

# Terrorism & Legal Policy in India

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The authority and legitimacy of modern nation states has come under a severe challenge as a result of rising trends in terrorism. Confronted with one of the most brutal forms of violence, a suitable or adequate response to terrorism is still to be framed, even as a proper context of evaluation and a sufficient understanding of its causation and methodology remain elusive. The uniqueness of terrorism lies in its complex inner dimensions, its continuous and rapid adaptations, and its wide variations across different theatres. Significantly, the transformation of terrorism over the past twenty years has been startling, with rising anxiety over its burgeoning lethality.

Traditionally, terrorism was considered to be a coercive tactic, sometimes adopted as part of a larger guerrilla strategy, in that actions created threats of worse to come if political demands were not met, and these demands tended to be geared to ending foreign occupation or to securing the objectives of a secessionist movement.<sup>1</sup> The rise of modern terrorism, however, has been far more complex, tied to diverse ideological and political goals, and often astounding in the scale of violence and the ambitions of its practitioners. The weapons used in the modern terrorist attacks

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<sup>1</sup> Lawrence Freedman, "A New Type Of War," in Ken Booth and Tim Dunne, *World In Collision*, Hampshire: Palgrave, 2002, p. 37.

have grown deadlier and far more accurate than the archaic guns and daggers of the early revolutionary terrorist and as terrorist groups make increasingly persistent efforts to acquire radiological, biological and chemical and weapons of mass destruction, the future outlook becomes more ominous. The situation is compounded further by the availability of enormous financial resources and new communications equipment that has immensely empowered both the terrorist 'footsoldier' and his masters.

The power of the media has also dawned on violent players, as is evident in the more symbolic ways in which acts of violence are executed or their targets selected. Yonah Alexander notes that terrorists have used the media to, first, enhance the effectiveness of their violence by creating an emotional state of extreme fear in target groups, and thereby ultimately alter their behaviour and dispositions, or bring about a general or particular change in the structure of government or society; and, second, to draw forcibly and instantaneously, the attention of the whole world to themselves in the expectation that these audiences will be prepared to act or, in some cases, to refrain from acting, in a manner that will promote the cause they presumably represent.<sup>2</sup> Terrorism, then, like advertising, increases the effectiveness of its messages by focussing on spectacular incidents and by keeping particular issues alive through repetition.<sup>3</sup> This is a far cry from the age when 'anarchists' met behind close doors, relying on mouth-to-ear communication to mobilize support for the 'cause', to project their secret and forbidden ideologies, and for the effective execution of their missions.

The recent spurt in terrorist incidents across the world, especially the 9/11 attacks, and the growing recognition of a burgeoning danger have prompted a number of countries to pass anti-terror laws to meet new contingencies. The spurt in anti-terror legislation appears to reflect a measure of surprise among governments around the world at the magnitude and character of the new wave of terrorist activities. A natural corollary to this

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<sup>2</sup> Yonah Alexander, "Terrorism and the Media: Some Considerations", in Yonah Alexander, David Carlton and Paul Wilkinson, eds., *Terrorism: Theory and Practice*, Colorado: Westview Press, p. 1.

<sup>3</sup> *Ibid*, p. 161.

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

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

On the one hand, the paramount social interest in the general security, which as an interest in peace and order dictated the very beginnings of law, has led men to seek some fixed basis of a certain ordering of human action which should restrain magisterial as well as individual wilfulness and assure a firm and stable social order. On the other hand, the pressure of less immediate social interests, and the need of reconciling them with the exigencies of the general security and of making new compromises because of continual changes in society have called for readjustment at least of the social order. They have called continually for overhauling of legal precepts and for refitting them to unexpected situations.<sup>4</sup>

Nevertheless, reservations have always existed regarding the exercise of the power to refit laws to unexpected situations; such reservations are rooted in considerations of morality, the fear of criticism, and the fear of high-handedness. Nevertheless, the exercise of power is often a necessary imperative of history. As Fukuyama puts it,

...much as people would like to believe that ideas live or die as a result of their inner moral rectitude, power matters a great deal. German fascism didn't collapse because of its internal moral contradictions, it died

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<sup>4</sup> Roscoe Pound, *An Introduction To The Philosophy Of Law*, London: Yale University Press, 1954, p. 2.

because Germany was bombed to rubble and occupied by Allied armies.<sup>5</sup>

Much of the reluctance in accepting the need for special anti-terrorism legislation is based on the fallacy of equating 'terrorism' with other forms of violence, and the consequent argument that the prevailing or 'ordinary' laws that have been enacted to deal with the latter are sufficient to take care of the former.<sup>6</sup> Thus, Walter Laqueur describes how it was widely believed that terrorism was a response to injustice and that the terrorists were people driven to desperate actions by intolerable conditions, be it poverty, hopelessness, or political or social oppression. Following this reasoning, the only way to remove or at least to reduce terrorism is to tackle its sources, to deal with the grievances and frustrations of the terrorists, rather than simply trying to suppress terrorism by brute force.<sup>7</sup>

This reasoning is, however, substantially flawed and ignores the unique social, political and ideological factors that contribute to, and are exploited by, the processes of terrorist mobilization. There is, further, little empirical evidence of a direct linkage between specific socio-economic conditions and the emergence of terrorist movements.<sup>8</sup> There is, moreover, an element of defeatism

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<sup>5</sup> Walter Laqueur, *No End To War*, New York: Continuum, p. 11.

<sup>6</sup> "For five years, the Indian 'intellectual', jurist and policy maker has failed to see the obvious, failed to understand the threat to national stability and democracy, and failed – indeed, stubbornly refused and resisted all attempts – to evolve legal instruments to confront and eliminate the threat while this can still be done at a relatively smaller price..." Vijendra Singh Jafa, "Ten O'clock to Bed Insouciance in the face of Terror", *Faultlines: Writings on Conflict & Resolution*, vol. 5, May 2000, Delhi, p. 27.

<sup>7</sup> Francis Fukuyama, "History and September 11," in Booth and Dunne, *World In Collision*, p. 34.

<sup>8</sup> "Many of the distortions in international research and perceptions....are born, instead, out of a lack of adequate information, data and critical inputs from, and research by, independent agencies directly in contact with the actors in and areas of the conflict, which could constitute a reliable backdrop to academic analysis by commentators located hundreds or thousands of miles away from the actual ground situation about which they are writing, and with which their familiarity is based on fitful and brief 'field tours,' during which they are often 'guided' by interested parties. These patterns of research and writing reflect an acute case of the larger and "continuing misuse of theoretical models and the shallowness of methodological approaches" prevalent in the entire field of terrorism studies." Ajai Sahni, "Social Science and Contemporary Conflicts: The Challenge of Research on Terrorism," *Faultlines: Writings on Conflict & Resolution*, vol. 9, July 2001, Delhi, p. 143.

