ANTI-TERRORISM LAWS IN INDIA:AN ANALYSIS

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1 Introduction

Terrorism is a heinous crime affecting the peace of national and international community and interest of the humanity. As rightly observed, no country is immune from the act of terrorism as almost every day a terrorist event is occurring in some part of the countries.[1] The terrorists are pursuing their activities by new methods and new techniques. They also take advantage of the modern means of communication and technology and to use the facilities available in the form of communication systems, transport, sophisticated arms and various other means.[2] Terrorists are inherently anti-democratic and unconcerned with human rights as they have their own aims to undermine the very systems and mechanisms that make democratic life possible.[3] Counter measures against terrorism includes restricting financial support for the terrorist organizations and there by safe guard the people from and terrorist activities.

Unfortunately, none of the traditional systems of criminal jurisprudence do not have the elementary strength to tackle such dangerous terrorist activities.

2 Anti-terrorism Laws: The Background

The anti-terrorism laws in India are mainly comprises of the in the preventive detention laws enacted during the British regime. It was during the independence period, these laws accorded statutory protection. In fact, the primary law was successful in imposing powers on the Central and State Governments to detain a person without trial. The war in 1962 resulted in the enactment which empowered the Central Government to frame rules for securing the defence of India, and national security. The Act gave wide powers to authorities to detain a person or restrict his movements etc. Simultaneously, the MISA Act, 1971 was enacted to deal with the pressure and challenges raised against national security since it was strained between India and Pakistan. The Armed Forces Special Powers Act, 1958 was initially intended for protecting the eastern borders of British India from the invasion of Japanese Forces, but later extended to north-eastern states of Assam and Manipur.

These legislations are forerunners to specified anti-terrorism legislations. The Terrorist and Disruptive Activities (Prevention) Act, 1987, Prevention of Terrorism Act 2002, Unlawful Activities (Prevention) Act, 1967 as amended and the National Investigation Agency Act, 2008 are the anti-terrorism laws of independent India. The primary laws of the country, the Indian Penal Code and Code of Criminal Procedure provide substantive provisions to investigate and prosecute terrorism related cases. Some states have also enacted legislations to address the

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1 S. Shetty, *Comparative Counter Terrorism Law.* Cambridge University Press (2015), p. 819.

2 Shruti B. *Indian Counter Terrorism Law,* Lexis Nexis (2016), p. 34.

3 Michel Gervais, "Terrorist Attacks and the Applicability of the Laws," 19 *ISIL Yearbook of International Humanitarian and Refugee Law* 91 (2010).

Challenges of Law and Order. The relevant provisions of Arms Act, 1959, the Explosive Substances Act, 1908 and Explosives Act, 1884 supplement the impact of these legislations.
The anti-terrorism laws were enacted with an objective[4] to ensure rigorous punishment with special procedure for trial of the accused of indulging in or abetting the act of terrorism. But after some time, many of these laws were repealed in view of rampant human rights violations. Simultaneously, the country has witnessed the occurrence[5] of terrorism in many times due to various reasons. The Indian Supreme Court pointed out the gravity of it in *Kartar Singh* v. *State of Punjab*[6]while observing that 'the country has been in the firm grip of spiralling terrorist violence and is caught between deadly pangs of disruptive activities.[7]
The legislations were aimed to make these measures a permanent factor and feature of the legal provisions. But due to the repeated incident of terrorist attacks in India the government had to amend and repeal the antiterrorism laws

3. TADA (Prevention) Act, 1985 and 1987

Because of the frequent happening of the terrorist incident in the country fear was created in the minds of the public and communal peace and harmony was disrupted. To deal with the situation at hand, the Central Government enacted the Terrorist Affected Areas (Special Courts) Act, 1984[8] and the Terrorist and Disruptive Activities (Prevention) Act, 1985. Both these Acts provided for harsh measures to prevent terrorist activities in the country. New offences such as "terrorist act" and "disruptive activities" were created. The objects and reasons of the Act stated that the new and overt phase of terrorism which requires to be taken serious note of and must be dealt with effectively and expeditiously.[9] The TADA, 1985 was meant to last only for a period of two years. On the expiry of the said period, the Centre enacted Terrorist and Disruptive Activities (Prevention) Act, 1987. Most of the provisions of the Act were like its predecessor. The validity of the Act was for the first two years and there after extended to four, later six and finally eight years. It thus remained valid till 1995.
TADA[10] was the primary anti-terror legislation which brought out many significant changes in the approach of law in handling terrorism cases. In addition to provide a definition to the act of terrorism, TADA has introduced conceptual clarity for certain key aspects to terrorism like "being member of banned organizations or unlawful organizations", "financing of terrorism," "disruptive activity" and "terrorist act" etc. But the basic definition[11] of act of terror remained the same as in the previous anti-terror legislations. The Act defined the "disruptive activity" as to mean:

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4 Peter, "Unlawful Activities Amendment Act, 2008 and its Loopholes,"60(4) *Indian Police Journal* 47(2013).

5 Rudha, "Unequal Citizens: Field Notes from Rajouri and Poonch," 48 (31) *Economic and Political Weekly* 131 (2013).

6 [1994] 3 S.C.C. 569.

7 Uma, "Unconstitutionality of Anti-terror Laws: Gujarat Control of Terrorism and Organized Crime Bill, 2015," 50 (28) *Economic and Political Weekly* 35(2015).

8 Terrorist Affected Areas (Special Courts) Act, 1985 (Act 61 of 1984).

9 Statement of Objects and Reasons of Terrorist and Disruptive Activities (Prevention) Act, 1985 (Act 31 of 1985).

10 The Terrorist Affected Areas (Special Courts) Act of 1984 was passed along with TADA which was later repealed in 1995.

11 Section 3(1) of TADA.

"Any action taken whether by act or by speech or through any other media or in any other manner whatsoever which questions, disrupts or is intended to disrupt, whether directly or indirectly, the sovereignty and territorial integrity of India; or which is intended to bring about or supports any claim, whether directly or indirectly, for the cession of any part of India or the secession of any part of India from the Union".[12]

One of the most striking features of TADA would be the introduction of extraordinary provisions such as the definition of 'terrorist acts', arrest, bail, remand, investigation, trial and enhanced punishment.[13] The much controversial feature of TADA has always been the enormous and overriding powers i.e., special powers to Central Government to make rules for executing its provisions and constituting designated courts to try TADA cases. TADA introduced exceptions in sections 436 to 450 of XXXIII of Cr.P.C. which provides the framework for granting bail. Bail provisions under TADA were stringent. TADA prisoners continue to be kept in prisons for long years.[14] Perhaps the most striking modification still stands to be the one made to law of evidence as TADA gave evidentiary status to the confessions before the police.

The Act provided punishment of death or imprisonment for life if the terrorist act caused the death of a person, and in any other case, the terrorist is liable to punishment for a term of not less than five years. The Act also empowered the Central Government and the State Governments to confer on its officers the powers exercisable by a police officer, for the prevention of and for coping an also fine if the act resulted in the death of any person, and in any other case the offence defined in the Act and to constitute one or more Designated Courts for such area or areas as may be specified by them.[15] The offences punishable under the Act were triable only by the Designated Court and not by any other court. Notwithstanding anything contained in the Code of Criminal Procedure, an appeal could lie, as a matter of right from any judgment, sentence, or order of the Designated Court to the Supreme Court both on facts and law. A statement made by a person before a police officer either in writing or on any mechanical device like cassettes, tapes or soundtracks from out of which sounds or images can be reproduced is admissible evidence where a person with intent to aid any terrorist or disruptions, contravened any provisions of the Arms Act, the Explosives Substances Act, 1908 or the Inflammable Substances Act, 1952.[16]

4. The Prevention of Terrorist Act, 2002 (POTA)

The new POTA of 1985 included provisions for proscribing organizations like that of the original UAPA 1967.[17] Numerous provisions of TADA were included in POTA; similarly, the amended UAPA, in turn, incorporated most of the provisions of POTA[18]. TADA marked as the

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12 *Id.,* s. (2)3 of the Act.

