar was the case with the anti-terrorism bills introduced by the Rajasthan and Gujarat governments, which were passed and tabled for Presidential assent. This became a major issue in the case of the *Gujarat Control of Terrorism and Organised Crime* (GCTOC) wherein the State was asked to tone down and rework on certain contentious provisions of the bill (Tripathi 2016). It was sent back to the state government in January 2016 (Press Trust of India 2016). The *Madhya Pradesh Aatankvadi Evam Ucchedak Gatividhiyan Tatha Sanghathit Apradh Niyantaran Vidheyak* (*Madhya Pradesh Terrorist and Disruptive Activities and Control of Organised Crimes Bill*) is another example of such conflict. The proposed legislation was submitted for Presidential assent in 2010; however, then Solicitor General considered this law repugnant to the Union legislations like UAPA along with the supporting credible laws like the Evidence Act, and Cr.PC. While declining assent to the Bill, it was suggested that the State did not have such power and only Parliament could legislate on these matters. It was further clarified that, since the subject matter of the proposed legislation fell under the Union List, Presidential assent could not validate it (P. Sharma 2013) and the bill was returned to the State government which resubmitted the bill in 2007 to the Union government. The Union government returned that bill stating that, the bill can only be considered for Presidential assent if it is passed by the State Legislature and approved by the State Governor (Ghatwai 2010).

Amongst several contentious issues arising out of MCOCA, one relates to the argument that MCOCA was already in operation in Maharashtra and Delhi

and hence there was no reason for the Union Government to restrain other states from enacting similar laws in their respective States. In response, the Union government held that certain sections of the proposed State laws had gone beyond the provisions incorporated in MCOCA. Further, the Union government also argued that to enact legislations dealing with the terrorism was beyond the legislative competence of States, thereby adding extended ambiguity, obstructing the execution of the anti-terror laws in India. Though the courts have at various stages clearly demarcated the spheres of operations for the States as well as Union whenever the respective legislation was challenged.

Despite legal pronouncements and judicial guidelines, State laws like MCOCA continued to be often challenged, particularly the specific provision that grants the investigating agencies with specific powers, superseding the powers demarcated in the general Union legislations and criminal investigation procedures like the Cr.PC. These include high-power investigation provisions such as interception of communications that were intensely criticized and challenged.

The Supreme Court and the Bombay High Court have already upheld the constitutional validity of MCOCA several times. The Supreme Court clarified in Paragraph 13 of the verdict pronounced in the case of *“State of Maharashtra V Bharat Shanti Lal Shah, “It was submitted by him that the provisions of MCOCA create and define a new offence of organised crime under Section 2(1) (e), which is made punishable under Section (3) of the MCOCA and that to aid detection and investigation of such an offence and to provide evidence of any offence involving organised crime, interception of wire, electronic and oral communication is necessary. The provisions of Sections 13 to 16, facilitate the detection and investigation of the offence of organised crime, and the State’s legislative competence to enact such provisions was traceable to Entry 1 and 2 in List II and Entry 1, 2 and 12 in List III of the Seventh Schedule of the Constitution. It was pointed out that ‘the duty of police officers is to collect intelligence regarding commission of cognizable offences or plans/designs to commit such offences, to prevent the commission of offences, and to detect and apprehend offenders (See Section 23 of Police Act, 1861 and Section 64 of Bombay Police Act, 1951). The grounds for interception of the communication under the State Law are different from the grounds covered by Section 5(2) of the*

*Telegraph Act. In as much as the State law authorizes the interception as it is intended to prevent the commission of an organised crime or to collect the evidence of such an organised crime'. 'Therefore, the constitutional validity cannot be questioned on the ground of want of legislative competence of the State Legislature to enact such a provision".* Thus, when it was argued that in presence of the *Section 5(2) of the Telegraph Act* is overpowered by the *Section (13) and (16) of the MCOCA* enabling the interception of wire, electronic and oral communication, etc (The Indian Telegraph Act 1885). While bringing in greater clarity in this regard, the Court further demarcated the grounds of interception under the Telegraph Act and the MCOCA are totally diverse. Even if the content of MCOCA is considered to encroaching the Union list<sup>4</sup>, such encroachment to be considered as a '*mere incidental encroachment*', broadly implying that, if the subject matter was generally within the limits of its powers of the State, '*it may incidentally encroach Union's powers and provide for auxiliary matters*'. In support of it, the court negated the argument and clarified that once the Presidential assent was obtained, the provisions of the State legislation can override the Union Acts. It enabled State to enact legislations and if that falls in contradiction with the Union Legislations over the matters, then it falls within the Concurrent list of the Constitution (The Supreme Court of India 2008).

### Multiple Investigation Agencies – Battle for Turf

Another bone of contention affecting the centre-state synergy is the existence of multiple agencies to investigate terrorism cases. At present there are three major investigation agencies namely, National Investigation Agency (NIA), the State Police and the Central Bureau of Investigation (CBI).

Since Law and Order is a state subject, the local police are supposed to be the primary investigating agency. The First Information Report (FIR) is necessarily filed by the police in all civil, criminal and terrorism cases. Consequently, after complying with the laid procedure the related agencies are incorporated and involved for further investigations and prosecution. However, given the complexities of investigation in such cases, some states like Maharashtra,

<sup>4</sup> *Entry 31 of the Union List of the Constitution of India – pg. 343 - <http://lawmin.nic.in/coi/coiason29july08.pdf>*

Gujarat and Karnataka, have specialised units or squads like Anti-Terrorism Squad (ATS) of Mumbai police etc. (Maharashtra Police 1990).

Even though the CBI was established under the Delhi Special Police Establishment Act, 1946 (DSPE Act) as a special police agency to investigate certain offences in Delhi and other Union Territories, Section (6) of the DSPEA enabled the CBI to investigate certain offences within the jurisdiction of other States; but, only after receiving the consent from the respective concerned State government (Central Bureau of Investigation 1946).

Following the 26/11 Mumbai carnage, the central government decided to set up the National Investigation Agency (NIA) under a special legislation and soon this new establishment has been largely dealing with the terror related incidents. The recent Gurudaspur and Pathankot terror attacks were initially registered with the local Police and then transferred to NIA due to its gravity of offence (M. G. National Investigation Agency 2016)(Punjab Police 2015).

Sometimes, complex situations arise as in the Hyderabad Mecca Masjid Bomb blast case, which was registered by the Police and then transferred to the CBI. The CBI re-registered the case and post investigation, filed the charge sheet. However, later the investigation was handed over to the NIA. (Andhra Pradesh High Court 2014).

A preliminary analysis of the cases in which multiple investigating agencies were involved, reveals that the procedures to be followed by the agencies, have not been streamlined. This adds to the confusion. At times, this leads to conflict arising out of poor resource management, capabilities, bureaucratic infighting and inter agency coordination (Shrivastava 2013)

The classic case in this regard was Pragyasingh Chandrapalsingh Thakur Vs State of Maharashtra, (Malegaon Blast Case) which was initially registered by the Mumbai police under IPC, UAPA, Indian Explosive Substance Act and Arms Act and the accused were arrested. The case was re-registered by the Anti-Terrorism Squad of Mumbai Police and provisions of MCOCA were invoked. The charge sheet was filled and the accused were produced before the MCOCA Special Court. This fits in with the provision under Section 23(2) of MCOCA;



the Deputy Inspector-General of ATS had approved the charges to be invoked under MCOCA. The Special Court took cognizance of the case and post-proceedings, discharged all the accused in July 2009. The ATS appealed against the order in the Bombay High Court which struck down the order issued by the lower court [though it was a Special MCOCA court].

This verdict was challenged in the Supreme Court of India. Meanwhile, in April, 2011, Union Home Ministry ordered the investigation of the Malegaon blasts to be handed over to the NIA, without the consent of the Government of Maharashtra. Thus, the petitioner who was in custody, since October 2008, challenged the constitutional validity of the NIA Act. The Bombay High Court upheld the constitutional validity of the NIA, broadly endorsed the grave nature of the terrorist offences involving complex inter-state and international linkages and NIA was the central agency to investigate offences having national ramification as defined in the preamble of the NIA Act of 2008 (M. G. National Investigation Agency 2008).

Such cases become ground for turf-battle between the Union and the State governments, adversely affecting the synergy of relations essentially required in dealing with such grave offences. While demarcating the difference between the legal structure of DSPE Act and NIA Act, the Court observed, “on request of Union Government the CBI can investigate any offence after the permission from the respective State Government is received, the NIA can investigate only offences under acts enumerated under the Schedule to the NIA Act”. Therefore, the State government’s consent was not necessary to investigate any case under the NIA Act, creating a question of ‘usurpation versus supplementation’. Section 6(7) and 7 (a), (b) of NIAA provides that till the case is handed over to NIA, the State police can continue to investigate the case. Once the case is handed over to NIA and if required, it can also request the State government to associate its police with the investigation. It also enables NIA to transfer the case back to the State government for investigation or trial (M. G. National Investigation Agency 2008).

Despite the conclusion by the Court that NIA Act is merely a supplement to the State governments, than usurping their powers; the general reading confirms that the statute primarily empowers the Union government to delegate or instruct state government to hand over case for investigation to

NIA, leaving no scope for the States to refuse the transfer or assistance in NIA investigation. This reconfirms the fact that Courts have invariably upheld the constitutionality of the anti-terrorism laws and validated their enactment in their respective judgments. None of the judgments disputed the executive powers related to the security and defence by Union and State government.

Another instance of turf-battle between the Delhi Police and the NIA surfaced over the investigation of a case involving Indian Mujahedeen operatives. The case once again highlighted the adverse effects of multi-agency mechanism. The chronology of event is that on June 8, 2012, the Ministry of Home Affairs, Government of India, instructed the NIA to register a case bearing No. RC-04/20112/NIA/DLi under Section 18 of the Unlawful Activities (Prevention) Act, 1967 against Zabiudding Ansari, Fayaz Kagzi, and others. However, the Special Cell of Delhi Police registered FIR no. 16/2012 dated July 07, 2012 on similar facts (Delhi High Court 2014). The NIA therefore, initiated procedure to take over investigation of the case, approaching the Court and communicating particularly with the Delhi Police. Subsequently, the Union Home Ministry ordered the transfer of the case to the NIA; but it was alleged by the NIA that the Delhi Police did not hand over the relevant documents to the NIA. As a result, no investigation was conducted by the NIA in this case.

The Delhi Police filed charge sheet and its Special Cell arrested the two accused for their alleged involvement in Dilsukhanagar blasts at Hyderabad in 2013. The NIA approached the Ministry of Home Affairs seeking directions to hand over the case to the NIA as it was the designated 'Federal agency' to probe terrorism cases. The move received strong opposition from Delhi Police, which claimed that they had made credible progress in the case and should be allowed to continue. The Ministry of Home Affairs ignored the representation of the Delhi police and instructed them to hand over the case to NIA. The NIA counsels stepped in during the hearing of the bail plea of Syed Maqbool and Imran Khan, alleged IM operatives, before the Delhi High Court. NIA submitted all the departmental communication between the Delhi Police and NIA. In consequence, after the meeting between the Special Cell officials and the NIA the Ministry of Home Affairs officials kept the order of transferring the case to the NIA in abeyance. (PTI 2014).

The multiple investigation agencies and their respective executive powers have made the issue complex. Even judicial guidelines have not helped simplify the process. Such ambiguities and conflicts within the executive authorities can cause enormous delay and damage in the investigation of terrorism and related offences. It also further raises a valid question whether the current mechanism of multiple agencies has enhanced inter-State and State-Union coordination while dealing collectively against the grave challenge of terrorism? Has it created strong ground to strengthen the democratic structure or created chaos and conflicts?

### Heard of NCTC?

Though not directly related to investigation and prosecution of terror offences, the post-26/11 Mumbai carnage (November 2008) proposal to establish a *National Counter Terrorism Centre* (NCTC) to act as the effective point of control of all counter terrorism measures and to tackle terrorism proactively by preventing, containing and responding to terrorist attacks, also became a victim of Centre-State battle of turf. The concept of NCTC was fashioned on the lines of the American NCTC and British Joint Terrorism Analysis Centre. The concept was proposed by the then Home Minister after the visit of the then National Security Advisor M.K. Narayanan to the USA in 2009 to study the functioning mechanism of the US NCTC(2012).

The proposal was strongly opposed by a number of state governments, notably Gujarat, West Bengal, Bihar, Tamil Nadu, Odisha, Punjab, Chhattisgarh etc. Their opposition arose out of constitutional ground that the NCTC in its then formulation, was in violation of the core concept of federalism (South Asian Terrorism Portal 2012). The major objections raised by the states included the power of arrest along with search, seizure vested on NCTC which was proposed to be established as a wing of the IB. Consequently, it meant giving the police powers of arrest to the IB, an encroachment on State powers.

The issue turned highly contentious as the Union government made an attempt to set up the NCTC through an executive order, without concurrence of State administrations. This clearly raised severe questions on the intentions of the then Union government to fight terrorism collectively.

Former IPS officer and noted commentator on security issues, Ved Marwah, in an extensive commentary in a journal expressed a valid counter narrative by questioning the capabilities of the States to deal with the contemporary cross-border nature of terrorism. He additionally pointed out that, the State administration lacked the resources, training as well as expertise to deal with terrorism. He strongly supported the need of a Federal agency like the NCTC to tackle the menace of terrorism (Marwah 2012). The manner in which the concept was introduced for execution startled the States. Instead it became the turf battle between Centre-State (Marwah 2012).

On the political front as well, various leaders opined that a collective approach was the need of the hour (Shinde 2013) and instead of 'terrorism versus federalism' divide, the fight against terrorism must co-exist in federalism (PTI 2013).

After the Pathankot Air Base terror attack (January, 2016), discussions on need for NCTC resurfaced amongst security analysts. Former Union Home Secretary, GK Pillai expressing his concern said, "NCTC would have joined the dots in time through institutional mechanism and alerted all quarters, rather than the Centre remaining at the mercy of Punjab Police choosing when to inform about the incident involving the SP. Would FBI in the US have waited to get such information from a state unit? The US has NCTC for the job; Germany has a Joint Counter Terrorism Centre. States do not bring all inputs to Multi-Agency Centre (MAC) in Intelligence Bureau," (A. Sharma 2016).