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

The lack of agreement on a definition of ‘terrorism’ has been another major obstacle to meaningful international countermeasures and laws. Cynics have often commented that, “one man’s terrorist is another man’s freedom fighter,” an argument at once immensely strong and entirely superficial. But this argument is based, as Ajai Sahni rightly notes,

... on a contrafactual expectation of unique identity. In truth, individuals have multiple identities – a man may be father and murderer; husband and rapist. We also share a multiplicity of transient identities – we are, for example, at particular times, workers, shoppers, hosts or guests. A man, on this reasoning, may be both terrorist *and* freedom fighter. The latter identity rests on his motives – what he is fighting *for*. The former relates to the methods he adopts in this fight – the targeting, specifically, of civilians, to achieve his ends. Terrorism, thus conceived, can be adopted for one among many motives – to fight for freedom, for particular environmental policies, for a ban on abortions, for animal rights, among others – and remains terrorism as

long as the method or means utilized involve the intentional targeting of civilians.<sup>9</sup>

If, however, terrorism is defined strictly in terms of attacks on non-military targets, a range of attacks on military installations and soldiers' residences would escape the scope of the definition. In order to cut through the Gordian definitional knot, terrorism expert Alex P. Schmid suggested in 1992, in a report for the then United Nations (UN) Crime Branch, that it might be a good idea to take the existing consensus on what constitutes a 'war crime' as a point of departure. "If the core of war crimes – deliberate attacks on civilians, hostage taking and the killing of prisoners – is extended to peacetime, we could simply define acts of terrorism as 'peacetime equivalents of war crimes'."<sup>10</sup>

Difficulties with the definition of terrorism, nevertheless, persist, many of them motivated by those who engage in, support or benefit from, activities widely perceived as such. Nevertheless, it is possible to clearly identify the essential considerations that would enter into an assessment of such acts: terrorism can, thus, generally be described as the systematic use of terror or unpredictable violence against governments, the public, or individuals, to attain a political objective. Terrorism has been used by political organizations with both rightist and leftist objectives, by nationalistic and ethnic groups, by revolutionaries, by groups pursuing particular political or ethical ends, and by the armies and secret police of governments themselves.

Counter-terrorism legislation is, moreover, entirely consistent with a jurisprudential history of special laws that have been enacted from time to time to deal with special situations, and India's record is no exception. The first preventive detention law was introduced by the British in 1793, and was aimed solely for the purpose of detaining anybody who was regarded as a threat to the British settlement in India. The East India Company in Bengal subsequently enacted the Bengal State Prisoner's Regulation, which was to have a long life as 'Regulation III of 1818'. An extra-Constitutional ordinance, opposed to all the fundamental liberties which the colonial state would later pretend to be bound

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<sup>9</sup> Ajai Sahni, personal notes shared with the author, May 27, 2003.

<sup>10</sup> See [http://www.unodc.org/unodc/terrorism\\_definitions.html](http://www.unodc.org/unodc/terrorism_definitions.html).

by, Regulation III provided for the indefinite confinement of individuals against whom there was insufficient ground to institute any judicial proceeding. Regulation III was the most effective tool in the hands of the British to quell any political violence.

The beginning of the 20<sup>th</sup> century witnessed an increase in the revolutionary movement in India, with the birth of many underground groups pursuing the goal of independence through violent means. The period also marked the emergence of several legislations to quell the rising tide. In 1908, the government passed the Newspapers (Incitement to Offences) Act and the Explosive Substances Act and, shortly thereafter, the Indian Press Act, the Criminal Tribes Act, and the Prevention of Seditious Meetings Act. A majority of these legislations were aimed at breaking the back of the revolutionary movements by curbing meetings, printing and circulation of seditious materials and propaganda, and by detaining suspects. The Foreigners Ordinance of 1914 sought to restrict the entry and movement of foreigners in India. The Defence of India Act (1915) allowed suspects to be tried by special tribunals, whose decisions were not subject to appeal.

The Defence of India Act was to expire shortly after the end of the First World War and the British Government had to come up with a new law to counter new tendencies. Based on the recommendations of Justice Rowlatt, Chairman of the Committee appointed to curb seditious movements in India, the Rowlatt Act, also known as the Anarchical and Revolutionary Crimes Act, was passed in 1919, giving unbridled powers to the colonial Government to arrest and imprison suspects without trial and crush civil liberties. The violent movement was blunted in the 1930s by the tough regulations passed by the Government, including the Constitutional Reforms of 1935.

After attaining Independence, the violence witnessed during Partition forced the Government of Free India to pass the Punjab Disturbed Areas Act, Bihar Maintenance of Public Order Act, Bombay Public Safety Act, and Madras Suppression of Disturbance Act, aimed at curbing forces that were using religion to incite violence. The rise of the Naxalite (Left-wing extremist)

movement prompted the West Bengal government to pass the West Bengal (Prevention of Violent Activities) Act of 1970.

The last three decades have witnessed a number of legislations being enacted to tackle various specific contingencies: Jammu and Kashmir Public Safety Act (1978); Assam Preventive Detention Act (1980); National Security Act (1980, amended 1984 and 1987); Anti-Hijacking Act (1982); Armed Forces (Punjab and Chandigarh) Special Powers Act (1983); Punjab Disturbed Areas Act (1983); Chandigarh Disturbed Areas Act (1983); Suppression of Unlawful Acts Against Safety of Civil Aviation Act (1982); Terrorist Affected Areas (Special Courts) Act (1984); National Security (Second Amendment) Ordinance (1984); Terrorist and Disruptive Activities (Prevention) Act (1985, amended 1987); National Security Guard Act (1986); Criminal Courts and Security Guard Courts Rules (1987) and the Special Protection Group Act (1988).

Although these laws were enacted to meet special situations, most of them were not directed against the larger menace of terrorism. The Terrorist and Disruptive Activities (Prevention) Act (TADA), 1987, and the Prevention of Terrorism Act (POTA), 2002, are the only Acts, which can correctly be termed anti-terrorism laws. The state, through these two laws, for the first time attempted to create legislative instruments to curb terrorist activities in India, recognizing the fact that terrorism was a special crime that needed special laws for an effective response to be created.