13 Furqan Ahmad, *Terrorism is a Challenge to Islam.,* Indian Law Institute (2015), p. 96.

14 Arun Mishra, "Not by Guns Alone: Soft Issues in CT Strategy," 58 (2) *Indian Police Journal* 49(2011).

15 TADA, s.9.

16 *Id.,* s.15.

17 The Unlawful Activities (Prevention) Act, 1967', available at *Indiankanoon.org*, 2021 httphps://indiankanoon.org/doc/1389751(accessed on 05/04/2021).

18 C. William Michaels, *No Greater Threat,* Angora Publications, (2007), p.90.

beginning of the antiterror measures in India i.e., It was however, reintroduced in 1987 through an ordinance, with a provision for an extension for a period of two years for legislative review. An organization was a terrorist organization if it was listed in schedule of UAPA (Unlawful Activities Prevention Act, 1967) or operated under the same name as an organization listed in schedule. Before POTA introduced the banning of terrorist groups (chapter III, sections 18-22) a procedure for banning unlawful organization existed under UAPA 1967. Under UAPA, the identification of an 'unlawful organization' required a notification in the official gazette by Central Government; and the notification had to be normally accompanied by the grounds for the decision to ban along with 'conspicuous and adequate publicity' of the same. POTA however changed the way an organization could be treated under UAPA[19]. Thus, the Government was no longer required to issue a statement explaining the reasons for issuing the ban. Under the provisions of POTA, terrorism is defined as act done with intent to threaten unity, integrity and sovereignty or strike terror. It carries death or a maximum term of life imprisonment and fine not less than five years. The membership of terror group would carry a punishment up to life or fine up to Rs. 10 lakh and the courts to presume that person guilty if found in possession of arms or if fingerprints recovered. Special courts can carry summary trials, direct for samples of handwriting, fingerprints, footprints, photos, saliva, semen, hair and voice and confessions to police admissible as evidence, through writing, tapes, cassettes, tapes or tracks.

5. The Unlawful Activities (Prevention) Act, 1967 (UAPA)

This Act was passed to provide for an effective prevention of certain unlawful activities of individuals and associations. The main objective of the Act was to curb terrorism by declaring unlawful activities which are a threat to the sovereignty of the territory.[20] In this Act, the Central Government may declare or designate any individual terrorist if he/she is found to be indulged in any kind of terror activities which is likely to cause a threat to the sovereignty or integrity of India.[21] An 'unlawful association' means any association which has for its object any unlawful activity, or which encourages or aids persons to undertake any unlawful activity, or of which the members undertake such activity. The Act empowers any inspector rank officer of the National Investigation Agency to investigate any kind of unlawful activities after taking permission from the concerned authority were in the incidents of terrorism happened and officer in charge of investigation is embedded to conduct search and seizure provided he is informed the Designated Officer of the State within 48 hours of conducting such raids.[22] The Act defines the terrorist act within the scope of any kind of treaties listed in the Schedule of the Act. The Act imposes reasonable restrictions on the fundamental rights[23] of the citizens since

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19 Akshaya Ramani and C. Renuka, "A Study on Terrorism Under Pota with Reference to Pulwama Case" available at [2019] *SSRN Electronic Journal* (accessed on 04/03/2017).

20 Mrinal Satish,, "State Monopoly over Legitimate Force and Solutions to Terrorism,"58 (2) *Indian Police Journal* 11(2011).

21 Section 15 of the UAPA.

22 Surtax, "Striking a Balance between Terror Laws and Human Rights Jurisprudence, 2(6) *Criminal Law Journal* 172(2012).

23 Citizen's right to form association under Article 19 of the Constitution of India.

25a Sajal Awasthi v. Union of India, WP(C) 1076/2019.

the Government has the power to declare any kind of act or organization as unlawful what it deems suitable on its prudence.

The Supreme Court headed by Ranjan Gogoi, J., issued notice to the Centre regarding the same. The case is still pending before the Court. In the case of *Jyoti Babasaheb Chorge v. State of Maharashtra*,[24] Thipsay, J., interpreted the idea of membership in an organization by referring to the *Arup Bhuyan v. State of Assam* [25]case, which differentiated between active and passive membership. In this case, the petitioners were detained under the provisions of UAPA, accused of being Naxalites and Maoist. They were in jail for more than a year and bail was granted to them. The Court in *Sri Indra Das v. State of Assam*[26] read down Section 10 of UAPA and Section 3(5) of TADA, both of which made mere membership of a banned organization as criminal. The Court held that a literal interpretation of these provisions would make them violative of Articles 19 and 21 of the Constitution. Another petition[27] filed by the Association for Protection of Civil Rights (APCR) contended that the new section 35 of UAPA allows the Centre to designate an individual as a terrorist and add his identity in Schedule 4 of the Act while earlier only organizations could be notified as terrorist organizations. The Act specifies the grounds of terming an individual as a terrorist and that "conferring of such a discretionary, unfettered and unbound powers upon the Central Government is antithesis to Article 14." Repelling the contentions, the Court observed that the terrorist Acts could not be equated with a usual law and order problem. It was a challenge to the whole nation.

UAPA being a piece of 'security legislation' allows the Government to arrest the citizens whoever commits crimes mentioned under it. However, these are many pitfalls in it. Firstly, it does not allow any kind of dissent and it criminalizes mere thoughts and political protests that cause "disaffection" with the state. The provisions under the Act curtail the citizen's constitutionally guaranteed fundamental right to expression which is also a collective right of groups and unions to disseminate their views and UAPA mainly targets this right.[28] Secondly, those who arrested under UAPA can be kept in jail up to 180 days without a charge sheet being filed which violates another constitutionally guaranteed fundamental right under Article 21 of the Constitution.[29] Thirdly, under the provisions of UAPA, the Government gets vast discretionary powers[30] it is being used to suppress dissent through intimidation and harassment thus threatening the very existence of public debate and freedom of press and criminalizing the performance of civil liberties. UAPA empowers Parliament to restrict the rights and freedoms of citizens to protect 'the sovereignty and integrity of India'. The Government contended that the amendment was brought because it is the individuals who commit the terrorist acts and having power only to designate organizations as terrorist organizations. But at the same time

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24 (2012) 6 A.I.R Bom R 706.

25 (2011) 3 S.C.C. 377.

26 (2011) 3 S.C.C. 380.

27 *PUCL* v. *Union of India,* (2004) 9 S.C.C 580.

28 Mithul, "Transnational Terrorism and Need for International Cooperation," 45 (34) *Journal of Constitutional and Parliamentary Studies* 159 (2011).

29 Sarovar Manas, "Tolerating Death in a Culture of Intolerance," 50 (12) *Economic and Political Weekly* 11(2015).

30 Section 15 of UAPA authorizes the creation of "special courts with the ability to use secret witnesses and to hold closed-door hearings."

the issue is that if an individual is exercising his fundamental rights, he will be booked under UAPA by believing that he is involved in terrorism without any trial or whatsoever.[31] The Government has time and again used draconian laws which are vaguely worded.