Whenever India's counter-terrorism narrative comes up for discussion, the prominent argument heard from most of the State administrations centres around "*concentration of power at the Centre*". The fierce opposition by the States to the idea of NCTC and even in certain issues of the NIA comes out of such apprehensions. Such strong resistance from the States will continue to dominate the debate as long as the growing political power of States remains pitched against a relatively weaker Union government. This has set the trend of State specific implementation of anti-terror legislations (Mate and Naseemullah 2010). This clearly suggests that after having vast experience of more than 70 years in dealing with terrorism, the Indian state need not blindly copy any module of NCTC which exist worldwide. India should attempt to develop

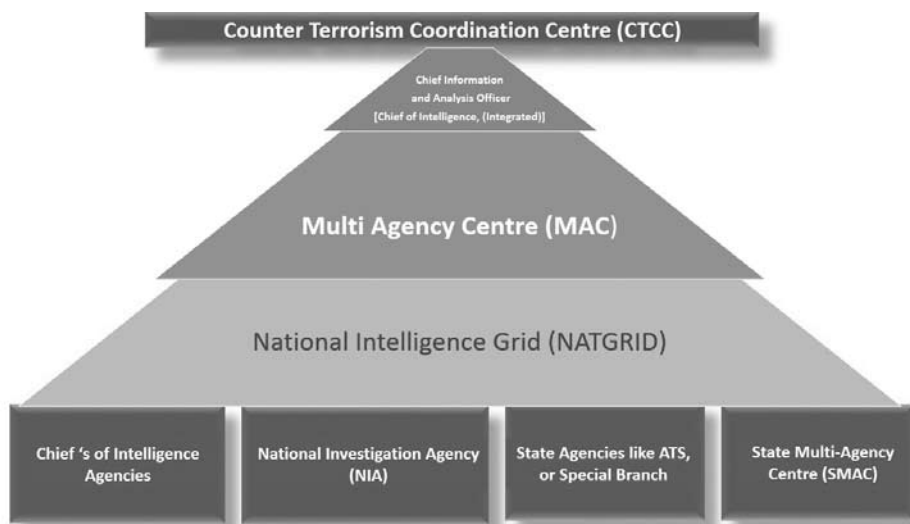
its own model based on its own experiences. Collaborative efforts between the central and provincial administration is the need of the hour. For effective coordination and execution, an efficient and empowered agency needs to be created where both states and centre will partially subsume their sovereignty. This proposed entity can be called *Counter Terrorism Coordination Centre* (CTCC) with core emphasis on intelligence evaluation, proactive follow up while keeping in view the sensitivities of the States. The proposed CTCC can be headed by *Chief Information and Analysis Officer* (CIAO) who can also be called Chief of Intelligence (integrated). For proactive collection, analysis and dissemination of information the CTCC needs to be backed up by the already existing structures of Multi-Agency Centre at the national level and State Multi-Agency Centre at state level. These will reinforce greater cooperation between the centre and the states. The entire mechanism and its functioning can be provided with strong statutory support in the form of omnibus anti-terror law and a well-defined comprehensive counter terrorism policy. The creation of proactive entities under the CTCC will complement the ‘*zero tolerance to terrorism*’ approach of the government and reflect the true spirit of cooperative federalism through its implementation. A possible model for the CTCC can be as depicted below:

This streamlined and well-coordinated set up will not only enable the centre as well as the state to effectively deal with the rising menace of terrorism but will further enhance their capabilities to handle any major law and order situation. The effective implementation of zero tolerance policy can be assured by strengthening the capabilities of existing entities like NATGRID, MAC and SMAC with future oriented high-end technology<sup>5</sup>. If implemented it is expected that, based on rapid transformation with emphasis on proactive capabilities, even duration of terrorism related trials may get reduced. The proposed CTCC will not only add muscle to the overall national security architecture, but will also address all points of contention such as power of interception, permissibility of evidences, etc.

After analysing issues pertaining to federalism, one can realise that, in the light of the post-Mumbai carnage, amendments made to the UAPA to strengthen

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5 *High end technology means qualitative technical resources which are speedy, handy, relevant to the present and oriented towards an assured secure future.*



*(Figure 1.1. – Proposed Counter-Terrorism Coordination Centre)*

the Union to fight against terrorism, implicit extension and strengthening of legislations pertaining to the organised crime along with the anti-terrorism legislations introduced by the States need a serious judicial introspection on the basis of competence and repugnancy.

## Summary of Chapter II

1. The profound analysis of anti-terrorism jurisprudence in India reflects the constitutional fact that the act of terror is defined in multiple entries of Seventh Schedule of the Constitution, yet it is a persistent challenge for prosecution in terrorism related cases.
2. Listed ambiguities pertaining to policing and public order are still prominent challenge in terrorism related cases especially about the preventive detention. These ambiguities are utilized to challenge the legislative competence of the legislature in the democratic framework of governance.
3. The Courts have time and again upheld the constitutionality of anti-terror laws. However, none of the verdicts pronounced by these courts have distinguished the executive powers of the union and state government pertaining to security and defense of India.

4. The Supreme Court has fairly resolved the issue and upheld the legislative competence of the Parliament to enact anti-terror laws; however, despite the provision of Article 254 which prevails Union legislation over state statute in conflict situation there is a greater need to study legislative competence of states in detail. This is required as frequent invoking of state and central statutes in anti-terror cases has led to conflicting situation.
5. Similar to that of multiple anti-terror laws multiple investigation agencies is also turned out to be a complex issue. Though the NIA has been raised with exclusive charter to investigate terrorism related cases. However, the recent development where the NIA is investigating LWE and criminal matters like murders denotes that the NIA is following the trajectory of CBI and dilutes the objective of the formation of the NIA.
6. In such circumstances the proposed Counter Terrorism Coordination Centre (CTCC) is a conceptual entity proposed in line with the customized need of the Indian States and not emulated any existing module of any country. CCTC can be seen as an effective entity which will not only strengthen the counter terrorism efforts at center as well state level but its intelligence-based orientation will enable India to deal with terrorism in proactive manner.

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## CHAPTER – III

# Judicial Interpretation of Substantive Provisions of Anti-Terror Legislations

As mentioned in the previous chapters, while conducting trials of terrorism cases, in the absence of special laws, both substantive and procedural, the standard practices of investigation and eventual prosecution are conducted in accordance with the basic laws such as Cr. PC, IPC, Arms Act, Explosives Act etc. These enactments, indeed the entire legal system was the product of the colonial legacy. However, gradually, particularly since the mid-1980s, in India, the process of enactment of several special laws was taken up to deal with the menace of terrorism, notables among these being TADA, POTA, and UAPA. Necessarily, the judiciary was called upon to adjudicate on some of the new and usually highly contentious issues like applicability of new enactments in anti-terror laws etc., as they kept cropping up.

As would be observed in the detailed analysis, the approach of the judiciary has remained very consistent in matters related to national security. It has, while recognising the fact that acts of terrorism constitute an '*extraordinary crime*', shown due appreciation for the laws framed by the legislatures from time to time. The courts have been carefully scrutinising the processes and procedures prescribed under the new legislations, with due consideration to protecting personal liberties and individual human rights of the citizen. The basis for this scrutiny can be in the form of an 'objective proof, relevant material in accordance with law and through a procedure which passes the muster of fairness and impartiality' (Sabharwal 2006).

In this background, it is proposed here to look into the interpretation of certain provisions of the anti terror laws by the judiciary at various stages of the trial. Primarily, it is intended to focus on how the courts have interpreted the act of terror and responded to the challenges posed by the interpretation and

evolving process of enactment of the anti-terror legislation. To get a better and holistic picture, our examination of the substantive aspects of anti-terror laws will primarily focus on issues such as:

- A) Conventional offences under IPC and such other existing laws to run terrorism related cases;
- B) Definition of terror under various special anti-terror legislations like POTA, UAPA etc.;
- C) Connections established by the courts while interpreting terrorism related cases under different special laws including provisions of special anti-terrorism law of UAPA;
- D) Prosecution of accused of being a member of terrorist organisation and
- E) Dealing with associated offences such as terror- financing etc.

### Application of IPC and Other Normal Laws to Terror Cases

It is generally observed that during any terror incidence, terrorists commit a number of offences which are conventionally categorised under the Chapter VI of the Indian Penal Code. These offences are prosecuted by invoking supportive laws like the Indian Explosives Act, Firearms act with IPC codes. Amongst some of these laws certain offences are described as “*Offences against the State*”. Sections 121-130 of the IPC primarily list offenses or actions such as ‘*waging war against the Government of India*’. As per Section 121 and associated Section 122 of IPC, “*whoever within [India] or without conspires to commit any of the offences punishable under the Section 121 or conspires to overawe, by means of criminal force of the show of criminal force against the Government of India [Both Union or State Government] shall be punished with imprisonment of life or shall also be liable to fine*(Indian Penal Code 1860).

The supporting explanation clarifies that to constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof. The following Section 122 of IPC prescribes, “*Collecting arms, etc., with intention of waging war against the Government of India, collecting Arms with intention of waging war against the Government of India. – Whoever*

*collects men, arms or ammunition or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against the Government of India [Union or State] shall be punished with life imprisonment or as described for a term not exceeding ten years and shall also be liable for fine” (Indian Penal Code 1860).*

In the following three landmark terrorism-related cases, the accused were prosecuted under anti-terror laws: -

- (1) *Navjot Sandhu V State* (Supreme Court of India 2004);
- (2) *Nazir Khan V State of Delhi* (Supreme Court of India 2003) *and*
- (3) *Mohd Ajmal Amir Kasab V State of Maharashtra* (The Supreme Court of India 2012);

During their trials, the Supreme Court examined the question as to what constitutes the offence of ‘waging war’ and its contemporary significance. In all the three cases, the accused were of Pakistani descent (Foreign National) and the trial courts had convicted the accused persons under Section 121 of the Indian Penal Code. The rationale was premised ‘on their intent to overawe the Government of India by the means of criminal force along with activities used to bring out hatred. These criminal forces generate a sense of contempt in the people of India with the utilisation of collected materials and arms for the aforesaid offences’ (The Supreme Court of India, 2003).

While pronouncing its verdict, the Supreme Court went on to further clarify and define the phrase “*Committing a Terrorist Act*”, which will fit the classification of Section 3 (1) of the TADA and reads as, “*Whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services*

*essential to the life of the community, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist act”* (South Asia Intelligence Review 1987).

However, the question that remained un-answered was, whether an “*act of terror*” was committed or not? This happened due to the ambiguous interpretation of Section 121 of IPC and its interjection with the definition prescribed under TADA which defines the act as one that ‘overawes the Government of India’. Based on the domicile of the accused, the applicability of the law to foreign nationals also came under challenge (Fawcett and Carruthers 2008). In defence, it was argued by the defence lawyers that the offence committed, did not fulfil the nature of the offences listed in Chapter VI of TADA (Supreme Court of India 2003).

While searching for answers to the above-mentioned questions, it is important to understand the meaning of the word ‘*War*’. In Navjot Sandhu case<sup>1</sup> the evolution and legality of this concept was deliberated in the court.

While pronouncing verdict, the Court referred to some of the judgements pronounced by the English courts in the past, stating that, “*Whether this exposition of law on the subject of levying war continues to be relevant in the present day and in the context of great socio-political developments that have taken place is a moot point*”. These guidelines by the Supreme Court have clearly conceptualised the interpretation of the clause ‘*waging war*’ with the support of certain colonial laws<sup>2</sup>. These offences with the objective of subverting the authority of the Government lead to the disturbance of the public peace and

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- 1 *Briefly, Navjot Sandhu was convicted of carrying out a terrorist attack and waging war. He was prosecuted under POTA. The specific act for which he was prosecuted was an attack on the Indian Parliament in 2002, where a car full of explosives was driven into the Parliament complex. The explosives however, failed to explode. During the crossfire, some security personnel were killed.*
  - 2 *In the British colonial era, war against the King or his military forces and post 1950 where, the expression of ‘Government of India’ was substituted for the expression of ‘Queen’ by adaptation of Laws Order of 1950 making slain terrorist acts pursuant to the conspiracy amount to waging or attempting to wage war is punishable under the Section 121 of IPC and Section 121 and 121A occurs in the Chapter ‘Offences against the State’.*

order. Therefore, the Court interpreted the expression 'War' preceded by the verb 'wages' admitting various shades of its meaning. It defines with exactitude; though it appeared to be an unambiguous phraseology to the Indian Law Commissioners who examined the draft Penal Code in 1847.

The Law Commissioners observed: "We conceive the term '*wages war against the Government*' naturally to import a person arraying himself in defiance of the Government in like manner and by like means as a foreign enemy would do, and it seems to us, we presume it did to the authors of the Code that any definition of the term so unambiguous would be superfluous."

Section 121 now reads, "*Whoever wages war against the Government of India or attempts to wage such war or abets the waging of such war, shall be punished with death or imprisonment for life and shall also be liable to fine*" (Supreme Court of India 2005). These guidelines clarified that the scale of the act during the attack on the Indian Parliamentary was certainly significant enough to determine the intention of waging war against democratic India.

The unique characteristic of the judicial interpretation and its incoherence is aptly observed in the decisions pronounced by the High Courts and the Supreme Court. This is interesting to observe that there is a relative ambiguity in the interpretation about the understanding of the 'war'; especially, when it is interpreted in the framework of International law.

The Delhi High Court while pronouncing its verdict in the instant case (*State V Mohd. Afzal*<sup>3</sup>) referred to the international law under which 'War is a flexible expression' and needs to be interpreted in relevance with the inter-state as well as intra-state wars. In this light, the Court acknowledged that insurgency is to be considered as an *Act of Waging War* against the Government of India and can be committed (even) by a solitary person<sup>4</sup>. In similar instance, the Supreme Court in Navjot Sandhu case upheld the decision of the Delhi High Court. However, it did not identify the difference between international and non-international armed conflict in the frame of reference of international humanitarian law. Thus, it further could not take cognizance of the development of principles of international law and the Geneva conventions (Chandrachud 2004).

3 State V Mohd. Afzal, (2003) 107 DLT 385

4 State V Mohd. Afzal, (2003) 107 DLT 385, Para 181-190

The Supreme Court further considered and enumerated the offences listed in the Parliament Attack case as offences attempting to subvert the authority of the Government or an attempt to paralyse the constitutional machinery, with further disturbing the public peace as listed in Section 121 of the Chapter VI (Supreme Court of India 2004). Clarifying further, the Supreme Court differentiated on the basis of gravity of degree; however, the court could not stipulate the distinction between *waging war* and *terror acts*. This is considered important especially in terrorism related cases as the difference between the two is day-by-day getting hazier.

Therefore, the Supreme Court in the Ajmal Kasab case (26/11 Mumbai carnage), rejected the submission that a '*terror act*' would automatically exclude the act from the purview of *Section 121*. The court further clarified that, *Section 121* could be applied to persons of foreign nationality, who did not owe his or her allegiance to India, since the word '*whoever*' used in the section ensure that it could not be restricted only to Indian nationals. Thus, any attempt by a foreign national to enter into Indian territory stealthily with a view to disturbing public order or subverting government functions, should be held guilty under the Section 121 of Indian Penal Code (Supreme Court of India 2004).

There are certain questions raised over the ambiguous nature of IPC Section 121, which merely stipulates that the target be Government of India, without specifying, whether it be Executive or the legislature? The Judiciary sensed the limitations of this section and clarified during the trial of Mohammad Ajmal Amir Kasab Vs State of Maharashtra case in which Ajmal Kasab was convicted under Section 15 of UAPA and Section 121 of IPC. The hon'ble court rejected the argument that *the act of terror could never occur together and thus, Section 121 must be repealed. In its considered view, the expression 'Government of India' is used in Section 121 to imply the Indian State, the juristic embodiment of sovereignty of the country that derives its legitimacy from the collective will and consent of the people. Therefore, the use of phrase 'Government of India' signifies the notion of sovereignty as consistent with Public International Law, wherein sovereignty of a territorial unit is deemed to vest in the people of the territory and exercised by the representative government* (The Supreme Court of India 2012). Therefore,



the conviction was duly upheld. In this matter, the court clearly demarcated boundaries between ‘waging war’ and committing an ‘act of terror’ which have a lot in common though.

### Section 124 A (Sedition): Another Contentious Section

This is a clause that can be associated with political ends. For proving the charge of sedition, there is need to prove an objective or intention to create disaffection towards the Government of India and create public disorder. Thus, an act of terror which can amount for waging war is a fit case of sedition<sup>5</sup>. Consequently, sedition can be described as disloyalty in action, bringing hatred or contempt for the sovereign or the constitution. These endeavours can lead to the development of public disorder, which can further deteriorate into a civil war-like situation. In certain instances, this section is also used as a political tool and intrinsically linked it to political ideology. In the case of *Asit Kumar Sengupta Vs State of Chhattisgarh*, the accused person was charged with spreading hatred against the government. It was also established that there was a conspiracy against the state and his being member of a banned organisation [*Communist Party of India (Maoist)*] was decisive in this direction.