A clear distinction between 'ordinary crime' and terrorism is, consequently, important as is well illustrated by the Supreme Court's observations in *Hitendra Vishnu Thakur vs. State of Maharashtra* that,

... 'terrorism' has not been defined under Terrorist and Disruptive Activities (Prevention) Act (TADA) nor is it possible to give a precise definition of 'terrorism' or lay down what constitutes 'terrorism'. It may be possible to describe it as use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. There may be death, injury, or destruction of



property or even deprivation of individual liberty in the process but the extent and reach of the intended terrorist activity travels beyond the effect of an ordinary crime capable of being punished under the ordinary penal law of the land and its main objective is to overawe the Government or disturb harmony of the society or 'terrorise' people and the society and not only those directly assaulted, with a view to disturb even tempo, peace and tranquillity of the society and create a sense of fear and insecurity. A terrorist activity does not merely arise by causing disturbance of law and order or of public order. The fallout of the intended activity must be such that it travels beyond the capacity of the ordinary law enforcement agencies to tackle it under the ordinary penal law.<sup>11</sup>

The Court added further that,

What distinguishes 'terrorism' from other forms of violence therefore appears to be the deliberate and systematic use of coercive intimidation. It is therefore essential to treat such a criminal and deal with him differently than an ordinary criminal capable of being tried by the ordinary courts under the penal law of the land.<sup>12</sup>

### **Anti Terror Laws: Legality, Controversy & the Judicial Response**

The ground realities in India are stark and statistics provide a grim reminder of the increasing threat that terrorism constitutes. India has lost over 56,000 lives to terrorism over the last decade in the major irregular and sub-conventional wars that have afflicted the country.<sup>13</sup> A majority of these fatalities have occurred in Jammu and Kashmir (J&K) and in the Northeast

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<sup>11</sup> (1994) 4 SCC 602.

<sup>12</sup> Ibid, p. 602.

<sup>13</sup> The fatalities comprise civilians, terrorists and security forces personnel who died between 1992-2003 in Jammu & Kashmir, Punjab, Manipur, Meghalaya, Mizoram, Nagaland, Tripura, Assam and Andhra Pradesh. Source: South Asia Terrorism Portal; [www.satp.org](http://www.satp.org).

alone as a result of the Pakistani proxy war in the former, and a range of separatist insurgencies in the latter. A significant number of deaths have also occurred due to Left wing extremism (referred to as Naxalism in India) and retaliatory violence in some areas of the States of Andhra Pradesh, Maharashtra, Madhya Pradesh, Orissa, Chhattisgarh, Jharkhand, Uttar Pradesh, West Bengal and Bihar.

Since Independence, free India has had to contend with a number of disparate elements and groups seeking political ascendancy through violence, or pursuing secessionist goals. The Northeast has long been a troubled area, with a heady mix of the assertion of tribal identities and a few influential leaders, secessionist movements grew in this part of the country into large scale agitations which, in many cases, transformed themselves into terrorist movements. In the 1980s and the 1990s, the secessionist movements in Punjab and J&K provided no respite to the state and its security forces. The proliferation of terrorist groups in the country has also been tremendous, indeed, unprecedented in comparison to in any other theatre of conflict in the world. In J&K alone, there are reportedly 32 terrorist groups operating independently, and occasionally in tandem.<sup>14</sup> In the Northeast, some 60 terrorist outfits have been involved in terrorism related brutalities.<sup>15</sup> As compared to other countries where terrorism is ordinarily localised to a particular area or region, India has witnessed the pugmarks of terrorism across the whole country. An analysis of terrorist incidents demonstrates the sheer spread of the phenomenon. Major terrorist attacks have, for instance, been witnessed in places like, Vellithirippur, (1998)<sup>16</sup> and Marudayar (1987)<sup>17</sup> in Tamil Nadu; Faizabad in Uttar

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<sup>14</sup> See South Asia Terrorism Portal; [www.satp.org](http://www.satp.org).

<sup>15</sup> Ibid.

<sup>16</sup> In December 1998, the Tamil Nadu Retrieval Troops, a secessionist group fighting for a separate homeland for Tamils joined hands with forest brigand Veerappan, attacked a police station in Vellithirippur, Tamil Nadu, and looted weapons.

<sup>17</sup> In March 1987, Tamil Nadu Liberation Army, a group which believes that independence of Tamil Nadu from 'Indian rule' is essential for the betterment of the people of Tamil Nadu and that armed struggle is necessary to achieve independence, carried out a bomb blast at the railway bridge at Marudayar near Tiruchi. The explosion derailed the Rockfort Express killing 25 persons.

Pradesh (2000)<sup>18</sup>; Kolkata in West Bengal (2002)<sup>19</sup> and Mumbai in Maharashtra (2003)<sup>20</sup>, to name a few. Between 1992 and 2003, at least 21,497 civilians and 7,046 security forces personnel have been killed in terrorist attacks, while 26,072 terrorists have been killed in counter-offensive.<sup>21</sup>

The saddening part in this war against terrorism has been the absence of a proper legal apparatus in the country, which could provide a mechanism for the conviction and legal punishment of the terrorists arrested in counter-terrorism operations. The difficulties in taking a terrorist up to the point of conviction have been pointed out by Veeranna Aivalli, Commissioner of Security (Civil Aviation), Bureau of Civil Aviation Security, in a letter to the Law Commission of India, dated February 12, 2000, where he stated,

...there is another difficulty and that is the collection of evidence in cases where the search, seizure and arrest in areas where there is no habitation and many a time these have been by security forces. In such a case, the arrested persons' confession to the security forces leading to the recovery of arms and ammunition and explosives is the only thing, which can be brought on record. Even the security force personnel do not come forward for tendering evidence because they keep on moving from place to place for performance of their duties not only within Jammu & Kashmir (J&K) but even outside J&K and sometimes

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<sup>18</sup> On August 14, 2000, seven persons died as a blast ripped through the Ahmedabad-bound Sabarmati Express near Faizabad in Uttar Pradesh. The bomb was planted by a member of the Student Islamic Movement of India, an organisation of young fanatical students who had declared *Jehad* against India.

<sup>19</sup> On January 22, 2002, a group of terrorists attacked the American Centre in Kolkata, killing four police personnel. The Asif Reza Commando Force claimed responsibility for the attack.

<sup>20</sup> On July 29, 2003, a bomb blast in a bus in Mumbai killed three persons and injured 47 others. It was allegedly carried out by the Lashkar-e-Toiba along with Ahle-Hadees, an Islamist extremist group allegedly linked to a Saudi Arabia-based Wahabi sect.