6. Glimpses of UAPA Amendments

The UAPA has been amended[32] on multiple times to incorporate the changing needs of terrorism, from shifting the burden of proof for making extra-territorial arrests. The UAPA 1967 amendment reflected the salient features[33] of POTA. As a result, the Government retained the power it gained under POTA to designate organizations as 'unlawful' with limited judicial review.[34]The amended UAPA Act, 1967 also includes with only slight modification of section 21 of POTA which had created a new crime of supporting a terrorist organization as a punishable offence. The amendment made to the UAPA in 2008 showed that the central content of 'security legislation' in India has been fairly established, unwavering, despite the fact of numerous repeals, amendments, and new laws. Along with membership of terror organization, UAPA also has a provision to prosecute a person for giving logistical support to terror organization or individual through finances, property or arranging or facilitating meetings with persons to execute further.[35] Likewise, the UAPA amendment, 2012, listed out the funding of a terror organization or raising funds for such organization as a punishable offence.[36] The Unlawful Activities (Prevention) Amendment Act, 2019 which dealt with expanding the definition of "terrorist" to include individuals under sections 35 and 36 of Chapter VI of the Act.[37]

It is widely accepted fact that, terrorism is a threat and must be tackled with stringent counter-terrorism measures. But under the guise of such laws the authorities have the powers to prosecute all those innocent persons who have freely expressed their thoughts about justice administration.[38] It is vital to set up an assessment committee to examine and supervise the method of designating people as terrorists and investigation of cases with objectivity and fairness. There is a greater role for judiciary to carefully examine the cases of alleged misuse. Under the right to appeal for the people against him being designated as terrorists, judiciary ought to follow the fundamental principle of fair procedure and should remain alert of any purpose of executive to frame the individual via the production of fake evidence.[39] Officers who are found guilty of any misuse and abuse of the powers under the law must be strictly punished. It is a fact that drawing the line between human freedom and state duty to provide security is a case of classical dilemma. It is up to the officers to make certain professional

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31 M.P. Brijesh, "Terrorist, Human Rights & the Entitlement of Prior to the Latter," 40(4) *Indian Bar Review* 163 (2013).

32 The Unlawful Activities (Prevention) Act has been amended in 2004, 2008, 2012, and 2019 since it has come into force.

33 The list of 32 organizations banned under POTA has been included in the UAPA amendment, 1967.

34 Madhu, "Need for a regulatory central law on terrorism", 7(5) *Madras Law Journal* 3 (2018).

35 UAPA., s.39.

36 *Id.*, s.40.

37 *Id.*, s.43.

38 Bincy B., "Terrorism and Human Rights Critical Analysis," 61(1) *Indian Police Journal* 28 (2014).

39 P.Puneeth, *Terrorism-Pressing Need to Have a Globally Acceptable Definition*, Indian Law Institute, (2015) p. 78.

integrity, follow the principle of objectivity and keep away from any misuse. When such horrendous legislation violates and takes away the rights of citizens, it becomes the responsibility of the Supreme Court to step in and restore faith in democracy.[40] The UAPA Amendment displays the intention with which laws have been made under the colonial regime to curb several freedom actions under the veil of ensuring public order. The UAPA mainly criminalizes acts on 'ideology' and 'association'. Thus, it could be visible that the above are the signs of shifting from democracy to autocracy.[41]

The amendments brought to the UAPA in 2008 have substantially increased the scope and purview of various offences and included acts that were already punishable under the IPC. In many cases, the 2008 and 2013 amendments have re-introduced controversial provisions of the now-repealed TADA and POTA, which are liable to be misused. In fact, the difficulty in conducting the trial of terrorism cases under the provisions of Cr.P.C. necessitated the need to enact UAPA. Practically UAPA made many deviations from the general law in handling terrorism cases; it was 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 antiterrorism 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 legislation. Though UAPA and the various legislations were enacted with the intension to curb terrorism,[42] the fastness in making these anti-terror laws resulted in number of problems like delay in the disposal terrorism trial, large misuse of the provisions the Act by police etc.[43] These issues were reflected even in enacting the other legislations to curb terrorism.[44]

7. National Investigation Agency Act, 2008 (NIA Act)

The Mumbai terror attacks have necessitated the Government to come up with substantial changes in the anti-terrorism laws.[45] Also the Supreme Court in *Prakash Singh* v. *Union of India*[46] directed for the need to establish a statutory authority to independently handle terrorism cases. The three important changes brought out to curb the menace of terrorism were to amend the Unlawful Activities (Prevention) Act, 1967; to create Special Courts for the trial of terrorism offences.[47] As an aftermath Parliament enacted the National Investigation Agency Act, 2008[48] (NIA Act) to address the complex legal challenges faced by the investigative authorities and local police in dealing with investigation and prosecution of the sole surviving

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40 Mala, P., "Terrorism and Anti- terrorism Laws in India: Rise, Decline, and Future of Terrorism in Punjab," 47 (3) *Civil and Military Law Journal* 229 (2011).

41 Somen J, "Terrorism and Counter Terrorism Measures - Eroding the Human Rights," 45 *Punjabi University Law Journal* 247(2012).

42 University Module Series, *Counter Terrorism*, UNODC, UN Document, (2018), p.145.

43 Sharma, S. K., and Behra Anshuman (Eds) *Militant Groups in South Asia*, Institute for Defence Studies and Analyses, Pentagon Press (2014), pp.144-164.

44 Sharma S, "Politics of Terrorism," 58 (2) *Indian Police Journal* 33(2011).

45 Ashok Kumar, *Dynamics of Global Terrorism*, K.K. Publications (2014), pp. 465-472.

46 (*2006*) 8 S.C.C. 13.

47 Abhinav, *Terrorism: History and Facets in the World and In India*, the Indian Law Institute (1985), p.323.

48 The NIA Act established the National Investigation Agency (NIA).

terrorist cases.[49] The NIA covers offences enlisted under few enactments[50] 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.[51]

The NIA officers of and above the rank of Sub Inspector will enjoy the powers of the SHO in-charge of any police station in the affected area. Trials of the terror accused would be conducted on a day-to-day basis in special courts and the NIA would have special prosecutors. Changes in the Unlawful Activities (Prevention) Act would increase the period of police remand of terror accused from the existing 15 days to 30 days.[52] These determinations are made by te political executive rather than the professional expert (the Director General who heads up the Agency). The entire gamut of the Act states about the categorisation of terrorist act as a scheduled offence and to assign NIA to investigate about it.[53] The Act[54] states that, "the superintendence of the Agency shall vest in the Central Government" without defining what superintendence means. In the past, the failure to define superintendence in Police Acts at both the State and Central levels have demonstrably led to the politicisation of policing with all its attendant ills.

The law enforcement agency provided an opportunity to remedy this situation by clearly defining the powers and functions of the political executive and the operational responsibilities of the Director General. Decisions on whether an offence warrants NIA involvement ought to reside with the Director General. Much of the suspicion that arises with the creation of a new law enforcement agency could have been allayed if the potential for illegitimate political interference had been curtailed rather than enlarged. Instead, section 6(3) increases the likelihood that political considerations will influence investigative decision-making when it states that the Central Government shall determine within 15 days whether the offence is a Scheduled Offence.[55]

The Agency is not empowered to investigate several interstate and trans-national crimes that require a national response. For example, human trafficking, drug trafficking, cybercrime and organised crime are not included in the schedule of offences to the NIA Act. Whether these crimes have a direct link to terrorism or not, the fact is that the prevention and investigation of these offences are best served by a national response.[56] Indeed it is fact that NIA was created in a hurry by the Government to tackle increasing number of terrorism cases, few sections[57] which empower the Central Government to remove difficulties and make rules, provide the opportunity to make considerable improvements to the NIA such as clarifying what "other

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49 R. Bhanu Krishna Kiran, "The Role of NIA In the War on Terror: An Appraisal of National Investigation Act, 2008" 4 *Journal of Terrorism Research* 9(2013).

50 SAARC Convention (Suppression of Terrorism) Act of 1993(SAARC Secretariat, The Legal Framework of NIA (1993), Chapter VI of IPC.

51 "The National Investigation Agency Amendment Bill, 2019", Law Times Journal, available at http://lawtimesjournal.in/the-national-investigation-agency-amendment-bill-2019(accessed on 03/04/ 2021).

52 David L., *Policing Terrorism: Research Studies into Police Counterterrorism Investigations*, CRC Press (2016), p. 202.

53 NIA Act., s.6(3).

54 *Id.*, s. 4(1).

55 Chomsky, Noam and Veltche, Andre, (Eds) *On Western Terrorism: from Hiroshima to Drone Warfare*, Pluto Press (2013), p.192.

56 *Supra* n.59.