The Court drew connection between the provisions of IPC and UAPA and mentioned in its verdict, “*This Court sees the provisions of Section 124A of IPC, the Act of 2005 [CVJSA] and the Act of 1967 UAPA have an element of commanding to deter the citizens of this country to refrain from indulging in sedition and doing or assisting any act of terrorism or by assisting such organisations in their act of terrorism, as these penal provisions have the effect of upholding and protecting the sovereignty, unity and integrity of India, to safeguard public property and to abjure violence*” (The Highcourt of Chattisgarh 2011). This indicates that the judicial fact that interpretation of the offence of sedition relating it to a terrorist act, is in close proximity to the special provisions of anti-terror laws, similar to that of the provision about the waging war.

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5 *The Section 124 of the IPC defines the Sedition as a comprehensive term and embraces practices, to disturb the tranquillity of the state by making an endeavour to subvert the Government and its legal mechanism.*

## Defining the *Act of Terror*

It is observed that, globally, in both international and municipal laws along with some international conventions that,<sup>6</sup> the act of terrorism has been defined, but most of the colloquiums do not answer the difficult question about motive and ideology. Does this amount to only simplification in defining terrorism, especially in the contemporary era, when use of high technology has created a complex situation in adoption of a global definition of act of terror? The intertwining of the meaning of act of terror with terrorism is obvious. In a general sense, the term terrorism designates extreme fear, which is vaguely perceived, but relatively unknown from a large threat. This can be caused by man-made actions, such as the use of force or weapons; which can cause human harm or fatalities or by natural disasters like flood, volcanic eruptions etc. It is not of any concrete significance while combating terrorism if we don't define it. Thus, terrorism needs to be defined in its true scope in today's era to avoid drawbacks in legal mechanism and uncertainties.

Due to its impulsive nature, the term terrorism has emerged as a core focus of power politics and, in certain cases, even a means of propaganda. The different posturing of ideologies, frequent endorsement of the use of force to establish sense of fear, legal narratives and creating, redefining judicial realities have a reflective propensity, making terrorism a tough challenge to deal with. The situation is worrisome when there is no evolution of consensus amongst states on definition of terrorism. The absence of an internationally accepted definition of terrorism has led to a kind of international lawlessness and unilateral vigilantism. The long standing failure on the part of the international community to develop a consensus in defining terrorism has intensified the

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6 *The international colloquiums or conventions means: 1) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 2) International Convention against the Taking of Hostages, 3) International Convention for Suppression of Terrorist Bombings, 4) Convention on Offences and Certain Other Acts committed on Board Aircraft, 5) International Convention for the Suppression of the Financing of Terrorism, 6) Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 7) Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 8) Convention for the Suppression of Unlawful Seizure of Aircraft, 9) Convention on the physical Protection of Nuclear Material etc. etc..*

war of terror between two prominent components of global governance. These states are capable of mobilizing military might across the world on the one hand, while weak or nearly failed states like Pakistan or Somalia, in which stateless actors and state-sponsored machinery view terror as a justified tool to be utilized against the mighty states of the world.

The consequence of absence of globally accepted definition of terrorism has been felt more by states like India than others. Indian Prime Minister Narendra Modi aptly said, “*Terrorism is deadly and fearless and the world is aware of this reality*”. He appealed to international organisations like the UN to develop a robust strategy to deal with terrorism. “*United Nations has documented the definition, consequences, and the ways to prevent war,*” he said, “*but when it comes to terrorism, the UN has not been to deliver a structured response.*” “In addition, rather than fulfilling its responsibility, the peacekeeping efforts by international entities had fallen short of coming up with a suitable resolution to combat the rising danger of extremism,” he added. “If organisations like the UN don’t come up with appropriate responses soon enough, they will risk becoming irrelevant” (Malhotra 2016).

The League of Nation had defined terrorism as, ‘All criminal acts directed against a State, intended or calculated to create a statute of terror in the minds of particular persons or a group of persons or a general public’<sup>7</sup>. There was an element of subjectivity in defining the acts of terror. India also seems to have followed a similar approach, where in an ‘act of terrorism’ is very well defined; but, ‘terrorism’ per se is yet to be defined. This legal position is acknowledged by the Indian judiciary also (The Supreme Court of India 1994). Does this make any difference? Let’s analyse this with reference to the provisions contained in some of our counter-terrorism legislations in this regard.

### 1. Unlawful Activities (Prevention) Act (UAPA)

As mentioned earlier, after the repeal of POTA in 2004 (PTI, Parliament passes POTA Repeal Bill 2010), as a situational reaction, the 1967 enactment of UAPA was amended in 2004 to fill in the void. In the amendment ‘terrorist act’ was included and defined along with the inclusion of Chapter IV, which is exclusively dedicated to punishments for the terror acts (Ministry of Law and Justice 2004).

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<sup>7</sup> LoN Convention of Terrorism, supra note 30, art. 1, 2.

Section 15 (1) of the UAPA, in a long winding definition states; “Whoever, with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people in India or in any foreign country, does any act by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community in India or in any foreign country or causes damage or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government in India or the Government of a foreign country or any other person to do or abstain from doing any act, commits a terrorist act”.

This is quite similar to the definition of acts of terror as found in any other international treaties mentioned in the second schedule of the SAARC (Suppression of Terrorism) Act, of 1993. This came into effect as a SAARC Convention on Suppression of Terrorism and was signed in 1987 (Ramraj, Michael and Roach 2005). This convention has the force of law in India and a structure at the regional level. Under this convention, criminal acts such as murder, assault, offences related to hostage situation, the situation of handling explosives etc. are considered as terrorist offences and not as political offences used for the purpose of extradition (SAARC Secretariat, 1993). In India, the jurisdiction, this single legislation or convention is enough to involve the NIA into the investigation process as mentioned in the preamble of the NIA Act (M. G. National Investigation Agency, 2008).

Section 38 of UAPA lists out guidelines as well as offences, membership of a terrorist organisation, as punishable offence, providing for punishment of up to ten years of imprisonments and fine, or both. Along with membership of terror organisation, UAPA also has a provision to prosecute a person for giving logistical support to terror organisation or individual through finances, property or arranging or facilitating meetings with persons to execute further

terror activities are listed in Section 39 of the UAPA. Section 40 of the Act, an amendment incorporated in 2012, lists out funding of a terror organisation or raising funds for such organisation as a punishable offence (G. Ministry of Home Affairs 2013). Successive amendments made in the UAPA in 2012, 2013 and 2014 brought in various additional features and certain additional significant components like terrorism financing and indirect or direct logistical support etc. In factual sense, the salient structure of the UAPA remained an inherited legacy of TADA, which had introduced aspects like the arms used for terror operation, immediate impact of the terror attack and intention of the attack etc. into the law books(G. Ministry of Home Affairs 2013).

## 2 The TADA and POTA

TADA can be considered as the first specific anti-terror legislation which was brought in the wake of secessionist activities that emerged after the assassination of then Prime Minister Mrs Indira Gandhi on October 31, 1984. (Stevens 1984). The Terrorist Affected Areas (Special Courts) Act of 1984 was passed along with TADA which was later repealed in 1995. However, the definitions provided therein, became the threshold point for virtually all anti-terror legislations that followed TADA. Indeed, various new aspects were introduced in the later legislations like being member of banned organisations or unlawful organisations or financing of terrorism; but, the basic definition of act of terror remained the same as in sub-section (1) of Section 3 of TADA (South Asia Intelligence Review 1987).

TADA defined terrorist act as, “Whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any person and threatens to kill or injure such person in order to

compel the Government or any other person to do or abstain from doing any act, commits a terrorist act” [which was further extended in POTA as well]. The likely effects of the acts were mentioned in POTA which was purportedly introduced in response to the 9/11 terror strike at the US. The soul difference TADA and POTA is that TADA encompasses *a likely cause of alienating any section of the people or adversely affecting the harmony among different sections* while defining terrorism (South Asia Intelligence Review 1987). This aspect was not present in POTA; introducing damage to the government property became a likely effect.

When the TADA was repealed in 1995, there was no credible anti-terror legislation for nearly five years. Recommendation of the 173<sup>rd</sup> report of the Law Commission gave the model template which subsequently became POTA in a later date (Ministry of Law and Justice 2000).

The POTA came in as an improved version of TADA, reiterating the definition of terrorism as it existed in TADA. Certain elements were changed at the suggestion of the Law Commission in its 173<sup>rd</sup> report; First, it suggested to remove the phrase *'intent to overawe the government'* and amend it to *'intent to threaten the unity, integrity and sovereignty of India'* (Government of India 2000) (Sabharwal 2006). Furthermore, it removed the element of *'intent to alienate any section of the people or to adversely affect the harmony amongst different sections of the people'*.

While the rationale behind these amendments were not clarified by the Commission, nevertheless, the variable terminologies indicated that a terrorist act had to be with the clear objective of destabilizing the union and directed merely towards the government currently in power. It was later endorsed by the law commission also. This provision needs to be interpreted in tune with the Section 121 of the IPC, which talks about the criminalization of the act of waging war *'against the Government of India'*. This needs to be understood in contemporary scenario than a mere intention to overthrow the government.

POTA also had a strong British influence, which is apparent in sub-section (2) of Section 3, substantially broadening the scope of the offences to be prosecuted under POTA. The scope was widened by introducing offences like membership

or indirect support of a banned organisation involved in a terrorist act. This is similar to the corresponding provisions of the British anti-terrorism Bill, which later became the Terrorism Act of 2000 in the UK (Parliament of the United Kingdom 2000). Under this, any person unauthorised in possession of firearms in notified areas and in some cases even beyond them, was classified as a terrorist act.

### **Act of Terror and Terrorism?**

In dealing with the subject of terrorism, it is important to understand the difference between '*act of terror*' and '*terrorism*'. The unfortunate phenomenon of terrorism has remained a major cause of concern that has intensified over the last few decades. Terrorism is driven by and flourishes under different driving ideologies like Marxism, nationalism, radical Islamism, Jihadist agenda of acutely radicalised individuals or groups etc. In this backdrop, one of the primary differences between terrorism and act of terror can be defined as; act of terror being neutral; an act which is wicked act; it is randomly executed in the form of violence or robbery, rape etc. However, when an ideology such as political agenda or religious belief or moral persuasion or any such dimension is added to the act of violence, the act of terror can be classified as terrorism. Thus, systematic use of violence by organised terror groups or states against non-combatants to achieve political objective can be classified as terrorism (Goodwin 2012).

Further, based on the execution pattern and impact factor, terror attacks are relatively easy to carry out, especially when the individual adopts a suicidal route. Such individual or group of individuals, in today's era of advanced technology, can inflict considerable damage to a large number of vulnerable targets. The terror attacks across Europe in the year 2016, 2017 carried out by Daesh terrorists, largely endorse the above-mentioned fact that people with strong ideology commitment, succeed in executing terror attack at that scale. The evolution of ideology-based violence blurs a thin line of separation between act of terror and terrorism. This blurred line along with legal loopholes, provide manoeuvring space for terrorists, which magnify their reach and power along with its supporting network.

### 3. Judicial Interpretation of Terrorism

The evolution of Indian legislation concerning national security issues is an ongoing process that is still a work in progress. This process of evolution has been heavily reliant on the constitutional as well as statutorily granted emergency powers to the State (Kalhan, et al. 2006). An analysis of the evolution of the legal system since independence highlights the fact that the Indian judicial system largely depended on non-emergency criminal legislations that permitted broad police powers and significantly curtailed defendant's rights compared to that of emergency powers<sup>8</sup>. The post-emergency period (1977 onwards) that was marked by political and economic instability in India, was '*exacerbated by intense security threats disrupted from unhinged Indian polity every time and again*' (Granville 1999).

This to an extent, hindered the evolution process of defining the concept of terrorism. This issue remained endemic with successive governments trying to define terrorism and establish its jurisdiction by de-contextualizing parameters in matters related to national security. However, unresolved inability to define terrorism had widespread implications across the national security architecture in India with certain severe ramifications. In this milieu, there is need for an in-depth analysis to try to understand the anti-terror initiatives in the larger calculus of national security than a mere political reaction to any terror attack.

When nations talk about defining terrorism, the need is for evolving a broad-based and expanded definition as a basic prerequisite. The definition should not be a mere attempt to perpetuate police power or sentencing guidelines; but, should comprise lessons learnt from each major national security crisis (Zeidan 2003). This clearly projects the need for working out a definition

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8 *Article 22 of the Indian Constitution provides that those arrested "must be provided the basis for arrest 'as soon as may be' and produced before a magistrate within 24 hours. However, Article 22(3) of the Constitution allows the central and state governments to enact preventive detention laws during non-emergency times and contains a carve-out such that a person arrested or detained under preventive detention laws need not be brought before a "magistrate within 24 hours of being taken into custody," nor does the detainee have the right to counsel or to be informed of grounds for arrest*



of terrorism which has evolved after intense consultations and deliberations during the drafting and the actual legislative processes.

However, in India the converse process of mounting political pressure led to the development of a legal definition of terrorism. The Judiciary had indeed provided some checks ensuring against vagueness or the scope of application of a legislation and definition of terrorism. The Judiciary seemed to more or less, rely mainly on the long-standing 'deference' to the established legislative and executive processes on issues concerning matters of national security.

On the other hand, another school of thought argues that the Indian Law Commission, which is a non-partisan group comprising lawyers and judges appointed by the Union Government of India to offer advice and proposals for legal reforms, can serve as an independent body to review the definition of terrorism. The Law Commission has long legacy of proposing numerous pieces of counter-terrorism legislations and other security related legal initiatives.

The Supreme Court of India has noted that the mere possibility of constituting a precise definition of terrorism and listing terrorist offences would separate them from criminal activities. The court defined two major components which would make terrorism-related cases different from criminal cases. These are: (a) Intention and (b) Impact or effect of terror strike. This interpretation should set apart terrorism from a usual law and order problem (Supreme Court of India 1994). Let's therefore, examine these in detail.

#### **a) Relevance of intention in terror strikes:**

On a number of occasions, Indian Courts have clarified, especially during the course of trials under TADA, that mere commission of crimes of the kind mentioned in the definition of 'terrorist act', will not suffice to convict accused, unless it was also established that the act was committed with a requisite intention (The Supreme Court of India 1994). These were perhaps missing in certain terrorism related cases that were lodged with the courts before the amendments were incorporated in UAPA of 2008. The 2008 amendment has reformed the existing rational element of '*intent to threaten the unity, integrity, security, sovereignty of India or to strike terror in the people...*' to "*intent to threaten or likely to threaten the unity, integrity, security and sovereignty of India or with intent to strike terror or like to strike terror...*". The vagueness in calibrating

parameters, gave rise to the question of what is 'likely' to strike terror. According to judicial interpretation, that mere act of violence or show of violence would create a feeling of terror among the community, will not be sufficient to prove that it was a terrorist act. The Court further drew distinction between panic caused by criminal acts and that resulting from an act terror committed with the intention of causing terror or panic that drives the accused to murder<sup>9</sup> (Supreme Court of India 1990).

Despite so much developed construct of the legislation, it is felt that in the amendments of 2008 and 2013 in UAPA there is diminutive emphasis on defining terrorist act that withstands in today's information era. The abstruse "likely" nature of anti-terror legislation gives police the liberty to charge a person under the amended provisions of the UAPA. In net analysis, the amendments hurriedly made in the UAPA in the aftermath of the Mumbai siege of 26/11, have introduced a great deal of uncertainty and vagueness in the law (Nair, *The Unlawful Activities (Prevention) Amendment Act 2008: Repeating Past Mistakes* 2009). These amendments were introduced into the law books without thorough (section by section) parliamentary debates.

#### b) Diverse from a law and order problem:

The Supreme Court has consistently maintained its standpoint that while using anti-terror legislation, '*act of terror*' under TADA, POTA and UAPA cannot be considered as a mere law and order issue. Therefore, the jurisdiction of the ordinary law and its enforcement is inadequate to deal with the issue of terrorist acts, its nature as well as intention (The Supreme Court of India 1994).