<sup>21</sup> The fatalities comprise of civilians, terrorists and security force personnel who died between 1992-2003 in J&K, Punjab, Manipur, Meghalaya, Mizoram, Nagaland, Tripura, Assam and Andhra Pradesh. Source: [www.satp.org](http://www.satp.org).

outside India. The security force personnel are reluctant to depose in any case as they feel that they are not attuned for this kind of exercise. In the last 15 years of militancy in J&K, thousands of people have been arrested, lakhs of weapons seized and millions of rounds collected and quintals of explosive material seized. These figures are real eye openers and the fact that not a single case has ended in conviction nor has there been any recording of evidence and even this itself is very disturbing.....<sup>22</sup>

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

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

1.1 In 1994, the Supreme Court, in the landmark judgement of *Kartar Singh vs. State of Punjab* dealt with various provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987 and upheld the constitutional validity of the Act. From the very outset, the Court, looked into the matter in a broad perspective. Acknowledging the fact that the existing situation in the country was peculiar, the Court observed that,

...deplorably, determined youths lured by hardcore criminals and underground extremists and attracted by the ideology of terrorism are indulging in committing serious crimes against humanity. In

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<sup>22</sup> See <http://www.lawcommissionofindia.nic.in/tada.htm> for the 173<sup>rd</sup> report on the Prevention of Terrorism Bill, 2000.

spite of the drastic actions taken and intense vigilance activated, the terrorists and the militants do not desist from triggering lawlessness if it suits their purpose.<sup>23</sup>

Further, realising the severity of the situation, the Court noted: “No one can deny these stark facts and naked truth by adopting an ostrich like attitude completely ignoring the impending danger.”<sup>24</sup>

- 1.2 Apart from this danger of physical violence, there is the further complication of existing prison realities. Prisons in India are overwhelmingly populated by undertrials. According to statistics compiled by the Custodial Justice Cell of the National Human Rights Commission, 225,817 of 304,893 or 74.06 per cent of the total prison population is comprised of those awaiting trial. The total jail capacity in India is for 232,412 prisoners, which makes the total prison population 31 per cent higher than capacity, clearly emphasizing the urgent need for a speedier justice mechanism.<sup>25</sup>
- 1.3 The right to speedy trial is not incorporated in any provision of the constitution, yet it is an inherent principle of any criminal justice system. A delayed trial harms the prosecution as well as the accused. Delayed prosecution means weakened prosecution, as witnesses are hard to find and memories become hazy as time goes by; there are also increasing probabilities of witnesses turning hostile if the trial is prolonged. For the accused, the delay in the trial means no end to incarceration in one of the numerous and pitiable jails in the country.
- 1.4 The Supreme Court in *Kedra Pehadiya vs. State of Bihar* had observed, “It is a crying shame upon our adjudicatory system which keeps men in jail for years on end without a trial.”<sup>26</sup> The Court added further:
- ... no one shall be allowed to be confined in jail for more than a reasonable period of time, which we

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<sup>23</sup> (1994) 3 SCC 569, p. 621.

<sup>24</sup> Ibid, p. 622.

<sup>25</sup> “Prisons filled with undertrials: NHRC”, *The Hindu*, Chennai, May 3, 2003.

<sup>26</sup> 1981 Cr.L.J. 481.

think cannot and should not exceed one year for a session trial... we fail to understand why our justice system has become so dehumanised that lawyers and judges do not feel a sense of revolt at caging people in jail for years without trial.<sup>27</sup>

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

No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would be foul of Article 21. There can, therefore, be no doubt that speedy trial and by speedy trial we mean reasonably expeditious trial, is an integral part of the fundamental right to life and liberty enshrined in Article 21.<sup>28</sup>

1.5 This principle of providing speedy trial was reiterated and reaffirmed in the Kartar Singh case, even as the question of enactment of new procedures for speedy trial of terrorists under TADA was challenged.

The provisions prescribing special procedures aiming at speedy disposal of cases, departing from the procedures prescribed under the ordinary procedural law are evidently for the reasons that the prevalent ordinary procedural law was found to be inadequate and not sufficiently effective to deal with the offenders indulging in terrorist and disruptive activities...<sup>29</sup>

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<sup>27</sup> Ibid, p. 482. This view was elaborated in *Maneka Gandhi vs. Union of India*, AIR 1978 SC 597, where the Supreme Court observed that "there can be no doubt that speedy trial and by speedy trial we mean a reasonably expeditious trial - is an integral part of fundamental rights to life and liberty enshrined in Article 21."

<sup>28</sup> AIR 1979 S C 1360. Even apart from Art. 21 the constitutional mandate for speedy justice is inescapable. Article 39A of the Directive Principles of State Policy lays down that "the State shall secure that the operation of the legal system promotes justice... to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities." While interpreting this provision, the Supreme Court in *Babu vs. Raghunathji* (AIR 1976 SC 1734) has held that "social justice would include 'legal justice' which means that the system of administration of justice must provide a cheap, expeditious and effective instrument for realization of justice by all section of the people irrespective of their social or economic position or their financial resources."

<sup>29</sup> Kartar, p. 653.

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

Notwithstanding anything contained in the Code, but subject to the provisions of section 299 of the Code, a Special Court may, if it thinks fit and for reasons to be recorded by it, proceed with the trial in the absence of the accused or his pleader and record the evidence of any witness, subject to the right of the accused to recall the witness for cross-examination.<sup>30</sup>

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

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

...the rule of differentiation is that in enacting laws differentiating between different persons or things in different circumstances which govern one set of persons or objects such laws may not necessarily be the same as those governing another set of persons or objects so that the question of unequal treatment does not really arise between persons governed by different conditions and different set of circumstances.<sup>31</sup>

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<sup>30</sup> Section 30 (5) POTA Act, 2002.

<sup>31</sup> *Kartar*, p. 672.

Further,

...the persons who are to be tried for offences specified under the provisions of TADA Act are a distinct class of persons and the procedure prescribed for trying them for the aggravated and incensed nature of offences are under different classification distinguishable from ordinary criminals and procedure.<sup>32</sup>

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

- 2.1 One of the matters of great concern for human rights activists with regard to POTA is the provision relating to the admissibility of 'confessional statements' as evidence under the Act. The National Human Rights Commission (NHRC) has expressed the view that the validation of confessions made to police officers would increase the possibility of coercion and torture in securing confessions, and would consequently be inconsistent with Article 14 (3) (f) of the International Covenant on Civil and Political Rights (ICCPR) which requires universal entitlement to the guarantee of not being compelled to testify against oneself or to confess guilt.<sup>33</sup>

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<sup>32</sup> Ibid, p. 673.