57 Sections 23 and 24 of the NIA Act.

relevant factors" can be considered in directing the Agency to investigate a scheduled offence. By mustering the requisite political will at both Centre and State levels, perhaps the NIA can become an exemplar for overall changes in future policing.

8. Pitfalls in Anti-terrorism and Security Laws

On tracing the scope and extent of the 'security laws', all the laws are intended to protect the security of the country, public order, communal peace. However, there is no explicit demarcation of the range and scope of these objectives, as all these 'security laws' are self-evident.[58]

One pertinent example evidencing this ambiguous scope of the 'security laws' can be the National Security Act, 1980. Under the Act, the Government is authorized to detain any person so as to prevent him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order.[59] Though the provision, on the face of it seems to be simple and necessary for maintaining the state security, however, it is to be noted that the statute contains no definition of what is deemed to be "state security" or "public order," or the "actions which may be prejudicial to either". The logical corollary of this sweeping provision is that any action or even a literary work that dares to disapprove of the Government may be caught under the garb of this provision.

Further, apart from the provision being vague, the other issue with respect to the 'anti-terrorism legislations' is that it covers a wide range of offences under the anti-terrorism. A particular example of this can be seen in the UAPA, where even after undergoing two amendments in 2004 and 2008, there is no definite definition of the offence of "committing a terrorist act."[60] The Act covered a wide range of activities such as exercising force against a public official, employing force against any individual to pressurise him to commit the offence of terrorism. As per the common understanding, a person perpetrating a "terrorist act" "threaten the unity, integrity, security or sovereignty of India" or "strike terror in people" in India or "in any foreign country." However, as per the present law, a person can be booked under these laws if his actions are "likely to" have the same result. The wording of the statute echoes of an ambiguous scope, where it is uncertain and left to the obscure whether a person is mandated to understand about or be negligent as to the likely reverberations of their actions, or should the provision be construed as one which creates a strict liability offense.

The Chhattisgarh Special Public Security Act of 2005 deposes a similar ambiguity, where the Chhattisgarh government was empowered to interdict and prosecute any organization that was engaged in "unlawful activities." Again here, the term 'unlawful activities' was not defined and hence could not be limited to the conduct that were considered as an offence as per the existing criminal law. These provisions recklessly apply metonyms such as "danger or menace", which lessens the verge that portrays an action to become illegal. This broadly formulated statute cedes certain activities as criminal which are a variant of peaceful speech and conduct but where they become cynical of a government action or challenge the dominant rhetoric of the

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58 Rahul Mishra, 'Anti-Terrorism Laws: Distinguishing Myth and Reality' [2010] *SSRN Electronic Journal,* (accessed on 04/05/2013).

59 Martinus. *Nijhoff, Diplomatic Kidnappings: A Revolutionary Tactic of Urban Terrorism*, Hague (1973) p. 182.

60 Anurag Deep, *Due Process in Trial of Terrorism Cases,* Indian Law Institute (2011),p.174.

day, relating to history or politics. This extensive power grants the executive the arbitrary discretion to ascertain which actions need to be prosecuted and would fall within the realm of the widely drafted 'security legislation' and which action should be left unprosecuted. It even becomes difficult for the people to understand and comprehend the consequence of their actions under such slackly defined standards. As a corollary to this, it becomes challenging to question an executive action as excessive under a particular legal provision as the provision itself is so broadly and ambiguously formulated, that the exact boundary of it cannot be determined.

The concept concerned with the nature and limits of governmental action to prevent harm and has been applied in respect to legislative measures that seeks to prevent harm by the restraint or deprivation of liberty. Further, a key aspect of the project of preventive state is to better understand whether continuities or discontinuities exist between disparate preventive measures, and what this might reveal about the contours and limits of preventive governance. The preventive state concept is thus a good fit for investigating whether control orders, as an example of prevention in anti-terror law, are exceptional when compared to other preventive practices.

The focus of the concept of the preventive state is the use of state power to prevent harm. As such, the concept may encompass a variety of preventive practices, not simply those connected to the criminal law or criminal justice system. Further, by not targeting dangerousness, risk or uncertainty, the preventive state concept may provide a way to read developments in Indian law that captures the range of governmental responses that seek to prevent future harm whether couched in terms of risk, security, uncertainty, or dangerousness. Importantly, on the preventive state concept and preventive justice inquiries that have succeeded it suggests a way forward to alleviate the problems identified as arising out of the use of preventive measures[61].

9. Judicial Approach towards Terrorism Laws

The judicial activism to tackle the menace of terrorism had begun in the pre-independent era wherein few cases had been reported relating to the preventive detention laws. In a plethora of cases the constitutional validity of the Defence of India Act, 1915 was challenged and the constitutional courts have upheld the validity of these legislations.[62] The entire judicial activism on terrorism in India may be analysed from three major perspectives. Firstly, an analysis of cases on pre-independent terrorism legislations, secondly, analysis of the cases of post-independent acts on terrorism and thirdly, an analysis of the post-2005 legislations on terrorism. Mostly, across the genre of the constitutional review cases on anti-terrorism legislations, the Supreme Court has taken the stand that the Indian Parliament had full authority to pass the law on terrorism and had the power to pass the particular provision of such law in dispute.[63] The Supreme Court has played an important role in interpreting abstract constitutional provisions and there by shaping the content and scope of constitutional provisions. However, when the

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61 Pradip Ninan Thomas, *Negotiating Communication Rights*, SAGE India publications (2011), p.34.

62 K.R.Gupta, *Anti-Terrorism Laws: India, the United States, The United Kingdom and Israel*, Atlantic Publications (2002), p.156.

63 Jaesam Lee, "Legal and Policy Proposal for The Technology: A Study on The Institutional Improvement Plan for Prevention of Terrorism Activities Under the Anti-Terrorism Act" 12 *Gan chon Law Review* 11(2018).

judiciary takes up the task of reviewing anti-terrorism legislations, it evades its own activist interpretive stance and adheres to in other types of decisions.[64]

As far as the issue of terrorism is concerned, India has faced and facing several threats in matters relating to internal security of the nation. In the last decade after the Independence, there is a raise of the terrorist activities in cross border terrorism activities and insurgent groups in different parts of the country. Presently, the face of terrorism has been changed radically due to the developments taken place in the field of science and technology as new forms of threats and challenges[65]are emerging. Due to this reason, terrorism became a formidable challenge to peace and security of the nation.[66] The rapid growth of technological revolution facilitated the terrorist for communicating with each other for planning the terrorist attacks.[67]

In the post-independent arena the judiciary has given various interpretations of preventive detention laws in a plethora of cases. Generally, the courts were of the view that the ground of detention should have a rational connection with the object which the detenue had to be prevented from attaining personal liberty.

Regarding the judicial interpretations on terrorism in the pre-independent era, the courts have shown a consistency in interpreting legislative provisions in a strict manner without leaving much space for the appellate provisions. Rigidity and lack of flexibility can be seen in these strict interpretations of legal provisions to preserve security of the State. In *Ameer Khan*'s case[68] court has given the right to make representation to the detenue to make representation in his defence. The *Bhagath Singh*'s[69]case was a controversial one in which the preventive detention laws were passed with the objective to make the Crown policy in India more influential than ever before. In this case no right to appeal was given to the accused in case of death sentence. Another significant case was *Keshav Talpade* v. *Emperor*[70]wherein Rule 26[71] of the Defence of India Act was challenged and declared *ultra vires* on the ground that it went beyond the rule making power of the authority for the detention of the persons reasonably suspected of certain things which were contemplated by the Act. While the act-imposed conditions of 'satisfaction' the rule advocated for 'mere satisfaction' of the Government. Again, in *Emperor* v. *Sibnath Banerjee*[72]regarding the same question of the interpretation of Rule 26 of the Defence of India the court ruled that 'it was not competent to investigate the sufficiency of the of the materials or the reasonableness on the ground of satisfaction of the Governments

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64 Suvendrini Perera &, Sherene Razack (Eds), *At the Limits of Justice: Women of Colour on Terror*, University of Toronto Press (2014), p. 619.