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9 Court observed that - "*We think that the designated Court was right in coming to the conclusion that the intention of the accused persons was to eliminate Raju and Keshav for gaining supremacy in the underworld. A mere statement to the effect that the show of such violence would create terror or fear in the minds of the people and none would dare to oppose them cannot constitute an offence under section 3(1) of the Act. That may indeed be the fail out of the violent act but that cannot be said to be the intention of the perpetrators of the crime. It is clear from the statement extracted earlier that the intention of the accused persons was to eliminate the rivals and gain supremacy in the underworld so that they may be known as the bullies of the locality and would be dreaded as such. But it cannot be said that their intention was to strike terror in the people or a section of the people and thereby commit a terrorist act*"

This makes it essential to differentiate between the anti-terror laws from the ordinary criminal procedural code. The legal parameters such as stringency of provisions, bail provisions, the duration of permissible police custody, clear provision of maximum and minimum sentences, time to file the charge sheet and the procedure of law adopted for the trials should differentiate special legislation like anti-terror laws from a normal criminal procedural code.

In reality, while applying these laws, it is observed that the amendments of 2008 and 2013 to UAPA have made the distinction between special laws and normal criminal procedural code ultra-thin. The fear factor is used as an element of extraordinary as well as exceptional jurisprudence and projected it as a credible rationale to expand the *actus reus and mens reus*<sup>10</sup> as elements of the offence. This is a critical situation, where there is need for re-evaluation of these special laws which are projected as ‘*extraordinary*’ and becoming part of our ordinary criminal justice system.

### c) Membership of terrorist organisations:

The amendment made to Section 20 of the UAPA in 2008 in the aftermath of Mumbai siege, interprets *membership of any terrorist gang or organisation* as a punishable offence. Section 38 of UAPA further lists out offences related to membership such as association with or professing to associate with such terrorist organisation as a punishable offence. This amendment is identical interpretation of the subsection (5) of Section 3 of the TADA, which is reintroduced in Section 20 of the UAPA in 2008.

Challenging this in the Court of law, an argument was made during the trial of *State of Kerala Vs Raneef* that, “Whether a person merely by being a part of a terrorist organisation could be prosecuted under this section even if the individual does not actually commit any terrorist or unlawful acts”. The matter was further referred to Supreme Court in an appeal against a bail plea. The accused in that case was a member of an organisation named *Popular Front of India* (PFI) which was not at that time designated as an unlawful

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10 Guilty knowledge and wilfulness. A fundamental principle of Criminal Law is that a crime consists of both a mental and a physical element. *Mens rea*, a person’s awareness of the fact that his or her conduct is criminal, is the mental element, and *actus reus*, the act itself, is the physical element.

organisation under UAPA. The Court could not penalise the accused as the PFI was not mentioned in the list. However, surprisingly, the Hon'ble Supreme Court observed that "*hypothetically even if it is presumed that PFI is an illegal organisation, they were yet to consider whether all members of the organisation can be automatically held to be guilty*" (Supreme Court of India 2011). This implied that there was no prima facie proof establishing the involvement of the accused in the crime and had not violated the proviso to Section 43D (5) of the UAPA on the bail and hence the bail was granted.

Similarly, in *Indra Das V State of Assam* case, the Hon'ble Supreme Court endorsed its decision and held that Section 20 of the UAPA was inconsistent with the fundamental rights and principles of democracy. It further examined sub-section (5) of Section 3 of TADA and rejected the *principle of guilt by association* under which membership is penalised (Supreme Court of India 2011). In 2012, the Government of Kerala informed the High Court of Kerala that, "*the right-wing Muslim outfit, Popular Front of India, was "nothing but a resurrection of the banned outfit Students Islamic Movement of India (SIMI) in another form*". In an affidavit submitted before the High Court of Kerala, the government said most former leaders of SIMI were either identified with the PFI<sup>11</sup> or were at present handling various portfolios in the new outfit. This showed that the PFI was just the SIMI in another form, said the affidavit (Shajju 2012). Further, Kerala has been declared as a *Red Zone* by the *National Investigation Agency* highlights the factual concern about the state which has become a hotbed for terror activities. The court trial of 2013, where 13 accused including suspected Lashkar-e-Taiba operative T Naseer were sentenced to life imprisonment (High-Court of Kerala 2012) for recruiting persons for terror organisations in Kashmir stands testimony to the rising terrorist activities in the state of Kerala. The NIA suspected the massive presence of the Indian Mujahideen (IM) and the Students Islamic Movement of India in Kerala. The work of such network was based on micromodule which made it a complex phenomenon. Therefore, it was very difficult to track every activity in such domain fabricated by such micro networking.

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11 *The PFI has moved a petition in the High Court of Kerala against the delay by the local police authorities in considering its plea to hold freedom parades on Independence Day.*

This is indicative of the change in Court's approach in interpreting and utilizing the procedures to run trial under the special laws. In these cases, the primary concern was the threat of terrorism, and the necessity for drastic action – the 2011 judgements saw a reappearance of concern for the fundamental rights of the accused.

#### **d) Terror financing:**

The existence of ideological motivation, terrorist infrastructure, efficient recruitment mechanism, mobility of resources within the region as well as worldwide, training and arms and ammunition are crucial components of any terrorist organisation. The effectiveness of all these components is ensured by uninterrupted source of finance to the terrorist organisation. It provides critical linkage in the entire terror networks spreading across the globe and is seen as relatively a cause of major concern. Former US Secretary of State (2001-05) Collin Powell too had endorsed this view when he said, "Money is Oxygen for terrorism" (Ashley 2012). From the other end of the spectrum, even a hardcore activist like Sheikh Saeed, a key al-Qaeda leader in Afghanistan, in an interview (May 2007) also highlighted the importance of finance for any terror organisation. He had said, "Foremost need is financial" and added, "There are hundreds of people willing to carry out martyrdom and seeking to be the part of such operations, but they can't fund to equip themselves. So funding is the lifeblood of terrorism" (Shapiro 2009).

Thus, for any effective anti-terror mechanism, it is extremely important to closely monitor at least two major aspects of terror financing i.e. a) generation of funds and b) its induction or distribution.

For these, there is a need of capacity building, reinforcing legal provisions backed by strong regulatory as well as financial intelligence capabilities. It will add muscle to the law enforcement mechanism and enhance the strength of judicial framework of India solidifying India's effort in dealing with the menace of terrorism. The need to choke flow of funds for terror financing, was first discussed and strongly recommended by the high powered Group of Minister (GoM) headed by then Deputy Prime Minister and Home Minister L. K. Advani (G. Government of India). The GoM was formed in the aftermath

of the Kargil conflict and specifically to examine the recommendations of the Kargil Review Committee. It was then realised that vintage acts like UAPA were due for review and revival. It was also found that some of the legislations may not be in full compliance with the UN Resolution of 1373 which strongly advocated an effective credible legislation against terrorism.

It is universally felt that there cannot be a single stipulated model to fight against terrorism; therefore, India needed to develop its own model based on the peculiar within its jurisdiction with unique domestic as well as regional impact.

The amendment of 2013 in the UAPA criminalises financial activities associated with the terrorism. The amendment introduced the concept of '*offences threatening economic security*' by bringing it within the ambit of a *terrorist act* under the Section 15 of UAPA. It also penalizes the smuggling of 'high value' counterfeit currency, even though counterfeiting is also a punishable offence under IPC. This is another instance of multiplicity of laws for same crime but seems inescapable since all acts of counterfeiting of currency are not related to act of terror.

The issue of multiplicity of legal provision on counterfeiting was tested for the first time when the designated NIA Special Court convicted 6 people, namely; Abdul Shaikh, Mohammed Aizul, Ravi Dhiren Ghosh, Nooruddin Bari, Mohammed Samad and Aizul Shaikh who were prosecuted under the provisions of Section 16 of the UAPA for terrorist activities, under Section 17 of the UAPA for raising funds for their act of terror, Section 18 of UAPA for conspiracy of terrorist act, which was interpreted as Section 120B for criminal conspiracy and Section 489 (B) of the IPC for counterfeiting of Indian currency notes, 489 (C) for possession of counterfeit currency notes and Section 489 (E) of IPC for making forged documents resembling as that of currency notes (G. National Investigation Agency 2014). The judgement for the first time highlighted the fact that possession and circulation of counterfeit currency amounted to '*damaging the monetary stability of India*' and becomes significant not only in defining terrorism but, also assisting the act of terror.

The second amendment came in the form of Section 17 of the UAPA which expanded the legal scope pertaining to the activities and purpose of funding.

However, the Court in *London Devi Vs NIA* indicated that all financial transactions with a terrorist gang would not fall within the ambit of this Section. However, the court did not clarify the differentiation between the money raised for legal activities and those raised for the commission of any terrorist act (N. Government of India 2012). Similarly, the new amendment of 2013 in the UAPA, did not resolve the ambiguity between legitimate and illegitimate sources of funding. Section 15 of UAPA which was amended in reference to 'high quality' counterfeiting also deemed raising funds for executing or planning the terrorism act. The quantum is also not defined while defining 'high quality'.

The Court also interpreted the amendment in its deliberations in *Redaul Hussain Khan V NIA* case, where the appellant had raised funds for the procurement of arms and ammunition for the banned terror organisation *Dima Haram Daogah DHD* (J). Here the Court held that this Section encompasses the act of fund raising, collecting and providing those funds to persons or organisations involved or engaged in terrorist activities.

The issue of *support structure* was challenged, *the Supreme Court brought clarity by providing guidelines that, "the provision of the UAPA would not be attracted to the facts the case. The submission is unacceptable that mere because Dima Haram Daogah - Jewel<sup>12</sup> DHD (J), had not been declared as an "unlawful association". When the petitioner was arrested, the said organisation could not have indulged in terrorist acts or that the petitioner could not have had knowledge of such activities* (Supreme Court of India). Though, the ambiguity pertaining to the requirement of the likelihood that a terrorist act was committed by utilizing the funds was not present. Nevertheless, the constructive utilization of the newly expanded provision entirely depended on the judicial interpretation of the provision by the Courts.

While dealing with the issue of terror financing, the ambiguity in laws remained a point of concern since distinction between the offences listed in Section 15 (1) (iii – a) of UAPA and 489A-D of IPC were ambiguous. The provisions of both the laws were made for dealing the issue of counterfeit currency. Moreover, Section 15 of the UAPA was introduced with the specific purpose of ensuring

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12 *It is a militant organisation operating in North East region of India*

economic security while the IPC sections were not only made for the security of the economy but for the protection of the overall currency system the country. Accordingly, there are differences in sentencing as well. Punishment under Section 16(b) of UAPA for economic terrorist offences is for five years whereas under Section 489A-D of the IPC the minimum sentence is for seven, going up to ten years. The UAPA has made a different provision of 180-day police custody making it a stringent one. Based on above all analytical rationales, the amendments made in UAPA in the last couple of decades enable investigation agencies with discretionary options.

#### **e) Interpretation of unlawful association and unlawful activity in anti-terror laws:**

Judicial interpretation of terms and concepts of legislations defines the pace and faith of the trial. In terrorism related cases prosecuted under the UAPA, interpretation of unlawful activities has very thin like what it was under TADA.

Alongwith unlawful activities, association with or membership of any banned organisation was deemed to be committing an act of terror. This provision was inserted in the UAPA in the course of the 2004 constitutional amendment. Since then, various terrorism-related cases started utilizing these provisions of unlawful activities in prosecution. These amendments remained operational even after the 2008 and 2013 constitutional amendments.

As against this, 'unlawful activity' was defined in the 2004 amendment as any action taken by individual or organisation through acts or words or signs:-

- i) Which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the Secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or*
- ii) Which disclaims, questions disrupt or is intended to disrupt the sovereignty and territorial integrity of India; or*
- iii) Which causes or is intended to cause disaffection against India; (Ministry of Law and Justice 2004)*



Detailed analysis of the definition indicates that the element of violence in any act of terrorism is the prime point of difference between unlawful activities and terrorist acts. The insertion in the amendment of 2004 has empowered the government to declare an association as unlawful. In this regard, the Supreme Court provided guidelines that, if someone is prosecuted for a terrorist act, there was no necessity for the organisation to be listed as unlawful. *'The UAPA brings this stringency in the law accordingly if UAPA's provisions on terrorist acts could be invoked against an organisation engaging in such activities, even though it was declared as 'unlawful' at a later date'* (Supreme Court of India 2009). Though, the legislatures and executives had done their homework by indicating the definition of a terrorist act, unlawful activity and inclusion of the terrorist organisations and unlawful associations, it was for the judiciary and judicial discourse to bring a decisive clarity on this issue.

### Unlawful Activity in State Enacted Anti-terror [Special] Laws

The Maharashtra (MCOCA) and Chhattisgarh (CVJSA) enacted state anti-terror laws codified provisions about unlawful activities. While the prime emphasis in UAPA was on sovereignty and integrity of India, in the state laws, the prime emphasis shifted to maintenance of public order, tranquillity and monitoring anti-national activity like violence, terrorism, vandalism etc. It has clearly addressed the concerns of the parliament and state legislature (Government of Chhattisgarh, Section 2(e) 2006). In a broader perspective, the state-enacted special anti-terror laws like MCOCA, KCOCA appear to be addressing a broader range of criminal activities or organised crimes and define it as unlawful activity. The MCOCA defines the *'Continuing Unlawful activity'* as *'an activity prohibited by law, which is a cognizable offence punishable with imprisonment of three years or more, undertaken as a member of or on behalf of an organized crime syndicate in respect of which more than one charge sheet has been filed within the preceding period of ten years and that Court has taken cognizance of such offence'* (The Government of Maharashtra 1999). A careful analysis suggests that these laws, apart from serious issues like insurgency, cover the continuing and serious criminal activities as well. Some state-enacted laws like MCOCA have also been extensively used in prosecuting terrorism cases.

Apart from criminal activities, these state-enacted laws also define 'unlawful associations' and membership of terrorist organisation as punishable offence. While bringing clarity on the issue of intention of membership, the Supreme Court has held that distinction must be made between active '*knowing*' membership and passive '*nominal*' membership (Supreme Court of India 2011). This highlights the overlapping of definitions between the state enacted laws and Union enacted UAPA. The confusion is created due to already existing *Criminal Penal Procedure Code* (Cr.PC), Union enacted anti-terror legislations and State enacted special legislations. The issue of jurisdiction of different agencies, the resolution in case of conflict, and the direction given by the authorities while framing charges, adds to the ambiguity to a greater extent. This has led to a situation of conflict affecting the Union-State synergy on a number of occasions.

It is surprising that the amendments made in UAPA in December 2008, immediately after the Mumbai terror attack, were passed without debating these aspects in both the houses of the parliament. It was not even referred to any parliamentary committee despite requests by several Members of Parliament. Though these amendments have enhanced the scope and purview of various offences, it also brought in certain uncertainty by including certain acts which were already punishable under the IPC. The amendments made in the UAPA in 2008 and 2013 have re-introduced certain provisions inherited from the repealed acts like TADA and POTA which may be liable for misuse.

### Summary of Chapter III

1. The inherited legacy colonial past often remained a bone of contention with the newly enacted laws, as these old statutes were made to "rule" India and not to "govern" India. Hence, there is a greater need to restructure laws which will enable entities to "govern" India effectively and proactively.
2. Post-independence the judicial approach remained consistent in matters of national security and has shown appropriate respect for the opinion formed by the legislature and executives as to the existence. However, there is a timely need to relook at judicial interpretation of certain provisions of anti-terror laws along with some sections of conventional Cr.PC.