<sup>33</sup> See <http://www.nhrc.nic.in/>. This view is apparently based on Justice Sahai's minority opinion in Kartar Singh's case where the Hon'ble Judge pointed out that there is a basic difference between the approach of a police officer and a judicial officer. A judicial officer is trained and tuned to reach the final goal by a fair procedure. The basis of a civilised jurisprudence is that the procedure by which a person is sent behind the bars should be fair, honest



## 2.2 Earlier, Section 15 of TADA had laid down:

...a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under this Act or rules made thereunder...<sup>34</sup>

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

...the police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily.<sup>35</sup>

2.3 This provision was one of the main grounds of a legal and constitutional attack against TADA launched by former Law Minister Ram Jethmalani. Concerns were primarily raised on the methods that would be employed by the police to gain confessions from the accused.

2.4 However, this procedure to record confessions was streamlined by the Supreme Court in *Kartar Singh*, where six

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and just. A police officer is trained to achieve the result irrespective of the means and methods that are employed to achieve it. So long as the goal is achieved the means are irrelevant and this philosophy does not change by the hierarchy of the officer.

<sup>34</sup> Section 15, TADA, 1987. Justice S. Ratnavel Pandian delivering the majority view in the *Kartar Singh* case upheld the validity of section 15 of the TADA and laid down certain guidelines to be followed by the police officer while recording a confession. In the case of *Lal Singh vs. the State of Gujarat* (2001 3 SCC 221) when it was pointed out that the guidelines laid down in the *Kartar Singh* case were not followed, the Supreme Court held that confession recorded by a police officer without following the guidelines is still admissible. In the case of *S.N. Dube vs. N.B. Boir* (2000 SCC Cr. 343) the Supreme Court ruled that it is sufficient if the court is able to conclude that the requirements have been substantially complied with by a police officer.

<sup>35</sup> Section 15 (2) TADA, 1987.

safeguards were defined, which was to be employed while recording a confession. POTA incorporated these safeguards in its Section 32, which required that,

- A police officer shall, before recording any confession made by an accused under sub-section (1) of Section 32, explain to such person in writing that he is not bound to make a confession and that if he does so, it may be used against him.
- Further, provided that, where such person prefers to remain silent, the police officer shall not compel or induce him to make any confession.
- Under clause (3) of the same section it is laid down that the confession shall be recorded in an atmosphere free from threat or inducement and shall be in the same language in which the person makes it.
- Under clause (4) the person from whom a confession has been recorded under sub-section (1), shall be produced before the Court of a Chief Metropolitan Magistrate or the Court of a Chief Judicial Magistrate along with the original statement of confession, written or recorded on mechanical or electronic device within forty-eight hours.
- Further, under clause (5), the Chief Metropolitan Magistrate or the Chief Judicial Magistrate, shall, record the statement, if any, made by the person so produced and get his signature or thumb impression and if there is any complaint of torture, such person shall be directed to be produced for medical examination before a Medical Officer not lower in rank than an Assistant Civil Surgeon and thereafter, he shall be sent to judicial custody.
- Another significant departure from TADA is that if the detainee's confession is not recorded before a magistrate within 48 hours, such confession fails to carry credence.

2.5 These substantial changes with regard to the admissibility of and safeguards relating to confessions under POTA have been appreciated by earlier critics of TADA. Ram Jethmalani, who had vigorously denounced TADA, stated, "I would have opposed POTA, but it must be said to the credit of the Government that all six safeguards suggested by the

majority of the judges have been introduced.”<sup>36</sup> He noted that the “amazing degree of dangerous sophistication which has been achieved by ruthless terrorists certainly is a material change from the situation in which TADA operated.”<sup>37</sup>

2.6 Interestingly, confessional statements made by the accused are also held to be admissible as evidence under various other acts: under Section 12, Railway Protection Force Act, 1957; Section 8 and 9 of the Railway Property (Unlawful Possession) Act, 1966; Section 108 of the Customs Act, 1962; and Section 40 of the now defunct Foreign Exchange Regulation Act (FERA), 1973. In *Kartar Singh*, the Court observed that

...while a confession by an accused before a specified officer, either under the Railway Protection Force Act or Railway Property (Unlawful Possession) Act or Customs Act or FERA is made admissible, the special procedure prescribed under this Act making a confession of a person indicted under TADA Act given to a police officer admissible cannot be questioned as a misnomer because all the officials empowered to record statements under those special acts are not police officers as per the judicial pronouncements of this court.<sup>38</sup>

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

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<sup>36</sup> “Legal eagles unimpressed by POTO safeguards”, *The Times of India*, Delhi, November 22, 2001.

<sup>37</sup> Ibid.

<sup>38</sup> *Kartar*, p. 671. Under the Railway Protection Force Act, 1957, the Railway Property (Unlawful Possession) Act, 1966, the Customs Act, 1962 and the Foreign Exchange Regulation Act, 1973, a Gazetted officer was empowered to summon any person whose attendance he considers necessary either to give evidence or to produce a document during the course of any investigation or proceeding under the Acts. Further, every such investigation or proceeding was deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code.

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

Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond unless the Court gives the Public Prosecutor an opportunity of being heard.

Section 49, Clause (7) adds,

Where the Public Prosecutor opposes the application of the accused to release on bail, no person accused of an offence punishable under this Act or any rule made there under shall be released on bail until the Court is satisfied that there are grounds for believing that he is not guilty of committing such offence:

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

Section 49, Clause (8) further adds,

The restrictions on granting of bail specified in sub-sections (6) and (7) are in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.

Finally, Section 49, Clause (9) states,

Notwithstanding anything contained in sub-sections (6), (7) and (8), no bail shall be granted to a person accused of an offence punishable under this Act, if he is not an Indian citizen and has entered the country unauthorisedly or illegally except in very exceptional circumstances and for reasons to be recorded in writing.<sup>39</sup>

3.2 These provisions are definitely different and harsher than the existing bail provisions under the Code of Criminal Procedure. On the other hand, however we are faced with the

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<sup>39</sup> Section 49, POTA Act.

fact that under ordinary bail provisions, it has been relatively easy for terrorists to get bail and return to the killing fields to inflict greater harm. As the former Director-General of Punjab Police, K.P.S. Gill, notes

In the Punjab, it was virtually impossible to detain any terrorist for any length of time, irrespective of charges. Terrorists were arrested again and again for the most heinous crimes, and were let out on bail 'pending trial'. In many cases, they committed other crimes while on bail, were arrested, and then bailed out again. Since the average criminal trial takes several years, it is unsurprising that the fear of conviction was the least of the terrorist's concern. In any event, witnesses could easily be intimidated or eliminated, and there was little possibility even of eventual conviction. In all this, the judiciary distanced itself from the consequences of its actions, claiming to be bound strictly by the law to release the accused on bail, even where the accused had, in the past, jumped bail and committed other crimes.<sup>40</sup>