65 Chemical Terrorism, Bioterrorism and Agricultural Terrorism are the classic examples of latest version of terrorisms.

66 Roman Grime Teshome, "The Fight Against Terrorism as A Contemporary Challenge to International Humanitarian Law: Rendering the Law of War Obsolete,"23 *International Journal of Legal Studies and Research* 90 (2013).

67 Ohlayan, S.K., "Fundamental Rights: A Constitutional Perspective to Contain Terrorism" 12 *Maharishi Dayanand University Law Journal* 29(2000).

68 *Supra* n.34.

69 *Re Ameer Khan*, (1870), 6 Beng.L.R.392: *Bhagat Singh* v. *Emperor*, (1931) 33 Bomb L.R 1950.

70 AIR 1943 FC 1.

71 Rule 26 of the Défense of India Act stipulates that the "detention of a person if it was "satisfied with respect to that particular person that such detention was necessary to prevent him from acting in any manner prejudicial" to the defence and safety of the country.

72 (1943) A.I.R FC 75: 1945 P.C.l56).

for detaining a person under the same rule. In appeal the Privy Council also ruled that 'the orders of detention should be taken as the *ex-facie* regular and proper'. The analysis of the pre-independent legislations reveals that many times, the British Government used the provisions of Defence of India act extensively to authorise preventive detentions and to criminalise offences against the State.

The majority in this case held that the Parliament being the final authority of preventive detention as the legislation was enacted with a specific objective to protect the peace and security of a state. But this minority led by Justice Kania, J., held that it was open for a detained person to challenge the grounds on which he was detained, and his freedoms have been curtailed. Ruling further, Justice Kania, J., opined those provisions of section 14 (1) were held abridged the rights given to citizens under Article 22 (5) and therefore *ultra vires.* The Court further relied on *Machinder Shivaji* v. *The King*[73]and held that the grounds of preventive detention must have connected with the orders of preventive detention.

POTA has been a subject of controversy in several cases. The constitutional validity of the TADA was challenged in *Kartar Singh* v. *State of Punjab*[74] wherein two of the five-member bench ruled that section 15 of TADA, which treats as admissible confessions to the police, was unconstitutional. The Court upheld the constitutional validity of TADA and observed that it is for Parliament to enact a law to discriminate between ordinary people and terrorists. This case[75] is a classic example in this regard, wherein the constitutional validity of TADA was challenged in the Supreme Court on the following grounds:

1. 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[76].
2. A confession made by a police officer was made admissible as substantive evidence in a Court of law under Section 15 of the TADA, is violative of the basic principles of criminal justice.
3. Denial of the traditional right of appeal and providing for a direct appeal to the Supreme Court are not in the interests of a fair and speedy trial.
4. Exclusion of the benefit of anticipatory bail under Section 438 Cr. P.C. and empowering an executive magistrate to grant bail under Section 167 and 164 of the Cr. P.C are also violative of the principles of criminal justice.

However, the Supreme Court endorsed the supremacy of the Parliament in enacting antiterrorism legislations like TADA. In support of its judgment the Court also explained that 'public order' falling under entry 1of the State List, relates to offences that are considered of lesser gravity.

The Court stated that regulations must suit the need of the society and be capable of dealing with the issue at hand. Therefore, the provisions or sections of the Act must not be looked in isolation to ascertain the competency of the legislature but the pith and substance. The Court thus held that the impugned legislations fall not within List II or List III as alleged by the

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73 A.I.R 1950 S.C 27.

74 (1994) 3 S.C.C. 569.

75 (1994) 3 S.C.C. 569.

76 Upendra Baxi, *In Search of Al-Qaeda - Terror Network that Shook the World*, Simon & Schuster (2002),p. 315.

Petitioner but under entry 1[77] of List I of schedule VII of the Indian Constitution which states/ Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination of effective demobilization.

In *R. M. Tewari* v. *State of Delhi*[78]"the Supreme Court ensured that there was no misuse of the stringent provisions of TADA and any case in which resort to TADA was found to be unwarranted, the necessary remedial measures should be taken" and that the Designated Court was expected to give "due weight to the opinion formed by the public prosecutor on the basis of the recommendation of the High Power Committee", if it was "based on the materials present" indicating that "resort to provisions of TADA was unwarranted."

In *Usmanbhai Dawoodhbai* v. *State of Gujrath*[79] the Court held that the TADA is an extreme measure to be resorted when the police cannot tackle the situation under general law. In *Hitendra Thakur* v. *State of Maharashtra*[80], the Court ruled that under TADA, every criminal cannot be treated as terrorist and criminal activity should be committed with 'intention under section 3(1) of TADA. In *Sanjay Dutt* v. *State of Maharashtra*[81]Accused have a right to prove that the possession being not for any terrorist activity and should be in conscious possession unauthorized. In *Shahin Welfare Association*. v. *Union of India*[82]for granting the bail, TADA detenus may be classified in to four categories: hard-core under-trials whose release would be a menace to society, under- trials arrested under provisions of TADA, under-trials roped under sections 120-B and 147 IPC and under-trials found possessing incriminating articles under section 5 of TADA.

In Delhi-Bomb blast case, *People's Union for Civil Liberties* v. *Union of India* [83] the constitutional validity of the Prevention of Terrorism Act, 2002 was challenged on the ground that Section 20[84] of the Act violates the human rights. The Court held that for protection and promotion of the human rights, prevention of Terrorism is essential. The Court upheld that on the ground that the 'mere possibility of abuse cannot be a ground for denying the vesting of powers or for declaring a statute unconstitutionally discussed'. The Court said that Parliament possesses power[85] to legislate the Act and once legislation is passed, the Government has an obligation to exercise all available options to prevent terrorism within the bounds of the Constitution. 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.

The Court looked at the possibility of fitting the impugned legislation under entries 2 and 2-A of List I.[86] On the face of it, the above entry does not in any way seem to accommodate the

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77 The Constitution of India, Entry 1, List I, Seventh Schedule.

78 1996 Cri.L.J. 2872 (S.C).

79 1988 (3) S.C.R. 225.

80 A.I.R *1993 SC* 8.

81 (1*994)* 5 S.C.C. 410.

82 (1994) 6 S.C.C. 731.

83 (2004) 9 S.C.C. 580.

84 Section 20 of POTA deals with offence relating to membership of a terrorist organization.

85 Article 248 and Entry 97 of Llist I of the Seventh Schedule of the Constitution of India.

86 The Constitution of India, Entry 2-A, List I, Seventh Schedule, Constitution of India.2-A reads: "Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or

impugned legislations. The Court did not seem to explain how exactly such a provision fits especially when the Défense of India Rules, 1962[87] mentions that 'defence of India' includes external sovereignty of the country. This was interpreted the same way in *Ram Manohar Lohia* v. *State of Bihar*.[88] 'Défense of India' was also understood in terms of the internal sovereignty of the State.

Presumption of guilt may be reversed by the Court, but at the same time there must be certain checks as to when they can be done. This attains significance when the special law and the ordinary law deal with a similar set of offences and just have different procedure. The procedure in the special law is acting to the prejudice of the accused and denying him is fundamental right to life. In *Maneka Gandhi* v. *Union of India*, it was held that any procedure must be just fair and reasonable and not be ambiguous as to its application.[89] When the law prescribes the same set of offences and the procedure for its application is different, questions are raised as to its fairness.[90]In giving its decision, the Court emphasized that the legislation must be seen in light of the context in which it is made. It was noted that terrorism is a world-wide phenomenon and India is not an exception.[91] In the words of the Court, "in recent times the country has fallen in the firm grip of spiralling terrorists' violence and is caught between the deadly pangs of disruptive activities. In such a situations measure must be taken to solve the issue." Reliance was placed on the judgment in *Sukhdev Singh*[92] where M.M. Punchi, J., stated:

"I know that in order to sustain the presumption of constitutionality of a legislative measure, the Court can take into consideration matters of common knowledge, matters of common report, the history of the times and also assume every state of facts which can be conceived existing at the time of the legislation".