3. The basis of judicial scrutiny shall remain in the form of objective proof, relevant material with law and follow a thorough procedure of mustering of fairness of impartiality while dealing with terrorism in its all forms.
4. It will streamline issues pertaining to interpretation which is a major complexity of present day where courts have different interpretation when it comes to act of terror and it has emerged as a serious challenge while enacting anti-terror legislations.
5. Despite the presence of anti-terror laws, invoking of basic laws of Cr.PC or IPC has become a trend in terrorism related trials like 26/11 Mumbai terror attack case, Parliament terror attack case of 2001, Malegaon Blast case, etc. highlighting the need of integrating more provisions, which will streamline the issue of misinterpretation and avoid complexities emerging due to overlapping of certain provisions.
6. *Since ages the world is facing the problem of terrorism, however, the global entities or institutions have failed to buildup consensus at global level to define terrorism. Definition of terrorism is considered to be the fundamental step of any counter terror mechanism. Counter terror mechanism without defining terrorism is not of any significance to the security architecture at state, regional or at global level. Hence, terrorism needs to be defined in its present manifestation, which will avoid drawbacks in legal mechanism and eradicate uncertainties.*
7. *A comprehensive definition of terrorism along with act of terror will exterminate ambiguities of interpretation and establish a clear separation of definition denying terrorists space and capabilities to magnify their reach and power.*
8. *Thus, a comprehensive definition of terrorism should be broad and inclusive, should not be a mere police power and guidelines of sentencing, it should delineate every national security crisis. This definition should evolve from considerations and deliberations through the thorough legislative process as to the appropriateness of each application.*
9. *In Indian context, while defining terrorism there is a greater need of in-depth analysis of contextualisation of terrorism in its perspective of national security*

*and not restrain it from the frame of federalism. Hence, there is a clear need to develop a comprehensive legislation which will resolve all the above-mentioned issues and unlike the present anti-terror laws which were passed in hurry and results into introduction of complexities and delay the pace of legal trial in terrorism related cases to reach its logical conclusion in less than five years.*

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## CHAPTER – IV

# Procedural Issues in Investigation and Prosecution of Terror Cases

The overall experience in the investigation and trial of terrorism-related cases in India has been characterised by rather inordinately long duration of trials and delays. After thorough analysis of the reasons for the same, one realises that these delays are caused primarily due to five reasons enumerated below:

- (1) *Investigation and later prosecution are carried out under the provisions of the conventional Criminal Procedures Code (Cr.PC), and the normal penal laws such as Indian Penal Code (IPC) etc.;*
- (2) *Multiple laws (Centre as well as state enacted) are invoked for the same offence;*
- (3) *Frequent interruptions are caused on account of repeated recourse to interventions by superior courts on technical, legal and procedural grounds;*
- (4) *Changes in investigating agencies/personnel cause disruptions; and*
- (5) *Mid-course change of presiding judicial officers.*

Before going into detailed examination of specifics, it may be recognised that the Indian legal system, by and large, still continues to function under the inherited legislations from the colonial past. These legislations, it must be admitted, have served the requirements of dispensation of justice in normal criminal matters admirably well since they evolved around the basic concepts of natural justice. But, are these good enough to deal with the complex requirements of emerging challenges posed by the appearance of an entirely new breed, as it were, of serious acts of terror on the criminal canvas of the country, introduction of several special legislations like TADA, POTA, and UAPA etc.?

These special laws define certain specific acts and offences related to terrorism and national security. On these issues, the approach of the Judiciary in India has been consistent. It has shown appropriate consideration for the Legislature's and



Executive's intended objectives behind the enactment of the special legislations through what one may call "deference" or "margin of appreciation". Yet, any action of the state, perceived as making an inroad into the personal liberties or basic human rights of an individual, have always been subjected to very careful scrutiny by the Judiciary. Relevant material produced in the form of objective proof in accordance with the law forms the basis of judicial scrutiny. The objective evidence produced has to follow a thorough procedure which passes the muster of fairness and impartiality (Sabharwal, 2006).

Certain special investigative and trial procedures prescribed in successive anti-terror laws in India, reflect a clear recognition of the fact that these laws are different from those meant to deal with normal criminal offences. Thus, in terror related trials, it is often observed that application of multiplicity of procedures along with their varied interpretations by the courts, do lead to conflict situations. The trials resultantly get protracted on procedural issue than substantive evidence. Our study reveals that the issues of procedures and their relevance to the anti-terrorism laws mainly arise out of five major considerations, namely:-

- 1) *Investigation,*
- 2) *Power of arrest and detention,*
- 3) *Grant of bail,*
- 4) *Admissibility of different types of evidence, and*
- 5) *Sentencing of the accused/convicted persons.*

Under these sub-headings, it is proposed to examine the prominent differences in procedural matters, with the view to achieve better understanding of the level of ease and flexibility available in these special statutes that investigation agencies may prefer to work with.

### **A) Procedures guiding the course of Investigation**

Following any act of terror, the two prominent questions that arise are:-

- (a) *Whether the accused of terror related case to be prosecuted under the normal laws of the country or under special laws and*
- (b) *Which agency should investigate the terrorism related offences?*

The former does not pose a major problem since considerable overlap and flexibility exist in this matter. Irrespective of the initial decision of the investigating agency to register the incident under any relevant provision of the applicable laws, the agency gets the opportunity right till the end of the investigation to add, delete or modify the sections and the relevant laws till the accused is finally charged. In fact, the legal procedures continue to provide this flexibility to the prosecution and even during the course of the trial court to carry out such amendments, following the due procedures thereafter.

A more serious challenge arises on the second count of firming up the right investigating agency. There have been instances in recent times, when investigating agencies have been changed mid-course, sometimes leading to inordinate delays and even possible detriment to the final outcome of the case. To illustrate this point we would like to refer to two specific cases; the first is known as the Akshardham terror attack case and the second; Malegaon Blast Case.

### 1. Akshardham Case

The Akshardham terror attack took place on September 24, 2002. After the attack, a case was registered by the Gujarat police on October 3, 2002. Later, DG Police, Gujarat handed over the investigation to the Anti-terror squad. The case was, after nearly one year, transferred back to Assistant Commissioner of Police (Crime) Ahmedabad on August 28, 2003. Five accused persons were arrested and POTA was invoked. On August 31, 2003, IG Police, Jammu Range, sent a fax to IG Operations of ATS Gujarat, informing about the arrest of the sixth accused in J&K. The sixth accused was handed over to the Gujarat Police on September 12, 2003. The POTA court sentenced three accused with the death penalty and life imprisonment to one of the accused. This was upheld by the Gujarat High Court.

However, in 2014 the Supreme Court in its verdict criticised the lower courts for overlooking certain the lapses in the investigation including delay in recording statements of the accused persons and the accomplices. The judgement pronounced by Justice Patnaik observed that investigation, in this case, was conducted '*casually and with impunity*' and the sequence of events was shrouded with suspicion (The Supreme Court of India, 2014).

## 2. Malegaon Blast Case

In the case of twin blast at a Mosque in Malegaon on September 08, 2006 in which over 40 people were killed and 125 people injured, initial investigation was taken over by the Maharashtra Anti-Terror Squad (ATS) which identified SIMI and LeT activists as accused persons. Charges were filed in the MCOCA court against 9 Muslims by the ATS. Further, another blast took place on September 29, 2008. The investigations of these blasts were again carried out by Maharashtra ATS under the supervision of the then Joint Commissioner of Police Shri Hemant Karkare. This investigation unravelled a conspiracy by a right-wing Hindu group with the intent of spreading terror in the country. Sadhvi Pragya Singh Thakur and Lt Col Purohit were arrested. In light of these arrests Maharashtra ATS chargesheeted 14 accused persons in 2008 in the Special MCOCA Court at Mumbai on January 20, 2009 (N. M. Government of India 2018). Subsequently, on April 04, 2011, the Union Home Ministry handed over the case to the newly formed National Investigation Agency (NIA) along with other two prominent terrorism related cases namely the Mecca Masjid Case and Ajmer Dargah blast case. In its investigation, NIA held activists of a right-wing Hindu group known as 'Abhinav Bharat' responsible for the incidents. The MCOCA court dismissed the case against all the Muslim accused. The case against some of the Abhinav Bharat activists continued.

The 2008 Malegaon Blast case came up for intensive judicial scrutiny on various constitutional issues. The Bombay High Court questioned the constitutional competence of the NIA Act and validity of Section 6 of the NIA Act vis-à-vis provisions of Article 14 and Article 21 (Fundamental Rights) of the constitution. It also questioned the 'arbitrary and unbridled' power vested on Union Government to transfer the case to the NIA. This issue was highlighted by the Bombay High court in absence of any guidelines for the exercise of power. Even while doing so, the court upheld the validity of Section 6 of the NIA Act and stated that not all the scheduled offences would be investigated by the NIA. The Central Government was restrained under Section 6, which called for due consideration of the gravity of the crime or offence, which necessitated a look into various factors affecting the sovereignty and security of the State, international relations, and existing framework of treaties and their

necessary framework. Besides, the Central Government was required to record its opinion supported by the credible rationale for the same.

While evaluating the Central Government's powers under Section 6 of the NIA Act, the Bombay High Court questioned the powers to transfer the pending investigations, regardless of filing of charge sheet and sought answers from the prosecution. It further heard arguments upon whether the NIA would start reinvestigating the case or carry out further investigation in the case. The petitioner had argued in favour of reinvestigation instead of further investigation. This could not be done in pursuance of an executive order and must be ordered by the competent court. The counsel for the petitioner also supported their argument that the prosecuting agency cannot reinvestigate or carry out a *de novo*<sup>1</sup> investigation on its own, because, these powers are bestowed on the superior court which alone could decide about any element of unfairness in the investigations which is contrary to the judicial conscience of the court.

Thus, the court refused to read Section 6 of the NIA Act to only apply to new investigations merely on the basis of the possibility of abuse and endorsed that it may defeat the purpose of creation of NIA. The court further ruled that only superior courts have the power to order fresh/*de novo* reinvestigation and issued guidelines for the NIA to investigate on the basis of additional investigation or under the scheme of Cr.PC and advised that the petitioners may approach the competent court or a superior court for further directions in the matter.

Now, though the NIA Special Court had not opposed the discharge plea of Pragma Singh Thakur and cleared her name in the Supplementary charge sheet submitted on May 13, 2016 at NIA Special Court at Greater Mumbai. Same day on 13/05/2016, NIA filed a final report U/Sec 173(8) of Cr. P.C. against 10 accused persons. However, the Special NIA Court held that not sufficient evidences had been found against six accused including Pragma Singh Thakur and their prosecution was not maintainable (N. M. Government of India 2016). However, Lt Col Purohit was to be prosecuted on terror charges under the Unlawful Activities (Prevention) Act (UAPA). The order of Bombay High

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1 *de novo*. adj. Latin for "anew," which means starting over, as in a trial *de novo*.

Court rejecting the quashing of charges in the bomb blast case and the NIA Special Court's order were challenged by Lt Col Purhoit in the Supreme Court. The Bombay High Court had left the issue of need for obtaining sanction to the Special Court to decide even though it had earlier rejected Lt Col Purohit's argument for valid sanction before taking cognisance of offence.

The Supreme Court of India issued notices to the NIA and Government of Maharashtra on January 29, 2018 with regard to the plea filed by Lt Col Purohit seeking cancellation of the UAPA charges framed against him in the Malegaon blast case (Supreme Court of India, Diary No.- 1695 - 2018 2018). The Supreme Court on November 19, 2018 asked the Bombay High Court to hear the plea of Lt Col Prasad Purohit about his prosecution under UAPA. The Supreme Court granted bail to Purohit on April 20, 2018<sup>2</sup>. While responding to the appeal of Lt Col Purohit to stay proceedings, the Bombay High Court refused to stay the proceedings and reiterated its direction to the NIA Special Court to expedite the hearing which had been going on since 2008(The High Court of Judicature at Bombay 2018).

These cases highlight the fact that investigation of terror cases in India is characterised by the delays caused by changes in the investigating agencies and lack of coordination between multiple investigation agencies. NIA charge sheet in the Malegaon blast case (N. M. Government of India 2016) and the 2014 verdict pronounced by the Supreme Court in the trial of Akshardham attack case (The Supreme Court of India 2014) are classic examples in this regard.

## B. Powers of Arrest and Detention

Article 22 of the Constitution of India guarantees fundamental rights of the citizen against arrest and detention. These statutory enactments are also referred to in Sections 41D, 50 and 57 of Chapter Five of the Cr. PC(T. M. Government of India 1974). The powers of arrest and detention assume centrality during

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2 *Supreme Court judgment states - However, keeping in view the fact that NIA has submitted the supplementary charge-sheet which is at variance with the charge-sheet filed by the ATS and that the trial is likely to take a long time and the appellant has been in prison for about 8 years and 8 months, we are of the considered view that the appellant has made out a prima facie case for release on bail and we deem it appropriate to enlarge the appellant herein on bail.*

the trials of terrorism-related cases. The special laws like POTA or the present UAPA have made special provisions pertaining to arrest or preventive detention which are different from those under the basic provisions in the conventional Criminal Procedure Code. Provisions of arrest under these special laws invite detailed deliberation within the framework of Constitution. These provisions can be discussed under the standard parameters of constitutional safeguards, arrest procedures and pre-charge detention: -

### **1) Constitutional Safeguards**

Article 22(1) of the Constitution enshrines the fundamental right of any person to being informed, as soon as possible, the grounds for his/her arrest. The Article also states that the person arrested has the right to consult and to be defended by a legal practitioner of his/ her choice and he/she needs to be produced before a court of law within 24 hours of such arrest. The law enforcing agencies cannot detain anyone beyond 24 hours without Magistrate's authority (T. Government of India 1950). However, certain exceptions to this basic rule are enshrined in Article 22(3) in the case of enemy aliens and operation of preventive detention. Here it must be noted that no law permits preventive detention of any person for a period beyond three months unless it fulfils certain conditions prescribed in the Article 22(4)-(7) of the constitution. Similarly, Article 20(3) states that every citizen has the fundamental right against self-incrimination, that is, no person accused of any offence shall be imposed to be a witness against her/himself (M. Government of India, Fundamental Rights - Article 22(4) - (7) and Article 20(3) 1950). The courts have uniformly upheld these provisions of personal liberty enshrined in the Constitution, though at times with certain reasonable restrictions.

### **2) Arrest**

There are detailed procedures for arrests defined in various legislations related to terrorism. Two significant provisions in this regard make the anti-terror laws different and these are; exclusion of anticipatory bail and rights of the arrested person.

**POTA:** Section 52 of POTA specifically provided for certain procedures to be followed during the arrest in terror-related cases. However, Section 49 of TADA

excluded any possibility of application for anticipatory bail which is otherwise permissible under Section 438 of Cr.PC. TADA Section 49 (5) specifically provides, 'Nothing in section 438 of the Code (Cr.PC) shall apply in relation to any case involving the arrest of any person accused of having committed an offense punishable under this Act' (M. Government of India 1987). This provision finds a place even under Section 43(4) of the UAPA. It was purportedly enacted in furtherance of certain guidelines laid down by the Supreme Court of India in various cases like *DK Basu V State of West Bengal* in 1997, or in the Supreme Court verdict of Parliament Attack Case explaining the provisions of Section 52(2) of POTA further than the constitutional guarantee in accordance with Article 22(1)<sup>3</sup> (The Supreme Court of India, 2005). In this case, the accused were not informed about their right to consult a legal practitioner either at the time of arrest. Although it may not have been necessary at the initial stage, Section 52 came into play as soon as POTA was invoked. The verdict stated, "*The non-invocation of POTA in the first instance cannot become a lever to deny the safeguards envisaged by the Section 52 when such safeguards could still be extended to the arrested person. The expression 'the person arrested' does not exclude person initially arrested for offences other than POTA and continued under arrest when POTA was invoked. The 'person arrested' includes the person whose arrest continues for the investigation of offences under POTA as well. It is not possible to give a truncated interpretation to the expression 'person arrested' especially when such interpretation has the effect of denying an arrested person the wholesome safeguards laid down in Section 52*" (The Supreme Court of India 2005). This dictum was referred to in several subsequent judgements pertaining to the rights of the accused and was also relied upon by the Supreme Court while pronouncing the judgement in the Akshardham Case in 2014 (The Supreme Court of India 2014).