3.3 In *Bimal Kaur vs State of Punjab*, the Punjab High Court opined that

The persons charged with the commission of terrorist act fall in the category which is distinct from the class of persons charged with commission of offences under the penal code and the offences created by other statutes.....The enforcing agencies find it difficult to lay their hands on them. Unless the police is able to secure clue as to who are the persons behind this movement, how it is organised, who are its active members and how they operate, it cannot hope to put an end to this movement and restore public order. The police can secure this knowledge only from the arrested terrorists after effective interrogation. If the real offenders apprehending arrest is able to secure anticipatory

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<sup>40</sup> K.P.S. Gill, 'Observations on Role of the state in Preservation of Internal Security vis-à-vis Human Rights-dilemma of Democracy, Paper presented at the National Defense College on November 8, 1997.

bail then the police shall virtually be denied the said opportunity.<sup>41</sup>

- 3.4 The Forty First report of the Law Commission rightly questioned the application of bail provisions of the Code of Criminal Procedure to cases of terrorism: “Can it be said with certainty that terrorists and disruptionists, who create terrorism and disruption and inject sense of insecurity, are not likely to abscond or misuse their liberty if released on anticipatory bail?”<sup>42</sup>
- 3.5 Further, the Supreme Court in *Kartar Singh* had pointed out that the language of sub-section (8) of section 20 of TADA (which is related to ‘bail’) was in substance no different from the language employed in section 437(1) of the Code of Criminal Procedure, section 35 of the Foreign Exchange Regulation Act, 1976, and section 104 of the Customs Act, 1962. The Supreme Court had, accordingly, upheld the validity of Sub-section (8) of section 20 of TADA, holding that the respective provisions contained therein were not violative of Article 21 of the Constitution, which declares that, “No man shall be deprived of his life or personal liberty except according to the procedure established by law.”
- 3.6 Nevertheless, in order to streamline the procedure of granting bail to the accused under anti-terror laws, Justice Sujata V. Manohar in *Shaheen Welfare Association vs. Union of India & Ors*, categorised TADA detainees in four groups with regard to their entitlement to bail:
- (a) hardcore undertrials whose release would prejudice the prosecution case and whose liberty may prove to be a menace to society in general and to the complainant and prosecution witnesses in particular;
  - (b) other undertrials whose overt acts or involvement directly attract sections 3 and/or 4 of the TADA act;
  - (c) undertrials who are roped in, not because of any activity directly attracting sections 3 and 4, but by virtue of section 120B or 147, IPC and;

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<sup>41</sup> AIR 1996 Punjab and Haryana 95.

<sup>42</sup> Cited in *Kartar Singh*, p. 699.

- (d) those undertrials who are found possessing incriminating articles in notified areas and are booked under section 5 of TADA.<sup>43</sup>

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

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

- 4.1 Further, a majority of terrorists go unpunished due to the unavailability of witnesses. As criminal prosecution hinges on witnesses and the availability of a witness to any crime is the sole test to establish the soundness of the prosecution – particularly in the Indian system, where technical and forensic evidence is usually weak, and in cases of terrorism, often worse than it would be in other cases – a provision which aims at protecting witnesses by concealing their identities is crucial, but is bound to create strong opposition among those who have a vested interest in a weak

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<sup>43</sup> JT 1996 (2) SC 719.

prosecution. Characteristically, in the prosecution of crimes involving bodily harm, witnesses are hard to come by, as there is always a lurking fear in their minds of the possible consequences of deposition.

4.2 Provisions for the protection of witnesses are envisaged under Section 16 (2) of TADA and Section 30 of POTA. Section 30 (2) lays down that,

A Special Court, if on an application made by a witness in any proceeding before it or by the Public Prosecutor in relation to such witness or on its own motion, is satisfied that the life of such witness is in danger, it may, for reasons to be recorded in writing, take such measures as it deems fit for keeping the identity and address of such witness secret.<sup>44</sup>

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

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

4.4 Doubts have, however, been cast on this provision and its jurisprudence. Whatever the reasons for non-disclosure of the identity of witnesses, it is argued, the accused persons, who are liable to severe punishments under these special laws, are placed at a disadvantage with regard to the possibility of effective cross-examination and exposing the previous conduct and character of the witnesses. In general, consequently, in order to ensure the purpose and object of the cross-examination, the argument continues, the identity, names and addresses of witnesses should be disclosed before the trial commences. However, it is reasonable that this principle should be subject to an exception where the court,

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<sup>44</sup> Section 30 (2) POTA Act.



in extraordinary circumstances, may in its wisdom decide to withhold the identity and addresses of witnesses, especially in cases of potential witnesses whose life may be in danger. As such, section 30 of POTA gives discretion to the court to decide whether the identity of the witnesses should be protected, creating ample scope for safeguards that would prevent any prejudice against the accused.

5. Given the difficulty of securing witnesses to provide concrete evidence against an accused terrorist, there is a need for greater reliance on technical evidence. Section 27 of POTA, consequently, provides that the court may, on the request of the police officer, direct the accused to give samples of handwriting, finger-prints, foot-prints, photographs, blood, saliva, semen, hair and voice of any accused person, reasonably suspected to be involved in the commission of the offence under this Act. Human rights groups have argued that this amounts to forcing the accused to incriminate themselves, and thus violates Article 20, Clause 3, of the Constitution, which states, “No person accused of any offence shall be compelled to be a witness against himself.” This, however, is entirely unsustainable logic. The courts have repeatedly held that “‘to be a witness’ is not equivalent to ‘furnishing evidence’ in its widest sense”.<sup>45</sup> The right against self-incrimination is established only where the possibility of coercion and abuse of the human rights of the accused are involved, and does not extend to the withholding of evidence. Securing scientific evidence to prove a crime does not inflict any violence on the accused, go against any human rights and this section is not a departure against the established mode of proving the guilt of an accused under the Evidence Act, which contains provisions with regard to forensic reports and handwriting reports, which have been employed even in ordinary crimes. It has, further, been held that giving thumb-impresions or impresions 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

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<sup>45</sup> Read for in-depth analysis of this provision, H.M.Seervai, *Constitutional Law of India*, vol. 2, Delhi: Universal Book Traders, 1993, p. 1060.

witness'.<sup>46</sup> Excluding new technologies of gathering such scientific evidence, such as DNA, blood, saliva and other such bio-profiling techniques on the grounds that these techniques have not been used before misses the spirit of the law, and cannot be considered reasonable. It is useful to note, moreover, that these techniques have all been admitted into evidence in the more advanced Western countries, including those whose concerns for the protection of human rights are no less serious than ours. Indeed, Indian jurisprudence has, in this regard, tended to lag far behind technological developments and progressive international norms.