Terrorism in effect, is a threat to the internal sovereignty of the State and today normal law and order agencies cannot seem to handle it. It then becomes necessary to have a Central legislation to deal with this menace. This interpretation of the Court also gives a new understanding to the entry 1 of List I to include acts that threaten the country both, internally and externally. Thus, the decision of the court regarding this issue is, correct and gives a new dimension to law-and-order preservation by the agencies in our country. The competency of the legislature, however, is not the only requirement to validate the enactments. Such enactments must then be in conformity with the provisions of Part III of the Constitution.

The second part of the case dealt with whether the impugned Acts are violative of the rights mentioned in part III of the Indian Constitution. One of the main contentions where the provisions are against the principles of natural justice as enshrined in Article 21 of the Constitution. These included the right to a fair and speedy trial, presumption of innocence, the right to a fair hearing and acts according to the 'procedure established by law'. The Court

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unit therefore in any State in aid of the civil power; powers, jurisdiction, privileges, and liabilities of the members of such forces while on such deployment".

87 The Defence of India Rules, 1962, Rule 30(1)(b).

88 (1966) 1 S.C.R. 709.

89 A.I.R 1978 S.C 597.

90 This principle has been applied in the U.S Courts in the cases of *Strunk* v. *United States*, 412 U.S 434 (1973) and *Coffin* v. *United States*, 156 U.S. 432 (1895).

91 *Kartar Singh* v. *State of Punjab*, (1994) 3 S.C.C. 569, para 22.

92 *Sukhdev Singh* v. *Union Territory*, A.I.R 1987 PH 5.

answered this considering the distinction between a special law and a general law. Stating that the impugned Acts are special in the sense that they are made to deal with only particular instances, the Court said that deviances from the procedure in ordinary laws is permissible. Then for instance, the Court can remove the burden of proof and presume the person guilty until proven innocent.

There were also questions about the constitutionality of Armed Forces Special Powers Act, 1958 (AFSPA) in the context that law and order is a state subject. The Supreme Court has upheld the constitutionality of AFSPA in 1998 in *Naga People's Movement of Human Rights Union of India.*[93]In this case, the Supreme Court arrived at certain conclusions including (a) a suo-motto declaration can be made by the Central Government, however, it is desirable that the State Government should be consulted by the central government before making the declaration; (b) AFSPA does not confer arbitrary powers to declare an area as a 'disturbed area'; (c) the declaration has to be for a limited duration and there should be a periodic review of the declaration after 6 months; (d) while exercising the powers conferred upon him by AFSPA, the authorised officer should use minimal force necessary for effective action, and (e) the authorised officer should strictly follow the 'dos and don'ts' issued by the army.[94]

However, in the name of the security of the State, legislation cannot compromise the rights of the individuals. All along the case, the Court has stressed that the situation in the country demands the need for strict measures and even if they violate the rights in part III, they are justified. It has always sought to protect the interests of the State *vis a vis* the individuals. This was more recently seen in the case of *PUCL* v. *Union of India*[95] where the Court upheld the validity of the Prevention of Terrorism Act (POTA). Contrasting this with the time of Earl Warren in the 1960s and 70s in the United States, individuals' rights were always sought to be preserved. Similarly, Justice Krishna Iyer was seeking to do the same in India. Whatever may be the stringent measures, it can be rightly concluded that if terrorism must be stopped, proper measures that do not violate due process must be used. This was also emphasized in the UN Resolutions regarding terrorism, where it was stated that in the prevention of terrorism the fundamental human rights of the individual must not be compromised.[96] If democracy needs to survive, rights of the individual must never be compromised.

The Court's wide deference to the Government around anti-terror policy was also evident in the *P.U.C.L.* v. *India*[97] decision, which involved a challenge to the validity of POTA. In this case, the People's Union for Civil Liberties invoked similar arguments raised by the petitioners in *Kartar Singh* regarding the constitutional validity of POTA on federalism principles. The petitioners thus alleged that Parliament lacked legislative competence to enact the law because it fell under entry 1 of list II (public order), which was within the domain of State, not Central Government powers. However, the Court rejected the petitioner's assertion that terrorist activity is confined only to States and therefore State(s) only have the competence to enact

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93 AIR 1998 S.C 431.

94 Pallavi Bedi, "All You Wanted to Know about AFSPA" *PRS*, available at : https://www.prsindia.org/media/articles-by-prs-team/all-you-wanted-to-know-about-the-afspa- 51(accessed on 22/11/2020)

95 (2004) 9 S.C.C.580.

96 GA Resolution 1373/2001, adopted during the 4385th meeting of the United Nations on 28th September 2001.

97 (2004) 9 S.C.C. 580.

legislation.[98] The Court accepted the Government's contentions that terrorism posed a threat to the "sovereignty and integrity" of the nation, and that the extreme threat of terrorism required granting the Government extraordinary powers.

The Court held that terrorism fell under a "residuary power" that was not defined in the Constitution that conferred Parliament with broad powers. Relying on to its earlier decision in *Kartar Singh* v. *State of Punjab* in which the Court upheld the constitutionality of the Terrorist and Disruptive Activities Act of 1985, the Court concluded thus:

"…the ambit of the field of legislation with respect to 'public order' under entry 1 in the State List has to be confined to orders of lesser gravity having an impact within the boundaries of the state. Activities of a more serious nature which threaten the security and integrity of the country would not be within the legislative field assigned to the states under entry 1 of the State List but would fall within the ambit of entry 1 of the Union List relating to the defence of India and in any event under the residuary powers conferred on Parliament under Article 248 read with entry 97 of the Union List".[99]

Likewise, in *Devender Pal* v. *NCT of Delhi*,[100] the Designated Court, Delhi found guilty of the accused and sentenced to death. Another ground of challenging POTA was its possible misuse as was the case with TADA cases. TADA was grossly misused and there were large numbers of acquittals. The Supreme Court turned down this contention by holding that the Court cannot go into and examine the 'need' of POTA. It is a matter of policy. Once legislation is passed, the Government has an obligation to exercise all available options to prevent terrorism within the bounds of the Constitution. The petitioners contended that section 3(3) of POTA provides that whoever 'abets' a terrorist act shall be punishable, and this provision fails to address the requirement of mens rea element. They added that this provision has been incorporated in POTA despite the contrary observation of this Court in *Kartar Singh*, wherein it was held that the word 'abets' needs to have the requisites of intention or knowledge. It should, therefore, be struck down. But this contention was not accepted. The Constitutional validity of section 14 was challenged by arguing that it gave unbridled powers to the investigating officer to compel any person to furnish information if the investigating officer had reason to believe that information would be useful or relevant to the purpose of the Act. It was argued that this provision was without any checks and amenable to misuse by the investigating officer; it did not exclude even lawyers or journalists who were bound by their professional ethics to keep the information rendered by their clients as privileged information. Hence section 14 was violative of Articles 14, 19, 20 (3) and 21 of the Constitution. The Supreme Court turned down these contentions.

It was further argued that the schedule contained in POTA, under section 18(1) giving the names of terrorist organisations was without any legislative declaration, i.e., there was nothing provided in the Act for declaring organisations as terrorist organisation. Moreover, under section 18(2) of the Act, the Central Government had been given unchecked and arbitrary powers to add or remove or amend the schedule pertaining to terrorist organisations. This was unlike the Unlawful Activities (Prevention) Act, 1967, in which an organisation could have

[98] *Id.,* para 123.

[99] *Id.,* para 43.

[100] (2002) 5 S.C.C. 234.

been declared unlawful only after the Central Government had sufficient material to form an opinion and such declaration had to be made by notification wherein grounds had to be specified for making such declaration, and that section 19 excessively delegates power to Central Government in the appointment of members to the Review Committee and that inadequate representation of judicial officers will affect the decision making and consequently it might affect the fair judicial scrutiny. Hence, sections 18 and 19 were violative of Articles 14, 19 (1) (a), 19 (1) (c) and 21 of the Constitution.