**UAPA:** - After the repeal of POTA in 2004, the UAPA was amended in 2008, but the provision mentioned in Section 52 of POTA was not specifically incorporated in the UAPA then or even after its major amendments of 2004, 2008 and 2013. These duties of the police are incorporated in the general criminal law i.e. Cr.PC as Sections 41B and 41D<sup>4</sup>. This makes Cr.PC provisions more stringent than before. Thus, in many cases, when arrest is made under UAPA instead of Cr.PC, an ambiguous situation is created. In the absence of such stringent provisions which are contrary to the Section 43C of the UAPA, Cr. PC provisions continue

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- 3 "Casts an imperative on the police officer to inform the person arrested of his right to consult a legal practitioner, soon after he is brought to the police station. Thus, the police officer is bound to apprise the arrested person of his right to consult the lawyer. To that extent, Section 52(2) affords an additional safeguard to the person in custody"
  - 4 The Section 43A which was added in UAPA in 2008, states that, "any officer of the Designated Authority may arrest a person on the basis of belief "from Personal knowledge" or information furnished by another person, or "from any document, article or any other thing which may furnish evidence of the commission" of an offence under the act".

to apply even in the investigation of terrorism cases(I. M. Government of India 2013).

## 2) Pre-charge Detention

Section 57 of Cr. PC specifies that any person who is arrested cannot be detained for more than 24 hours without any judicial orders. This is in line with Section 167 of Cr. PC which provides the detailed procedure that needs to be followed by the police in case they cannot complete the investigation in 24 hours and authorises detention beyond 24 hours after fulfilling certain conditions.

**POTA:** In anti-terror laws like POTA, Section 49(2) (b) and Section 43 D(2) (b) have amended the application of Section 167 of Cr.PC. This enables investigation agencies to extend the duration of detention up to 180 days in terrorism related cases, after fulfilling certain conditions mentioned in the subsequent sections of POTA (I. M. Government of India 2013). This further provides a breathing time for the investigation agencies to complete investigation and file charge sheet. However, if charge sheet is not filled within 180 days of arrest, the accused secures the right to be released on the bail<sup>5</sup>. It was reiterated and explained in detail by the Supreme Court during the trial of the Godhra cases, *“the acceptance of application of police custody when an accused is in judicial custody is not a matter of course. Section 49(2)(b) provides inbuilt safeguards against its misuses by mandating filling of an affidavit by the investigating officer to justify the prayer and in an appropriate case the reason for the delayed motion”* (The Supreme Court of India 2004).

Despite these clear guidelines, the reasons for misuse or likely misuse of the provisions of detention, despite the effective inbuilt safeguards offered by the investigation officer and accepted by the Court, are unclear. This position was endorsed by the Supreme Court in the *Mulund Blast Case*, where it made an attempt to balance the consideration of national security and the basic rights of the accused. The court observed that though in cases involving serious crimes or offences under TADA, POTA; some latitude was given to the investigation agencies for extension of time to complete investigation. This cannot be granted as a matter of course, but only after analysis of conditions enumerated in the Act and its fulfilment. Till those conditions are fulfilled, the Court should refuse to extend the period of detention. Further, the Supreme Court stated:

*“The report of the Public Prosecutor must satisfy the Court that the Investigating Agency had acted diligently and though there had been the progress of the investigation,*

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5 CrPC Section 167(2) and POTA Section 49(2)(b)



*yet it was not possible for reasons disclosed to complete the investigation within the period of 90 days. In such cases, having regard to the progress of the investigation and the specific reason for the grant of extension of time, the Court, may extend the period for completion of the investigation thereby enabling the Court to remand the accused to custody during the extended period. These are compulsions which arise in extraordinary situations. The activities of the terrorists are well-organized, well-planned and deftly executed by professionals who have perfected the art of creating panic in public mind. Their activities are pursuant to a deep-rooted conspiracy, and the co-conspirators are more often than not stationed at different places where they perform the role assigned to them. It is only with great difficulty that the investigating agency is able to unearth the well planned and deep-rooted conspiracy involving a large number of persons functioning from different places. It is even more difficult to apprehend the members of the conspiracy. The investigation is further delayed on account of the reluctance on the part of the witnesses to depose in such cases. It is only after giving them full assurance of safety that the police is able to obtain their statement. Thus, while law enjoins upon the investigating agency an obligation to conduct the investigation with a sense of urgency and with promptitude, there are cases in which the period of 90 days may not be sufficient for the purpose. Hence, the legislature, subject to certain safeguards, has empowered the Court concerned to extend the period for the completion of the investigation and to remand the accused to custody during the extended period” (The Supreme Court of India 2005).*

Apart from these safeguards, the judicial inclusion of some more safeguards like pre-charge detention is another issue of concern. In terrorism-related cases, the Supreme Court further referred cases prosecuted under TADA and clarified that the detention in Police custody should be extended only on the report of the public prosecutor and not at the request of an investigating officer. Failure to produce such report, would entitle the accused to be granted bail.

**UAPA:** The currently available anti-terror law of India UAPA has inherited the Section 49(2) [Pre-charge detention provision] from POTA as Section 43D (2). It was incorporated through the constitutional amendment of 2008. Since then, courts have interpreted the provisions on several occasions in the course trails of several terrorism-related cases. The provision of issue of notice and extension of detention for accused continues under UAPA. However, in this regard, in certain cases where there is a combined application under NIA Act and UAPA, the Court of Session alone can deal with the accused person’s requests for extension of remand, and not the court of the Magistrate, who ordered the remand in the first instance. It is worth notice here that the guidelines provide that “*the Court of Session must take its decision based on a report of the Public Prosecutor, and not an Assistant Public Prosecutor who is appointed under Cr.PC or NIA Act*”.(The High Court of Kerala 2010). Similar sentiments were echoed by the Supreme Court in the Mulund Blast Case in which the accused was detained for more than 90 days and the High Court had directed the appropriate Court of Session

to consider relevant report under UAPA and act accordingly. The High Court cited the rationale that, “the offences alleged against the petitioners are grave offences involving terrorist activity”. Under Section 43D(2) of UAPA, High Courts have also emphasised on the need for stringent parameters for releasing a person detained beyond 180 days, even if the investigation is not complete and must be released on bail (The High Court of Kerala 2010). In this regard, most of the High Courts have referred to the Supreme Court of India’s jurisprudence under the Section 167(2) of Cr.PC mentioned in the Supreme Court’s verdict in the case of *Rajnikant Jivanlal V Intelligence Officer, Narcotic Control Bureau, New Delhi* of 1989; however, there is no explanation cited to Section 167(20) of Cr.PC. It states, “regardless of expiry of 60/90 day period [as prescribed in Cr.PC, in UAPA it is up to 90/180 days], an accused shall be detained in custody so long as they do not furnish bail. Thus, if the accused is poor or unable to meet the terms of the bail bond for which sureties is prerequisite”, there is no safeguard in the UAPA for them to be released on bail (India 1989). It means that they will continue to languish in pre-trial detention. Adding further in *Sayed Mohd. Ahmed Kazmi V State of Delhi* case of 2012, the Supreme Court enunciated that, “when an accused has applied for statutory bail under Section 43(2) of UAPA after his custody was held to be illegal and application for extension of investigation and detention has been made subsequently, the period of detention cannot be extended retrospectively” (The Supreme Court of India). It defeats the statutory right of the accused that arises on expiry of the period of 90 days. It is only applicable when the charge sheet has been filed. The Section 43D (2) is similar to Section 21(2) of MCOCA and it is observed that it is often interpreted in the same strain.

It is observed that within the framework of the Constitution, despite several procedural safeguards relating to arrests, the courts have consistently maintained their stand based on and in accordance with the established criminal law that permits pre-charge detention for up to 180 days on the grounds that the law has provided for suitable defences.

When compared with the provision relating to period of detention as obtaining internationally in some other democracies, it is noteworthy that the period of 180 days mentioned in the UAPA is vastly higher than the 28-day period for judicially authorised pre-trial detention in the UK, and seven days for aliens suspected of committing the terrorist act under the landmark anti-terror law of Patriot Act of the USA (Nair, 2009). Further, it is also significant to observe that despite the recent amendments introducing vague standards such as ‘likelihood’ and economic security test, investigation or judicial process likely to go in favour of detainee under the UAPA despite Cr.PC. Nevertheless, the higher courts usually have upheld the right to statutory bail after the expiry of pre-charge detention period [excluding the cases where the accused fail to furnish bail]. This calls for a study of the jurisprudence of bail as well as underscores the need for timely conclusion of investigation which often get delayed due to various procedures and furnishing of permissible evidences from various facets of forensics.

### C. Jurisprudence of Bail

The jurisprudence of bail is considered to be a well-developed and defined provision under the normal criminal law procedure. However, there is a different framework of laws applicable to the terror-related cases along with other related offences like terror financing. While examining various anti-terror legislations, it is observed that additional restrictions on grant of the bail under these special laws, do not entirely bar the applicability of Cr.PC. This makes it complex as well as ambiguous. Under the Maharashtra law, MCOCA, it has been held that the power to grant bail is subject to the limitations (as per interpretation of the Section 439 of Cr.PC<sup>6</sup> as well as Section 21(4)<sup>7</sup> of MCOCA). Further, restrictions of such nature cannot be extended to anti-terrorism laws that do not contain a clear provision to this effect. Similar is the situation under the Chhattisgarh Vishesh Jan-Suraksha Adhiniyam (CVJSA), which endorses the application of Cr. PC to grant of bail for offences committed under these special acts. In order to get a better understanding of basic framework of the jurisprudence of bail, it is important to look at the original anti-terror laws; POTA and UAPA.

**POTA:** The provision of bail was a prominent point of contention and was deliberated extensively during the existence of POTA. It was alleged that its provisions relating to grant of bail, were misused for settling political rivalries

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6 Section 439. *Special powers of High Court or Court of Session regarding bail.*

(1) *A High Court or Court of Session may direct-*

(a) *that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in subsection (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;*

(b) *that any condition imposed by a Magistrate when releasing a person on bail be set aside or modified: Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.*

7 *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-*

(a) *the Public Prosecutor has been given an opportunity to oppose the application of such release; and*

(b) *where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.*

and political gains (Krishnan 2004). Sub-section seven of Section 49 [49 (7)] states, “Where the Public Prosecutor opposes the application of the accused for release on bail, no person accused of an offence punishable under this Act or any rule made thereunder 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” (Government of India 2002). Similarly, under the Section 49 (6), “no bail could be granted to the person of foreign origin illegally entering into the country”. There is also no question of grant of anticipatory bail under this Act. Section 34 (4) was another important provision under POTA which allowed for appeal against the order on bail by the Special Court to the High Court. While supporting its stand about longer detainment, the Court did not engage in detailed discussion about the merits of the Section 49(7) of POTA and concluded, “offences listed under POTA are complex in nature and required a longer period of investigation, thereby the custody of accused is needed for longer period of time”. However, some legal analysts maintain that the Court possibly overlooked the basic principle that before granting bail the court must consider the accused ‘not guilty’ or else it would lead to a situation in which the accused has the burden of proving the prosecution wrong at the stage of bail itself. Some legal scholars considered it ‘absurdity’ of this law in its construct. It makes POTA India’s first anti-terror law that made such stringent provision for grant of bail which sets the norm of denial of bail rather easy.

This complexity of granting bail was aptly deliberated by the Gujarat High Court while pronouncing the verdict on Godhra Violence case of 2002 where bail was denied to the accused. Though, the Gujarat High Court stated, “it would not be appropriate to express opinions on the reliability of the evidence, it nonetheless relied on Police statements to hold that, there was sufficient evidence to indicate that there was conspiracy that resulted into Godhra Burnings” (Gujarat 2004). Hence, bail was not granted.

It may be mentioned here that a different perspective emerges in terrorism-related cases processed in the North East region of India. It is said that in no instance, bail is being granted in any of the reported decisions since the enactment of the Law. In maximum number of cases during the trial stage [terror financing case] all available evidence by way of the accused being found in possession of the cash or were linked to the amount in some manner possibly led to some sort of indicator if guilt and hence no bail was granted.

**UAPA:** The Section 43D of UAPA about bail was inherited from POTA. It was incorporated in UAPA through constitutional amendment of 2008. Under the provisions, the presence of Public Prosecutor is a prerequisite while granting the

bail and also one of the conditions which still stands in UAPA. However, despite the presence of prosecutor the Court shall deny the bail, if on perusal of the charge sheet there is reasonable ground to believe that the case is fit to be a “*Cognisable Case*” and accusations are *prima facie* true. This holds the prosecution responsible to produce credible evidence to ensure that the courts do not grant bail to the accused. The UAPA also inherited certain special conditions from POTA as well as state enacted anti-terror laws like MCOCA, which do have similar provisions on bail.

While moving the UAPA amendment bill in the Parliament in December 2008, the then Home Minister P. Chidambaram said, *this is one provision that I would like to draw your kind attention. We are saying that if on a perusal of the case diary or the report under Section 173 -that is the final report or what we call the challan- the court is of the opinion that there are reasonable grounds for believing that the accusation against a person is prima facie true, then and then alone can bail be refused. Please remember that in POTA and other Acts, it was the other way round. The court must come to the conclusion that the accused person is not guilty of the offence and that he is not likely to commit any other offence while in bail, which really meant prejudging the case. So, what we have said is, you can refuse bail only under one circumstance, namely, if on a perusal of the case diary or the report under Section 173 you come to the conclusion that there are reasonable grounds to believe that the accusations against the accused are prima facie true, only then the Court can decline bail. Again, the High Courts and the Supreme Court have ample powers and this does not, in any way, bind the High Courts and the Supreme Courts. This will apply mainly to the trial Court* (Chidambaram 2008).

This discussion triggers a fundamental question that how has this distinction between POTA and UAPA played out in the courts? It is observed that though some courts have *prima facie* questioned the standards under the amended provisions of UAPA, the courts consider the ‘lower standard’ of judicious ground to believe in the guilt of the person as reasonable for rejecting bail under section 437 of the Cr.PC. It is highly unlikely that, at any point of time, whether in granting or denying the bail petition, the Court would refer the charge sheet ‘*inherently improbable or wholly unbelievable*’. This highlights the fact that under UAPA, very high standards are placed about bail and in most cases of trial under UAPA, the Courts have cited 43D (5) and refused bail when the accusations were *prima facie* true.

The approach of Courts in deciding bail applications under the UAPA may be best summed up in the words of the Kerala High Court in *Abdul Sathar v Superintendent of Police in which the court* directed, “It is true that the freedom of movement of a citizen is a precious fundamental right. The freedom of movement and the right to live peacefully of the citizens of the country, in general, are also precious rights. The law imposes certain restrictions on the rights of persons who indulge in certain criminal acts which would have an impact on the fundamental, statutory and civil rights of the citizens at large. When pitted against the rights of the citizens at large, the individual right of a citizen is of less importance. That is why a provision like sub-section (6) of section 43D was introduced in the Unlawful Activities (Prevention) Act, by Act 35/2008. It is not the number of days that a person stays in jail which becomes relevant for the purpose of considering whether he is entitled to bail. It is the magnitude of the offence and the impact of granting bail to him that matters. Statutory provisions like sub-section (5) of Section 43D of the Unlawful Activities (Prevention) Act would also become relevant and decisive in the matter of granting bail” (The High Court of Kerala).