6.1 It is certainly the case that the powers of investigating officers as well as of the police in general are significantly increased by various provisions under anti-terrorist laws. The possibility of abuse of such enhanced powers cannot be ruled out. As the Supreme Court observed in *Kartar Singh*,

We are aware that the police are still not totally free from adopting questionable practices while interrogating accused persons, but one cannot possibly deny that the greater vigilance now exercised by the public and the Press, growing awareness of citizens about their individual rights under the law and the increasing earnestness and commitment of the senior levels of command in the police structure to put down such malpractices have all tended to reduce the prevalence of such practices in the police to a lesser degree than before.<sup>47</sup>

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

It must be remembered that merely because power may sometimes be abused, it is no ground for denying the existence of power. The wisdom of man has not yet been able to conceive of a government with power sufficient to answer all its legitimate needs and at the same time incapable of mischief.<sup>48</sup>

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<sup>46</sup> State of Bombay vs. Kathi Kalu Oghad, AIR, 1961 SC 1808.

<sup>47</sup> Kartar, p. 679.

<sup>48</sup> 1978 1 SCR, p. 77.

Similarly, in *Collector of Customs vs. Nathella Sampathu Chetty*, the Court observed that, “the possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity.”<sup>49</sup> In *Kesavananda Bharati vs. State of Kerala*, Justice Khanna noted,

In exercising the power of judicial review, the Courts cannot be oblivious of the practical needs of the government. The door has to be left open for trial and error. Constitutional law like other mortal contrivances has to take some chances. Opportunity must be allowed for vindicating reasonable belief by experience.<sup>50</sup>

- 6.3 However, the possibility of malicious action by police officers has been explicitly recognized under POTA and, as a safeguard, Section 58 of the Act lays down that any police officer who exercises power corruptly or maliciously, knowing that there are no reasonable grounds for proceeding under this Act, shall be punishable with imprisonment which may extend to two years, or with fine, or with both. Further, if the special court is of the opinion that any person has been corruptly or maliciously proceeded against under this Act, the court may award such compensation as it deems fit to the person so proceeded against, and it shall be paid by the officer, person, authority or government, as may be specified in the order. This section ensures that police officers will not easily abuse their powers under the Act, and would not falsely accuse a person of committing a terrorist crime, knowing fully well that such an officer may be held personally accountable for malicious prosecution.
- 7.1 POTA, according to some critics, also threatens the freedom of the Press, and “the provisions in POTA for making it obligatory to reveal the source of information, the provisions making the mere act of receiving a mail, even if unsolicited, a crime, aim at taming the media.”<sup>51</sup> The Press has complained vociferously against Section 14 of POTA, which according to

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<sup>49</sup> AIR 1962 SC 316.

<sup>50</sup> 1973 Supp SCR p. 1.

<sup>51</sup> Y.P. Chibbar ‘Some questions on POTO’ in <http://www.pucl.org/reports/National/2001/poto-questions.htm>.

them, violates Article 19(1)(a) of the Constitution of India, which guarantees the right to freedom of speech and expression, from which the freedom of the Press derives. Section 14 of POTA imposes an obligation on any individual, including journalists, to furnish information that may be useful for the purposes of the Act, that is, information that relates to possible crimes that fall under its mischief, failing which the individual shall be punishable with imprisonment for a term that may extend to three years.

- 7.2 Once again, these concerns are based on a misunderstanding of the character of the Press and the scope of constitutional protection. The right to freedom of speech and expression, and concomitantly the freedom of the Press, is not unfettered, and is subject to 'reasonable restrictions.' At a practical level, it is useful to note, further, that the information that journalists ordinarily possess with regard to terrorists or their activities seldom have any operational value. In almost all legitimate interactions that a journalist may have with a terrorist, operational strategies are not discussed and neither is the journalist given any idea of the hideouts or movements of the terrorist. Furthermore, the Police would incline to be extremely circumspect in their use of this clause, and would avoid trying to rub the Fourth Estate the wrong way to the greatest extent possible. Few individuals and institutions of governance have been impervious to the power of the Press in India, and even those at the highest echelons of power tend to treat the Press with a high measure of deference. The Police is not, and has seldom been, an exception to this rule.
- 7.3 There are, moreover, legitimate limits to the freedom of the Press. "The liberty of the Press," said Lord Mansfield, "consists in printing without any previous license, subject to the consequences of the law."<sup>52</sup> Closer home, the Supreme Court in *C.G. Janardhan vs T.K.G.Nair*, stated that "The freedom of the journalist is an ordinary part of the freedom of the subject and to whatever lengths the subject in general

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<sup>52</sup> R. vs. Dean of St. Asaph 3 T.R.431 in G.K.Roy, *Law relating to Press and Sedition*, Allahabad: University Book Agency, 1999, p. 38.

may go, so also may the journalist, but apart from the statute law, his privilege is no other and no higher.”<sup>53</sup>

- 8.1 The easy availability and movement of finances has been another major contributory element in the support of terrorism. The easy availability of funds and the concomitant free flow of these funds across international borders through ubiquitous ‘*hawala*’ channels has enormously empowered the terrorists, made the sponsorship of terrorism easy, and its control immensely difficult. After September 11, 2001, most of the discussion about the darker side of the globalisation of financial markets turned away from its distributional effects and tendencies towards periodic instability, and began focus on the manner in which it facilitated the transfer of funds that enabled global terrorism. The new challenge of financial market globalisation was how to track and freeze the financial assets of global terrorist networks.<sup>54</sup> The UN Security Council through Resolution 1373 decided that all States should prevent and suppress the financing of terrorism, as well as criminalize the wilful provision or collection of funds for such acts. The funds, financial assets and economic resources of those who commit or attempt to commit terrorist acts or participate in or facilitate the commission of terrorist acts and of persons and entities acting on behalf of terrorists should also be frozen without delay.<sup>55</sup>
- 8.2 In India there have been no attempts on the part of the lawmakers or enforcers to address the issues raised by UN Security Council, prior to POTA. Before the passing of the Act, *Hawala* crimes were prosecuted under the Foreign Exchange Management Act, 1999, which describes *Hawala* as a civil offence and imposes a maximum penalty of payment of three times the money involved.
- 8.3 However, under Section 6 of POTA, no person shall hold or be in possession of any proceeds of terrorism and if the

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<sup>53</sup> G.K.Roy, *Law relating to Press and Sedition*, Allahabad: University Book Agency, 1999, p. 40.

<sup>54</sup> Thomas.J.Biersteker, *Targeting Terrorist Finances: The New Challenges Of Financial Market Globalization*, in Booth and Dunne, *World In Collision*, p. 75.