Rejecting the above contentions, the Apex Court held these sections were intra vires the Constitution on the following grounds:

i) The right of citizens to form association or union that is guaranteed by Article 19(1)(c) of the Constitution is subject to the restriction provided under Article 19(4). Under Article 19(4) of the Constitution, the State can impose reasonable restrictions in the interest of sovereignty and integrity of India. POTA is enacted to protect the same imposing restrictions under Article 19(4) of the Constitution. Hence Section 18 is not unconstitutional.

ii) The banned organisation can approach the Central Government and can prove that it is not a terrorist organisation and can subsequently approach the Central Review Committee and it is also free to exercise its Constitutional remedies. The post-decisional remedy provided under POTA satisfies the audi alteram partenu requirement in the matter of declaring an organisation as terrorist. Therefore, the absence of pre-decisional hearing cannot be treated as a ground for declaring Section 18 invalid.

iii) As per section 60, chairperson of the Review Committee will be a person who is or has been a judge of a High Court. The mere presence of non-judicial members by itself cannot be treated as a ground to invalidate section 19; and

iv) As regards the reasonableness of the restriction provided under section 18, it must be noted that the fact of declaration of an organisation as a terrorist organisation depends upon the 'belief' of the Central Government. The reasonableness of the Central Government's action must be justified based on material facts upon which it formed the opinion. Moreover, the Central Government is bound by the order of the Review Committee. Considering the nature of legislation and magnitude or presence of terrorism, it cannot be said that section 18 implies unreasonable restriction on fundamental right guaranteed under Article 19(1)(c) of the Constitution. Sections 20, 21 and 22 deal with situations where a person 'professes' (s.20) or 'invites support' 'or arranges, manages, or assists in arranging or managing a meeting; or addressing a meeting' (s.21).

v) The Apex Court accepted the contention of the petitioners that mens rea is necessary for commission of offences under these sections.

In respect of confessional statement made to police under section 32 of POTA, the Apex Court held that there are proper safeguards, judicial wisdom will surely prevail over irregularity, if any, in the process of recording confessional statement. It is for the concerned court to decide the admissibility of the confessional statement. Section 49 relates to bail. The provisions for bail are very strict. The petitioner's main grievance about this section was that under section 49 (7) a Special POTA Court could grant bail only if it is satisfied that there are grounds for believing that an accused 'is not guilty of committing such offence,' since such a satisfaction could be attained only after recording of evidence there is every chance that the accused will be granted bail only after a minimum of one year of detention etc. The Court found some

incongruities in these provisions but held them constitutional and proper. It diluted these provisions by holding that after one year of detention; the accused can resort to ordinary bail procedures under the Code of Criminal Procedure. The Apex Court held that the whole POTA as constitutional and proper. It has read *mens rea* in sections 20 and 21 where a person 'professes or invites support' or 'arranges, manages or assists in arranging' or 'managing a meeting' or addressing a meeting without knowledge or intention of encouraging or furthering or promoting or facilitating the commission of terrorism, he will not be guilty of committing the offence. On this interpretation, it was held by the Court in another case that mere expression of sympathy for the LTTE by Mr. Vaiko did not constitute an offence under POTA.[101] Vaiko was arrested in 2002 under POTA by the then Jayalalithaa Government for his speech at a MDMK meeting supporting the LTTE. He was in the high security Vellore prison for 17 months.[102] Another reprieve for an accused under POTA is that he can seek bail under the provisions of the Cr.P.C. after one year of his arrest and in such situations the rigorous bail provisions of POTA shall not apply.

Whether membership of terrorist organisation will carry any criminal liability was the issue in the following cases. In *State of Kerala* v. *Raneef*[103]the Court held that mere membership in a terrorist organization could not carry criminal liability. The defendant was a member of a terrorist organization and was injured while returning from job. The Court held that Raneef would not be penalized for merely belonging to a group since the organization was not banned. The Court held that there was no prima facie proof that the accused was involved in the crime and had thus not violated the proviso to section 43D (5) of the UAPA on bail. For deciding this case, the Court relied on *Arup Bhuyan* v. *State of Assam*[104]the case involved a challenge to the appellant's conviction under s. 3 (5) of the TADA Act, which criminalized "membership" of a terrorist gang or organization. While setting aside the conviction, Katju, J., read down section 3 (5)[105] to save it from unconstitutionality on the grounds of Article 19 and 21 of the Constitution. He did so by distinguishing passive from active membership and restricted the latter to actual commission of violence, or incitement to violence. In this case it was held that the failure to obtain mandatory sanction within the period prescribed would vitiate prosecution launched under the UAPA. In this cool, Justice Vijaya Raghavan directed the concerned authorities to "scrupulously stick to the time frame, particularly in view of the very provisions of the Act. The Court held that if the section was read literally, it would violate Article 19 of the Constitution. Therefore, 'mere membership of a banned organization would not make a person a criminal unless he resorted to violence or incited people to violence or created public disorder by violence or incitement to violence'.

Indra Das v. *State of Assam*[106]the facts of the case were like that of *Arup Bhuyan.* The Court observed that even if the appellant was a member of ULFA, it had not been proved that he was

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101 *Vaiko* v.*Deputy Superindent of Police,* decided by Madras High Court on April 29, 2004.

102 Available at httpcmsmediumtext(accessed on 22/11/2020)

103 (2011) 1 S.C.C 784.

104 (2011) 3 S.C.C 377.

105 S. 3 (5) reads: "Any person who is a member of a terrorist's gang or a terrorist organisation, which is involved in terrorist acts, shall be punishable with imprisonment for a term which shall not be less than five years, but which may extend to imprisonment for life and shall also be liable to fine".

106 (2011) 3 S.C.C. 380.

an active member and not merely a passive member. Hence, the decision in *Arup Bhuyan* [107]squarely applies in this case also. In this case, the Court while endorsing the decision in *Arup Bhuyan* held that reading section 20 of the UAPA literally would be inconsistent with fundamental rights (primarily Article 19) and principles of democracy. Thus, the Court read down section 3(5) of TADA and rejected the principle of 'guilt by association' in which membership is penalised whether further proof that there was specific intent to further the illegal aims of the organization[108]

The Courts have time and again upheld the constitutionality of anti-terror laws. However, none of the verdicts pronounced by the courts have distinguished the executive powers of the Union and State Government pertaining to security and defence of India the Supreme Court has fairly resolved the issue and upheld the legislative competence of Parliament to enact anti-terror laws. The approach of the judiciary was that there is a substantial difference between the ordinary criminal laws and anti-terror laws as the nature of 'terrorist acts', under the TADA, POTA, or UAPA, cannot be equated with mere ordinary laws and related crimes.

Arrest and detention[109] in terrorism cases were the contentious issues in number of cases. The Supreme Court in *State (NCT of Delhi)* v. *Navjot Sandhu*,[110] clarified that section 52(2) of POTA goes a step further than the constitutional guarantee in Article 22(1) and 'casts an imperative on the police officer to inform the person arrested of his right to consult a legal practitioner. In this case the accused persons were not informed of their right to consult a legal practitioner either at the time of arrest, or even later when POTA offences were added.

The time of keeping the under-trial prisoners arrested in terrorism cases was the major issue in many cases. When TADA was repealed, the only option was to resort back to the provisions of Cr P C. The modification of section 167(2) of Cr P C entailed that if investigation could not be completed within 90 days and if the court was satisfied with the report of the Public Prosecutor indicating the progress of the investigation and specific reasons for detaining the accused beyond the period of 90 days, it could extend the said period up to 180 days. Section 49(2)(b) provides inbuilt safeguards against its misuse by mandating filing of an affidavit by the investigating officer to justify the prayer and in an appropriate case the reason for delayed motion.[111] This position was reaffirmed, though not explicitly, in the *Mulund Blast* case[112]and POTA, some latitude was given to the investigating machinery by providing for extension of time to complete investigation, this extension was not to be granted as a matter of

In the significant judgment of *State of Maharashtra* v. *Mohammed Ajmal Mohammad Amir Kasab*[113], In the Mumbai attack case, Ajmal Kasab was convicted under many different Central Acts like IPC for offences[114] such as murder, criminal conspiracy, waging of war, collecting

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107 *Supra* n. 114.