It is also observed that even if the High Court grants bail to the accused under the provisions of Section 439 of the Code, it is further subjected to the conditions, which are prerequisite for the Section 43D (5) of the UAPA. This is in contradiction to the legislative deliberations in the parliament during the introduction of the UAPA Bill in 2008, when the Home Minister had assured the House, “*The provisions would apply ‘mainly’ to the trial courts, not the higher judiciary*” (Chidambaram 2008). The stringency of the provision is evident from the subsequent judgment of the Guwahati High Court in *Redaul Hussain Khan Vs NIA* case, where the High Court observed, “*Coupled with the above, the proviso to Section 43-D(5) does not require a positive satisfaction by the court that the case against the accused is true. What is required is a mere formation of opinion by the court on the basis of the materials placed before it*” and not the “*positive satisfaction*” that the case against the accused is true (The Gauhati High Court 2012).

The above examples endorse the view that despite the differences in language used in POTA and UAPA, the legal impact of certain sections remains the

same. Hence, there is a need to study the specific legal implications of the issues in the anti-terror laws with greater emphasis on their net impact on the jurisprudence of 'Bail' including the provisions relating to 'pre-charge' detention and bail. Along with bail, the admissibility of evidence is one major aspect which remains a point of contention in terrorism related cases. Some aspects of this are discussed below.

#### D. Admissibility of Evidence

An analysis of the judicial verdicts on anti-terror laws in India reveals that the method of acquiring evidence, its admissibility and the attended presumptions, play a crucial role in the final outcome of the case. AS stated earlier, majority of the procedures and laws pertaining to collection and admissibility of evidence in terrorism related cases, are governed by the normal laws applicable to normal acts of crime. These are the Code of Criminal Procedure (Cr.PC) and the Indian Evidence Act. It is important to note that in the special laws dealing with terrorism, an attempt is been made to ensure witness protection. This is in recognition of the critical centrality of depositions of witnesses in navigating the pace and final outcome of the case. Thus it is important to analyse the conceptualization of evidence which, in the Indian context can be examined under on following parameters;

- 1) *Admissibility of the statement, confessions made to the police officers;*
- 2) *Power police officers to collect samples from the body of an accused;*
- 3) *Acceptance of the evidence collected through interception of communication*
- 4) *Adverse conjectures towards certain offences, and*
- 5) *Procedures for witness protection.*

**Confessions before Police Officers:** Confession made by an accused in police custody, though a crucial piece of evidence, is however, not admissible in the trial as conclusive for conviction. This is an issue of major concern in India, though it is not so in many democracies. This is surprising that even in the 21<sup>st</sup> century we have a provision in the Evidence Act, inherited from the colonial

era, when the courts were under the 'Majesty's rule' while the police comprised mainly of locals at the cutting edge. Under the colonial rule, therefore, only confession or statements made before a judicial magistrate was made admissible evidence.

Given the vastly changed situation in the country, the professionalism exhibited by our special investigating agencies, the well-established layers of supervision of investigation, the system of Public Prosecutors established in all states and above all the evolution of a truly independent judiciary, do call for a review of the provisions of the Evidence Act, especially in the terrorism related cases dealt with under the special laws like MCOCA and others in terrorism-related trials. This is in contradiction with the Section 25 of the vintage *Indian Evidence Act, 1872* which precludes the confessional statements of the accused made before a police officer (The Supreme Court of India 2011).

This issue emerged as a major consideration during the trial of 26/11 Mumbai terror attack, where the trial of a lone terrorist caught alive. The trial was carried out in the absence of special laws. As a result, prosecution could not utilize Kasab's own confession as evidence and relied mainly on testimonies and depositions of witness along with material evidences including forensics (Kartikeya 2009).

Over the period, there has been a notable departure from this safeguard against police in anti-terror laws. This safeguard was first introduced under TADA. In one of its landmark verdict of Kartar Singh V State case, the Supreme Court validated the statements recorded by the Police as constitutionally admissible and permissible evidence. In its support of validation of statement recorded to the Police, the Supreme Court also laid down certain guideline in its verdict for recording of confessional or normal statement by the Police. Thereafter the concept was introduced under certain sections in MCOCA and POTA. The POTA was repealed and with it went all the amendments in the UAPA.

Today, some of its traces still can be found in the laws against organised crimes enacted by certain states. In the case of Kartar Singh Vs People's *Union for Civil Liberties*, the Supreme Court justified special exception to the Evidence Act by making a special case for terrorism and related cases. It further upheld



the safeguards incorporated in section 32(3)-32(5) of TADA were adequate to prevent misuse and added that '*judicial wisdom will surely prevail over irregularity, if any in the process of recording confessional statement to the Police*' (The Supreme Court of India 1994).

Similarly, certain observations made by the Supreme Court on this issue in the course of trial of the Parliament Attack Case are worth consideration. The Court observed, "*It is perhaps too late in the day to seek reconsideration of the view taken by the majority of the Judges in the Constitution Bench. But as we see Section 32, a formidable doubt lingers in our minds despite the pronouncement in Kartar Singh's case [...] In People's Union for Civil Liberties case, a two-Judge Bench of this Court upheld the constitutional validity of Section 32 following the pronouncement in Kartar Singh's case. The learned Judges particularly noted the 'additional safeguards' envisaged by sub-Sections (4) and (5) of Section 32. The court referred to the contention that there was really no need to empower the police officer to record the confession since the accused has to be in any case produced before the Magistrate and in that case the Magistrate himself could record the confession. This argument was not dealt with by their Lordships. However, we refrain from saying anything contrary to the legal position settled by Kartar Singh and People's Union for Civil Liberties. We do no more than expressing certain doubts and let the matter rest there*" (The Supreme Court of India 2005).

These guidelines laid by the Supreme Court have played a significant role, where the Parliament of India took due cognizance of these notes while making amendments in the UAPA. Nonetheless, though the legislature reintroduced certain sections of POTA in UAPA during various amendments incorporated in 2004, 2008 and 2013, but it did not codify admissibility to extra-judicial confessions.

**MCOCA:** While analyzing the state-enacted MCOCA, one finds that Section 18 of MCOCA is an inherited provision from Section 15 of TADA and Section 32 of POTA. By incorporating this section of POTA into MCOCA, the safeguards as laid down by the Supreme Court in Kartar Singh case mentioned above, have been retained. Thus, Section 18 of MCOCA also extends the admissibility of a confession made under the section to the co-accused, abettor or conspirator. The Supreme Court once again endorsed this interpretation

during the Mumbai Train blast case of July 11, 2006<sup>8</sup> stating, “It needs to be reiterated that Section 18 of the MCOCA is an exception to Sections 25 and 26 of the Evidence Act, only in a trial against an accused (or against a co-accused - abettor or conspirator) who has made the confession. The said exemption has not been extended to other trials in which the person who had made the confession is not an accused. Since the vires of Section 18 of the MCOCA is not the subject matter of challenge before us, it is imperative for us to interpret the effect of Section 18 of the MCOCA as it is”(The Supreme Court of India 2013). It is interesting to note here that neither the Supreme Court nor the Bombay High Court<sup>9</sup> discussed the similar provisions in TADA and POTA and the jurisprudence emanating from them.

**UAPA:** In the absence of UAPA, in the 26/11 Mumbai Terror attack case, provisions of UAPA were still invoked. Despite all the amendments incorporated in UAPA, there is no stringent provision in the Act similar to Section 32 or Section 52 of POTA. While pronouncing the verdict in the Mumbai Terror Case, the Supreme Court once again clarified by citing the Parliament attack case and rejected the appellant’s contention that even in such confessions the procedural safeguards in Section 32 and 52 of POTA must be applied and stated:

*“As we see Navjot Sandhu, it is difficult to sustain Mr. Ramachandran’s submission made on that basis. To say that the safeguards built into Section 32 of the POTA have their source in Articles 20(3), 21 and 22(1) is one thing, but to say that the right to be represented by a lawyer and the right against self-incrimination would remain incomplete and unsatisfied unless those rights are read out to the accused and further to contend that the omission to read out those rights to the accused would result in vitiating the trial and the conviction of the accused in that trial is something entirely different. As we shall see presently, the obligation to provide legal aid to the accused as soon as he is brought before the magistrate is very much part of our criminal law procedure, but for reasons very different from the Miranda rule, aimed at protecting the accused against self-incrimination. And to say that any failure to provide legal aid to the accused at the beginning, or before his confession is recorded under Section 164*

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8 On July 11, 2006 there were seven bomb blasts in seven different first class compartments of local trains of Mumbai Suburban Railways. These bomb blasts resulted in the death of 187 persons. Severe injuries on account of the said bomb blasts were caused to 829 persons

9 Refer Kamal Ahmed Mohammed Wakil Ansari V State

*Cr.PC, would inevitably render the trial illegal is stretching the point to unacceptable extremes” (The Supreme Court of India 2012).*

The Supreme Court further clarified the issue of admissibility of a confession by stating, *“The object of the criminal law process is to find out the truth and not to shield the accused from the consequences of his wrongdoing. A defence lawyer has to conduct the trial on the basis of the materials lawfully collected in the course of the investigation. The test to judge the Constitutional and legal acceptability of a confession recorded under Section 164 Cr.PC is not whether the accused would have made the statement had he been sufficiently scared by the lawyer regarding the consequences of the confession. The true test is whether or not the confession is voluntary. If a doubt is created regarding the voluntariness of the confession, notwithstanding the safeguards stipulated in Section 164 it has to be trashed; but if a confession is established as voluntary it must be taken into account, not only constitutionally and legally but also morally” (The Supreme Court of India 2012).*

A careful analysis of the court verdicts in the Kartar Singh case, Parliament attack case and the Mumbai terror attack of 26/11, indicates that despite heavy criticism by the civil society, the Supreme Court had established the constitutional validity of Section 32 and 52 of POTA and TADA respectively in Kartar Singh’s case. This has overturned a century-old established rule of admissibility of evidence and demonstrated faith in the procedural safeguards listed in POTA. In this regard the acquittal of all accused in the Akshardham case on charges of torture and other rights of accused once again reaffirmed the fact that purely notional compliances of safeguards laid down in the statute, does not establish ground for admissibility of the evidence. Thus, it would be apt to say that though the new UAPA has retained the ‘operational teeth’ of POTA; there is still substantial difference between UAPA and POTA in many provisions for execution. There is, therefore, a need to strengthen provisions of UAPA pertaining to permissibility/admissibility of evidences in the quest of strengthening the overall national security architecture.

However due to multiplicity of laws at state and central levels, there is considerable scope for misinterpretation of existing statutes, which may lead to even acquittal of accused in terrorism related cases.

**Collection of samples from the person of an accused:** In the trial of accused persons, material evidence collected during the course of the investigation, backed by scientific analysis, form a strong component of the evolution of the judicial narrative of any case. In anti-terror cases also material evidences are considered to be the crucial element of net evidence produced before the court. The special anti-terror laws do provide for specific procedures to be followed by the investigating agencies in this regard. Section 27 of POTA, which is similar to the Section 53 of the Cr.PC bestows powers on a police officer [not below the rank of sub-inspector] to ensure that the medical examination of the accused is done by a registered medical practitioner. In POTA, it is clearly defined where the police officer is required to request for samples which included samples of handwriting, fingerprints, foot-prints, photographs, blood, saliva, semen, hair or voice sample etc. The critical part under Section 27(1) of POTA is that the police officer is required to get a written permission from the Chief Judicial or Metropolitan Magistrate. Section 27(2) provided that refusal by accused to provide such samples 'shall' lead the court to draw an adverse extrapolation against him (Government of India, 2002).

The validity of Section 27 of POTA was challenged in the courts on the ground that it violated the *fundamental right against self-incrimination* as defined in Article 20(3) of the Constitution. The Court clarified and referred to its previous judgement in the *State of Bombay V Kathi Kalu Ogadh* of 1961 case in which it had stated, "*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'*" (The Supreme Court of India 1961).

The UAPA did not inherit the provisions of Section 27 of POTA. When POTA was repealed in 2004, Section 53 of the Cr.PC was amended to state, "*the registered medical practitioner examining the accused is permitted to use reasonable force necessary to ascertain facts, which may afford evidence against the accused. Moreover, 'examination' in this context has a seemingly broader ambit, including DNA profiling, use of modern and scientific techniques, and such other tests that a medical practitioner may think necessary*" (M. Government of India 2005). In the absence of a special provision in this regard in UAPA, Section 53 of Cr.PC can be applied and certainly, it would stand the test of constitutionality, unlike

Section 27 of POTA. It is still argued that in POTA more powers were vested in the courts to permit the collection of samples from an accused than what obtains under Cr.PC. Thus, wide power conferred to the police, under the UAPA, empowers them for direct examination of, and to obtain samples from, the accused and reduces delays caused by systematic procedures (The Supreme Court of India 1972).

**Evidence collected through interception of communication:** In recent times, a peculiar situation has emerged on account of growing mass of critical evidence obtained by the investigating agencies through interception of communication. The question of admissibility of such evidence in the court of law has come into focus because of contrasting yet similar provisions obtaining in the general law and specialised anti-terrorism laws.

**Provisions of Indian Telegraph Act:** The vintage Indian Telegraph Act of 1885 authorises the government to order interception of communication under certain circumstances of public emergency (Indian Telegraph Act, 1885 n.d.). The admissibility of the intercepted communications as evidence in the court of law is not clarified in the Act. However, the Supreme Court has clarified that intercepted telephone conversations are admissible as *res gestae* under *Section 8 of the Evidence Act*,<sup>10</sup> (Sarkar and Jhingta 2016). This matter was also referred to in the verdict pronounced by the Bombay High Court (The Bombay High Court, Mumbai Bench 2011) and the Supreme Court<sup>11</sup> where it said, '*It is the prosecution case that interception of telephone conversation was approved by the competent authority and the ex-post facto permission was granted under Section 5(2) of the Telegraph Act, 1885 and Rules made thereunder*' (The Supreme Court of India 2012). This mention by the judiciary without much discussion demonstrate the fact that the law is well-settled on the point. However, there

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10 The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "*as to form part of the same transaction*" becomes relevant by itself. *This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible*'.

11 Kasab Supreme Court Case, Para – 353 – "*In Normal Circumstances, a telephone interception can only be done after getting sanction from the Government but in an emergency, interception is permissible with the approval of the immediate superior who, in this case, was the Officer in-Charge of ATS*".

is scope for the legislature to clearly incorporate in the relevant law, the stated objective of intercepted communications and its admissibility in evidence in terrorism related cases.

**Provisions in the Anti-Terror Law:** The anti-terror law MCOCA enacted by the Government of Maharashtra was the first one to specifically incorporate a provision in the lines of the stated objective of intercepting communications and use it as evidence in the trail of crimes and well defined in the statement of the Objects and reasons ”(Government of Maharashtra, 1999). Sections 14 to 16 of MCOCA authorise interception of wire, electronic, or oral communication and also make it admissible in evidence against the accused in a trial. The Supreme Court while upholding the constitutional validity of this provision in MCOCA (The Supreme Court of India 2008). It clearly established the fact that Sections 14 to 16 of MCOCA contained sufficient procedural and other safeguards to ensure that these restriction on the right to privacy were reasonable and did not violate Article 21 of the Constitution.