<sup>55</sup> See <http://www.un.org/News/Press/docs/2001/sc7158.doc.htm>.

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

### **Faulty Legislation or Faulty System?**

Unending debates over the working of the anti-terror laws, TADA and POTA, in judicial, political and social circles have cast aspersions on the need for such a specific law. Yet, it can hardly be denied that terrorism is here to stay, and constitutes the greatest contemporary threat to individual and collective security. No legal instrument can be perfect, and no law can attain such a measure of flawlessness that it cannot be bent or broken, as long as the human instinct to do so survives. Inherent deficiencies in the framing of laws, moreover, are magnified manifold within the context of a criminal justice system which is in as poor a state of health as India's. It is an accepted fact that convictions for any

offence, whether minor traffic violations or murder, take an extraordinary length of time. The courts are overburdened, and recent estimates indicate that there are around 3.1 million pending cases in 21 high courts and 20 million in subordinate courts in the country.<sup>56</sup>

There has been negligible effort on the part of successive Governments to streamline the judicial system in the country. Attempts to create fast track courts to tackle pending cases have been largely unsuccessful. Even in areas where such courts have been established, prosecution continues to be delayed. The Recovery of Debts due to Banks and Financial Institutions Act of 1993 was one such law that established fast track courts to recover money from debtors. With nearly 44,000 cases pending in various Debt Recovery Tribunals (DRTs) involving around Rs. 380 billion, the processes and procedures of these courts have also fallen into the mould of 'normal' courts in the country.<sup>57</sup>

The fault lies, not in the legislation, but in the system that implements the law. Delays are chronic, right from the stage of issuing summons to the defendant, which, in some cases, can take several months, as processes are delayed on flimsy grounds. Delays in civil cases hurt particular individuals and institutions; but the failure to expedite the prosecution of the accused in criminal cases – especially of serious criminal offences such as terrorism – is a cause of alarm, as it constitutes a threat to the life of the individual and to the security and stability of the state.

TADA was victim to this process as well, and was widely criticized because its conviction rate was less than two percent. This was, curiously, advanced as grounds for scrapping the law by its critics. The argument is certainly eccentric: rape, for instance, has among the lowest conviction rates for violent crimes in India; this, however, has rightly been the basis of strident demands for strengthening of the law, and harsher penalties.

The situation is nor irreparable, and the experience with the Maharashtra Control of Organised Crime Act (MCOCA), 1999,

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<sup>56</sup> "Judicial Delays", <http://www.indolink.com/Analysis/a110102-054653.php>.

<sup>57</sup> "Tribunals, a boon to bankers," *Hindu*, June 15, 2000.

deserves special attention in this regard. This legislation was passed by the Maharashtra Assembly in view of the growing menace of organised crime. 'Organised Crime' bears an uncanny resemblance to terrorism: neither phenomenon is confined by international borders; both organised crime and terrorism involve murder, kidnapping, arson, robbery, burglary, extortion, dealing in narcotics or dangerous drugs, intimidation and violence; finally, the support structures and sources of finance are often the same for both.

The MCOCA has been an extraordinary success in Maharashtra, with a conviction rate as high as 78 per cent in some years. Many of the provisions of MCOCA are similar to those under POTA. For example, both acts have identical provisions with respect to

- i. Procedures and powers of Special Court – Section 9 of MCOCA and Section 29 of POTA;
- ii. Authorisation of interception of wire, electronic or oral communication – Sections 14 and 16 of MCOCA and Section 36 to 48 of POTA;
- iii. Certain confessions made to police officer to be taken into consideration – Section 18 of MCOCA and Section 32 of POTA;
- iv. Protection of witnesses – Section 19 of MCOCA act and Section 30 of POTA;
- v. Forfeiture and attachment of property – Section 20 of MCOCA and Sections 6, 7 and 8 of POTA.

There can be no doubt that, if a clear anti-terrorism strategy involving the police, the executive and the judiciary could be formulated and executed on a national scale, the successes of MCOCA could be replicated under POTA.

Regrettably, political indulgence and high-handedness have constantly undermined the implementation of counter-terrorism laws, and have infinitely complicated the terrorism debate. Among the aspects that have most frequently come under criticism is the abuse of such laws to carry out arrests of political opponents and a wide range of activists who are not covered by the intent and purpose of such laws. Indeed, TADA was used far more often against those who would not be covered by any definition of terrorism, than it was against terrorists. Similarly, a



review of the arrests made under POTA over the first year of its operation projects the Act in poor light. According to the Union Home Ministry, the total number of those arrested and put in jail across the country under the POTA was 257.<sup>58</sup> The data indicates further, that it is not in the terror wracked State of J&K that POTA has been extensively used, but in Jharkhand. This newly created State has the 'distinction' of detaining the highest number of persons under POTA, at 113, as against 104 detained in J&K. Worse, among those detained in Jharkhand were a 12-year-old child and an 81-year-old man. Others in the POTA list are Delhi with 20 detainees; Uttar Pradesh and Tamil Nadu with 10 each.

It has also been nigh impossible to work out any kind of political consensus on the implementation of anti-terrorism laws. In a shocking development on June 4, 2003, the J&K Government decided that it would not invoke POTA in the State, and that detainees who had 'no serious cases' against them would be released. J&K is the worst terrorism affected State in the country, but is not the only one to refuse to implement POTA; Governments in Manipur, Karnataka, Punjab, Assam, Tripura and Madhya Pradesh have also said that the law would not be used in their States.

This negates the very purpose for which the anti-terrorism legislation had been enacted. J&K is the major theatre of terrorist conflict in the country, and its past record of convictions of arrested terrorists under any law has been abysmal. The populist and politically motivated refusal to implement POTA can only weaken the enforcement agencies in their fight against terror.

POTA is, of course, far from perfect. The difficulty with counter-terrorism legislation in this country – indeed, with much other legislation as well – is that once it passes through Parliament, it tends to be looked upon as an immutable whole, to be accepted in full, or, like TADA, cast out in entirety for its deficiencies. There was certainly a high measure of gross abuse of TADA in certain States – but this was valid grounds for re-examination and amendment of the law, not for throwing the baby out with the bathwater. To bury legislation which provided the only effective legal instrument to bring terrorists to justice on the

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<sup>58</sup> See <http://www.rediff.com/news/2002/aug/14spec.htm>.

grounds that it was susceptible to abuse was nothing short of foolhardy. What is needed is a constant process of review of the law in action, the identification of its strengths and weaknesses, and the streamlining of processes and provisions through marginal amendments that would ensure its greater efficiency in securing the ends for which it was legislated, and limiting any existing possibilities of abuse.