108 *Supra* n. 116, para 11

109 The provisions for arrest under anti-terrorism legislations were section 20(7). Section 49(5) of POTA and section 43D (4) of UAPA which states, 'Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person accused of having committed an offence punishable under this Act.'

110 (2005) 11 S.C.C. 600.

111 Clarified by the court in *Maulvi Umari* v. *State of Gujarat,* (2004) 6 S.C.C. 672.

112 *Ateef Nasir Mulla* v. *State of Maharashtra,* (2005) 7 S.C.C. 29.

113 2011 SCC Online Bom 229.

114 IPC sections 302, 120B, 121, 122, and 392.

arms with intention of waging war, robbery and wrongful confinement; UAPA[115] for commission of terrorist and unlawful activities; and Arms Act[116] 1959 and Explosives Act, 1884[117] for the offences relating to carrying and using of arms and explosives.[118] The important issue in this case was that whether whenever one committed an offence under section 3(1) TADA seeking to 'overawe the Government of India, it satisfied the intention required under section 121[119] IPC. The Court clarified that 'though every terrorist act does not amount to waging war, certain terrorist acts can also constitute the offence of waging war and there is no dichotomy between the two'. The Court went on to state that despite the overlap between the two acts, the degree of animus or intent and the magnitude of acts done were indicators to help decide whether the terrorist act amounted to waging war. Thus, according to the Court the difference was a matter of degree, but the distinction was by no means clear, and gets even thinner if the terror act is compared with an act aimed at 'overawing the Government by means of criminal force'. In this case, the Court held that a 'terrorist act' would automatically exclude the act from the purview of section 121, since the provisions of Chapter IV of UAPA and those of Chapter VI of IPC, including Section 121, basically cover different areas. While Kasab's trial is hailed as one of the quickest trial-to-execution cases in the history of India taking a little less than four years, it is also criticized for violating certain due process measures followed in ordinary criminal cases.

These judicial pronouncements have proved that the Supreme Court time and again adopted a compound model of constitutional review by invalidating executive power and it recommended nonbinding checks and balances. Few recommendations of the Court were substantial and concrete, like the proposal to establish a review committee by the Central Government to assess how TADA was being used.[120] However, most of the other recommendations seemed superfluous. The Court cautioned the trial judges to be vigilant and appreciative of the fact that custodial confessions could have been coerced. When the Court attempted to offer nonbinding suggestions, it could have perused international standards. The executive's extraordinary national security powers of these 'security laws' ranging from the earliest to the latest one, evidence similar content bestowing extensive powers to the executive and similar methods and mechanisms attendant to the executive powers that have been relayed across[121]. Hence, it is feasible to recognize significant and the inveterate features of these laws that augment the executive's powers.[122] The significant role of courts in combating against terrorism can be summarized as follows:

Courts all over the world enunciated the need to protect the human rights. Terrorism is obviously an act of human rights violation in which thousands of innocent people are targeted

115 Sections 13 and 16 of UAPA.

116 Carrying of arms (Arms Act, 1959, sections 25(1B) (a), 25(1A)); using arms (Arms Act, section 27).

117 Section 9B(1)(a), (b) (for import, possession, use and transportation of explosives under the Explosives Act).

118 Section 121.

119 Offence of waging war against country.

120 Madan, *Combating Terrorism: Strategies of Ten Countries,* Manan Publications (2003), p. 436.

121 David, *Comparative Counter Terrorism Law,* Cambridge University Press (2015), p.198.

122 Yashwant J. Naik., "A Critic on The Anti-Terrorism Laws in India" [2016] *SSRN Electronic Journal,* (accessed on 02/03/2015).

and assassinated. In number of cases[123] the courts pointed out that 'it becomes the duty of the courts to see that terrorist suspects are not tortured are worthy of a democratic state'. In one of these cases the court ruled that the suspension of writs at the time of civil unrest will be a human rights violation as it will torture the innocents. It has also been noted in many cases that political and religious factors becomes an impediment to implement anti-terrorism legislations which violates the equality provisions.[124]

Objectives of Antiterrorism legislations results in infringement of fundamental rights: Many courts while deciding the terrorism legislations confronted with the question of legislative intentions *vis s vis* violation of fundamental rights. Taking note of this situation, the courts categorically held that 'the courts should maintain the proportionality between the objectives of antiterrorism legislations and fundamental rights of the citizens.

Judiciary act as a mediator between executive and legislature in terrorism cases: In many cases the courts have also confronted with situations where they must review an executive action as justified by the provisions of the antiterrorism legislations. It provides an opportunity to the legislature to cross check the validity of an executive action as per the law. In such situations the courts can even suggest amendments in law or enact new antiterrorism laws.

10. Conclusion

This Chapter deals with the anti-terrorism laws and the judicial response in India. This part begins with examining the constitutional provisions and safeguards provided for the protection of the individuals. The Chapter then proceeds to make an analysis of each of the legislations provided by Indian parliament to address the challenge of terrorism. The evaluation from the preceding discussion arrives at the following conclusion.

The extraordinary powers endorsed on the police and security forces under the laws, such as powers to search, seize, forfeit, compel confession, shoot at sight, preventively detain etc., all have been major cause of concern because there have been instances where they were widely abused or misused. The blanket provision of declaring an organisation to be a terrorist one and thereby creating a status offence, where any association with the organisation is deemed to be an offence, is a provision that has invariably been questioned in several cases. Further, the provision to prosecute offences under the statutes in special courts and the limit on the judicial review of the actions perpetrated under these laws have proved detrimental to the citizens of India beyond expectation and have been uniformly challenged in all the statutes. However, it is to be noted that in many cases the question of legislative competence of the Central Government in enacting such laws has been put before the court. But in all times the Court upheld the Constitutional validity of the legislations.

The constitutionality of anti-terrorism legislations is challenged because of making their intrusions into fundamental rights, liberty, and basic human rights of individuals. The courts have been consistently adhering to the method of judicial restraint. The Supreme Court, however, emphasised the need for balancing the competing interests of national security with civil liberties of the individuals. Regarding the task of evaluating executive action under the anti-terrorism legislations, the Court has been insisting upon procedural guarantees to avoid

123 *Boumediene* v. *Bush,* 128 S.Ct. 2229 at 2247.

124 *Charkaoui* v. *Canada,* [2007] 1 S.C.R. 350.

misuse of subjective satisfaction of the officials concerned. On a broader perspective, it may be stated that the courts have stuck to a hands-off approach whenever countered with questions of broader legislative policy and framework. However, when the Court was concerned with individual cases, it has investigated ensure that the executive did not overstep the legislative mandate.

A lot of criticism with appreciable evidence mounted over years for human rights abuses under TADA and subsequently the TADA was repealed in 1995. The Prevention of Terrorism Act (POTA) was enacted in 2001. It has got the same fate. Parliament amended the UAPA of 1967. The amendment incorporated within the UAPA various provisions from the earlier POTA and TADA with minor alterations, some additions, and miniscule dilutions.

Counterterrorism strategies and laws of almost all democratic countries necessarily undermine human rights of citizens and inhabitants of the respective states, especially the rights of civil society groups, media houses and journalists, and human rights activists. The rights to life, dignity of the human person, privacy, free and fair trial, freedom from all forms of discrimination, unlawful detainment, torture, association and expression, the presumption of a suspect innocent until proven guilty, and the rights ascribed to refugees are some of those which the counterterrorism strategies fell short of.