Sections 36-48 in Chapter 5 of POTA also deal with interception of communication and define the competent authority at central level (Joint Secretary) and at State level (Secretary, Home Department) to grant the sanction for interception within Section 39 (1). (Government of India 2002). The safeguards mentioned in POTA are significant. However, during the trial of the Parliament attack case, these safeguards were bypassed since the POTA offences were not listed in the FIR when the actual interception of communication in question had taken place. However, the Supreme Court intervened and held that non-inclusion of these offences was not deliberate and thus, the evidence was admissible in the framework of the Law of Evidence and the Indian Telegraph Act. However, the Indian Telegraph Act has not laid down procedural safeguards as defined in anti-terror laws like POTA or MCOCA, which made it easier for the Court to admit intercepted communication as evidence (The Supreme Court of India 2005). The Telegraph Act authorises the interception from the concerned competent officer within a period of fifteen days, which shall remain in force for ninety days under its Rule 419(5), which may be extended to 180 days unless, revoked earlier. Thus, the different definitions under different provisions that constitute ‘emergency’ added to the ambiguity and complexity.

A review of the provisions in the major laws highlights the fact that multiplicity of statutes provides investigative agencies with discretion to apply the more stringent statute, wherever applicable. However, when more stringent safeguards on the right to privacy are found in the anti-terrorism legislations, the investigation authorities might prefer to not opt for these legislations and apply the omnibus provisions of the general law. This tendency raises the question of drafting laws with stringent safeguards if an easier option under a general law is additionally available. There is need for a relook at the multiplicity of statutes that can weaken the intent of the special anti-terror legislation.

**UAPA:** UAPA did not replicate the provisions on interception of communication as obtaining in POTA. Instead, UAPA refers to the new law of the century; the Information Technology Act of 2000 which permits admissibility of the evidence collected through interception under the above-mentioned statutes. Further it also provides safeguards that were already present in the proviso to the Section 45 of POTA. The only point which makes UAPA different is that, the accused need not be required to be provided with a copy of the order of the competent authority. This is different from proviso in POTA or under the *proviso to section 14(13) MCOCA*. Thus, it is possible for the investigation agencies to intercept communications under the general Telegraph Act, without adhering to the safeguards listed under UAPA or MCOCA.

**Presumption of innocence:** The basic concept and principle of presumption of innocence of any accused person under the common law, is well-established under the Indian jurisprudence. However, a significant departure in this regard is observed under anti-terror laws like MCOCA, POTA and UAPA. Sections 22 of MCOCA, 43(E) of UAPA and formerly Section 27(2) of POTA, do require the trial court to draw an inference of presumption of guilt against the accused unless the contrary is proved. Hence, such adverse inference in the form of presumption of guilt based on definitive evidences gives UAPA a stringent character. This becomes a crucial support mechanism for investigation agencies dealing with trained terrorists and masterminds of terrorism.

**Witness protection:** Along with the crucial evidence coming from credible witness/es plays the most decisive role part in any trial. It is essential to protect witness against all odds and take the case to the logical conclusion. It would be

in order to study certain aspects of witness protection under various anti-terror laws.

This crucial and decisive aspect of trial procedure is found in every major anti-terror legislation enacted at both the central as well as state levels. Section 19 of MCOCA, Section 30 of POTA, Section 44 of UAPA and Section 17 of NIAA extensively provide for witness protection. This is certainly a major improvement over the provisions under the normal criminal laws. (I. M. Government of India 2013). It is similar in Section 17(4) of the NIAA(N. M. Government of India 2008). Despite this commendable legal provision towards witness protection the fine which is imposed for the contempt of this provision is capped 1000 INR which is very nominal and barely has any deterrence impact on trained terrorists and radicals.

### **E. Jurisprudence about sentencing**

The final sentencing is considered to be the ultimate test and crucial outcome of any trial that defines the fate of the case. Particularly in cases related to terrorism, anything less than award of death sentence would be possible without successful culmination of investigation and judicial processes. The pronouncement of verdicts by the Courts in Mumbai Terror Attack Case, Parliament Attack Case, and Mumbai Serial Blast case of 1993, ISIS related cases stands testimony to it.

A cursory glance of the final verdicts and sentencing in major cases of terror violence, it is observed that of all the accused persons who underwent trial, more than half were acquitted by the trial court while some were awarded capital punishment and life imprisonment. The trial court reduced the gravity of charges particularly against those proving logistic and other support including financial. In real terms such support or financing of any heinous act as grave as the terror act itself. Furthermore, in terrorism related cases when the verdict is appealed against or challenged in higher courts, only in 'rarest of the rare' cases death sentence is pronounced. Majority of verdicts in which death sentence were awarded by the trial court, either ended in acquittal by the high courts or the sentences diluted to life imprisonment by the Supreme Court. The Kolkata American Centre Attack Case of 2002 is classic example



in this regard, where in Supreme Court concluded that the role of the accused was of lesser gravity than that of the appellant Aftab and modified his death sentence to life imprisonment for 30 years. It was later extended to entirety of his natural life. The higher court considered most of the appeals for study and as a result the cases have not reached to their logical conclusion yet. This clearly underscores the fact that in most of terrorism related cases, the process is inordinately delayed from the date of commencement of the trial to the final disposal of the appeal in the Supreme Court. In certain cases, Supreme Court further refers the cases back to the trial court. The investigation agencies often use stringent provisions of anti-terror laws and keep the accused from pre-charge detention till the expiry of the extended 180-day period, deny bail, etc... Thus, in such cases of delayed acquittals, civil liberties and human rights of the innocent persons who have wrongfully been accused of terror acts, are seriously undermined. The socio-economic and health impact on such detunes, changes the life course of innocent people. It is even egregious to know that in such conditions, there is no provision of suitable compensation framework in India.

In this regard, the European Convention of Human rights could be a credible convention to incorporate in Indian Legal System. The Article 5(5) of the Convention states, *“Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation”* (European Court of Human Rights 1953). It is an exceptional situation, but it is not catered for by the legislative nor discussed by the judiciary. In the last, it is worth to note an observation about the judiciary that in most of the cases despite the due right of legal intervention, the judiciary has not brought clarity in certain contested aspects of sentencing or the theory relied upon. This further highlights the need for judiciary to consider terrorism related cases in light of sovereignty and national security of the country while scrutinizing the legal aspects of these cases.

## Summary of Chapter IV

1. The investigation of terror cases in India is characterised by the delays caused by handovers of the investigation, lack of coordination between

multiple investigation agencies. Along with handovers invoking of multiple laws and frequent interruptions by judiciary at various stages are related aspects that causes delays in terrorism related cases.

2. The trial of the terrorism related cases further get affected or delayed due to various procedures and furnishing of permissible evidences from various facets of forensics.
3. Admissibility of evidence still remains a prominent challenge in the judicial procedures and investigation in terrorism-related cases. In this, statement or confession in presence of police officer is not considered as a permissible evidence. However, there is a greater need for judiciary to consider admissibility of evidence, which can be entrusted on SP, DySP, Inspector rank officers and to be collaborated with forensic evidences.
4. Though certain sections of UAPA permits intercepted communication as a permissible evidence. However, certain intelligence inputs collected by intelligence agencies are still considered to inadmissible. Hence, there is a greater need to provide a legal basis for evidences collected by intelligence agencies.
5. In bail jurisprudence of special laws remained a complex phenomenon where granting of bail is not guided entirely by application of CrPC. This complexity generates a situation which may encourage different interpretation of certain Sections. Hence, there is a greater need to scrutinize these special laws on various legal parameters in light of the national security perspective.
6. The award of final sentencing is considered to be the ultimate test and crucial outcome of any trial that defines the fate of the case. Particularly in the cases related to terrorism, anything less than the pronouncement of death sentence/ capital punishment would not have been possible without a successful culmination of investigation and judicial processes. However, longer time taken by the higher courts in studying appeals has added delay in terrorism-related trials. As a result most of the terrorism cases have not reached to the state of verdict yet. What is more worrisome is that, this critically exceptional situation is neither addressed by legislatives nor deliberated by judiciary.

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## Conclusion

After ascertaining various aspects in the framework of jurisprudence of anti-terror laws and related procedures it is observed that the entire process is riddled with complexities that lead to serious delays at every stage. This accentuates the need for a better coordination amongst stakeholders involved in this investigation and judicial process to curb their inefficiencies in timely manner. The study also felt the need to curb the possible involvement of political factors, which adversely impact investigations and trials. Further, an important aspect that impinges on successful prosecution under special laws is of witness protection. There is an immediate need to strengthen provisions of witness protection and get rid of the difficulties associated with witness protection. It will add muscle to the submission of prosecution and assist them in establishing the motive of the accused.

It has been observed that whenever the courts consider the terrorism related cases as ordinary criminal case, the rate of conviction is low due to various issues and procedures. In this regard, the Second *Administrative Reforms Commission* (ARC) in the preface to its eighth report submitted in June 2008 discussed the issues pertaining to the anti-terror legislation and observed that the country has not kept pace with the development of cross-border terrorism and highlighted the need of reforming system of India (S. Government of India 2008). While reviewing the jurisprudence of anti-terror laws in India the study found that the recommendations of the ARC are indeed valid. It clearly points the possibility that the anti-terror legislation in India are introduced in rush or rather in reactive mode, without deliberating various aspects and consequences during discussions, outside consultation and legislative deliberations. It further reveals that the overall approach in framing anti-terror laws has not changed since the days of TADA. Most of the anti-terror laws, be it state or central enactments, the language and overall structure are largely based on the POTA structure, which was formulated in the 1980s, while the nature of terrorism and counter-terrorism have undergone significant changes especially in the 21<sup>st</sup> century.

This has badly affected the structure and composition of the statutes passed with a significant amount of incoherence, without substantial thought being given to the (un)intended consequences of the slight tweaks in language.

As a result, various complex situations have emerged due to misinterpretation of certain sections, ambiguities of application of sections, procedures under anti terror laws. This has caused greater delay in the conduct of the trial of terrorism related cases. Despite the repeal of POTA, in more than half of the terror cases that were pending at the time of its repeal, the investigating agencies chose to charge the accused persons under that law. In this backdrop, the amendments inserted in the UAPA created more confusion and possible misuse of the new law. Thus, the establishment of Special Courts under the various special anti-terror laws could not facilitate expeditious trial, thereby, to an extent, undermining the very purpose for which the special laws were enacted.

In the area of counter-terrorism efforts also, due to various complexities of federal structure difficulties have arisen on account of some conflicting situation that emerged due to overlapping of Centre and State enacted laws. Definition of terrorism extends to the more substantive issue of demarcation of duties and responsibilities of the Centre as well as State government. These are certain key areas which need immediate attention. It is grieving to witness that in terrorism-related cases a major contention revolves around questions such as: Is the act of terror a mere law and order problem? Is it an act that gives credible option to prosecute the accused under criminal laws where both the Centre and the State have the competency to take cognizance of? Do cross-border terrorism or act of terror with international linkage fits squarely in the Centre's domain?

These complexities have posed a serious challenge to the legislative processes for enactment of anti-terror legislations without disturbing the synergy between the Centre and the State administrations. The enactment of NIA Act of 2008 has added another element of complexity to it. Though, the NIA Act has provisions pertaining to an act of terror committed in a State, any local laws on organised crime, generates complexities in terms assertion of the Centre and

State, which includes their investigation agencies and local police in terms of jurisdictional issues and precedence sought by the two. The balance between the two has not been definitive. The multiple laws and their overlapping provisions have created an ambiguous situation which further lead to a chaotic scenario of application of safeguards restraining the abilities of investigation agencies in terrorism related cases.

It is commonly observed that in most of the terrorism-related cases, courts have had to decide on the validity and applicability of anti-terror legislation. Such dilemma can be resolved by the constructive political discourse in the interest of national security. In most cases, courts have found a way of upholding the validity of both sets of laws and thus resolving any repugnancy that may arise. This is in keeping with the court's largely deferential approach to national security laws, challenges to which have rarely succeeded. The validity TADA, POTA, and UAPA have on multiple occasions been upheld by courts, with little reasoning beyond the assertion that terrorism is an extraordinary crime requiring extraordinary laws. While this may work as a general principle, it does not assist in understanding the many deviations that anti-terror laws take from ordinary criminal law. Especially pertaining to procedure on matters such as arrest, detention, bail, and admissibility evidence. Nor does it help elucidate the nature of the balance between civil liberties and individual rights on the one hand and compulsions of ensuring national security on the other, that the criminal justice system seeks to uphold. Worse still, such bare assertions can be used to defend any deviation from established principles of criminal law, without considering the impact on individual freedoms and rights and the actual efficacy of the deterrent and retributive effect of such laws. In this direction, the extensive discussion by the Supreme Court about the offence of membership to a terrorist organisation is notable decision in the Akshardham Case. A comprehensive review of most of the terrorism cases reveals that the above-mentioned verdict is an exception; as a whole, the extraordinary character of the anti-terror laws is barely explored by the judiciary and is not found in judicial reasoning either.

The laws are designed to provide a consolidated and updated statutory basis for an array of counter-terrorism measures which encompass different areas of the



prior law comprehensively. The purpose of the anti-terror law is to empower the government with the required civil, administrative and criminal law tools to combat the modern multi-faceted terrorist threats with a global outreach. The Human Rights considerations is significant and should, to the extent possible, be in line with the international norms.

Thus, it is imperative that any comprehensive anti-terror law must contain both punitive and preventive measures designed to curtail and disrupt terrorist activities by blocking financing channels and other supporting infrastructure. Preventive measures developed and designed as part of a proactive approach of any government should comprise policy actions, an efficient task force and a mature civil society which will keep narrow partisan interests completely away from the daunting task of a comprehensive fight against terrorism.

The overall analysis of the procedural aspects of various anti-terror statutes indicates that the UAPA carries stringent provisions which make the tasks of investigation and prosecution a bit easier because its provisions pertaining to the evidence, admissibility of confessions to police officers etc. However, it is worth consideration that in most of the terrorism-related cases, the validity of the normal criminal laws of the land is mostly upheld by the courts. Therefore, any legislative exercise that departs from the long-held and established norms of criminal procedures, without adequate justification and debate, while passing the anti-terror legislations as well as special statutes at the central as well as state levels, will always come under intense scrutiny and will be considered as unjustifiable and hence unsustainable in law.

### **Summary**

1. The jurisprudence of anti terror legislations needs to be studied in isolation than general criminal jurisprudence and emphasis needs to be given to study it from national security perspective which will restrain the chances of failure of legislations like in the past.
2. At present though UAPA is the soul anti terror law, it is observed that it is insufficient and is inadequate to address the issue of cross-border terrorism. It further needs strengthening to enable India to effectively deal with cyber aspect of terrorism and growing menace of radicalisation.

3. Despite the establishment of the NIA, country lacks a dedicated and trained special task force to deal with and investigate the cases of terrorism which has effective legal and forensic support and has core objective of investigating terrorism-related cases.
4. The overlapping of provisions from special laws and its relative application with general CrPC causes enormous delay in terrorism-related cases. Hence, there is a greater need to enact special provisions relating to procedure, investigation, evidence and trial as regards cyber offences which is a crucial element of 21<sup>st</sup> century terrorism.
5. Need for zero tolerance for political interference.
6. The structure and composition of the statutes passed with a significant amount of incoherence, without substantial thought being given to the (un)intended consequences of the slight tweaks in language. This has created space for complexities, misinterpretation, ambiguity in bail issues - which certainly are not in the interest of the prosecution side or the accused.
7. Thus, an anti-terrorism legislation can be enacted with an objective to empower the government with the required civil, administrative and criminal law tools to combat the modern multi-faceted terrorist threats with a global outreach.
8. The comprehensive anti-terror law must contain both punitive and preventive measures designed to curtail and disrupt terrorist activities by blocking financing channels and other supporting infrastructure.
9. On Policy Level – Proactive sense must prevail while framing preventive measures and later justify policy actions.

## About the Author



Ramanand Garge is an alumnus of the Department of Defence and Strategic Studies, University of Pune. As a scholar of security studies he is also an alumnus of the prestigious National Security and Law Institute, University of Virginia, USA known for its valuable contribution to the international law and global security. His specialisation in research includes counter-terrorism, anti-terrorism jurisprudence, besides in matters concerning internal security and maritime security.

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