

Counter-terrorism Laws
The Supreme Court on Confessions
Solil Paul*

A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape.... *Both are public duties....*¹

The lack of a consistent policy backed by serious research and public debate remains a crucial drawback with counter-terrorism legislation in India. Political expediency and the fulfilment of populist pre-election promises and postures, and not well considered security concerns, appear to be the only and overwhelming reasons for such enactments. This is precisely what happened when the Unlawful Activities (Prevention) Amendment Ordinance, 2004, was accepted by Parliament as an Act without much debate and with no discussion whatsoever on the contents of its predecessor, POTA².

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¹ Per Viscount Simon in *Stirland v Director of Public Prosecution*, (1944) 2 All ER 13 quoted in *State of UP v Anil Singh*, (1988) Supp SCC 686, 692. [Emphasis added]

² The Prevention of Terrorism Act, 2002 (Act no. 15 of 2002) – referred to as POTA.

Whatever the political compulsions of the Government to scrap the much-maligned POTA, the problem of terrorism cannot be wished away. As with the assurance to continue with the process of economic reforms pursued by the previous Government, albeit “with a human face”,³ it is now high time that successor Governments, whichever party they may belong to, must not be embarrassed to admit that terrorism cannot be tackled with regular criminal laws and that a special legislation to deal with this heinous crime is necessary, and, consequently, that some continuity is needed in this dimension of governance and legislation as well. This does not, of course, mean that earlier laws such as POTA or its predecessor TADA⁴, once legislated, must simply be allowed to persist without review. However, the experiences of these laws must not cavalierly be dismissed, with the repeated duplication of legislative effort and processes which repeal each past *avatar* of counter-terrorism legislations simply to enact a new and peripherally amended clone of its predecessor. It is also time for the human rights groups in India to take the role of constructive critics, accepting the necessity of counter-terrorist legislation in the present circumstances, to help the Government with positive inputs to draft a suitable law that does not sacrifice its “human face”. As one commentator expressed it, in the context of the now-defunct POTA:

The debate about POTA’s necessity reveals that not many critics of the Government are considering the larger issue – it is not whether there is need for POTA, but what is missing in POTA that could make it work, to make it more useful and successful than the ordinary law in prosecuting terrorists in accordance with democratic norms.⁵

³ As the Prime Minister-designate, Dr. Manmohan Singh, said at a press conference in New Delhi on May 20, 2004, that economic reforms would be undertaken with a human face. See *The Tribune*, Chandigarh, May 21, 2004.

⁴ Terrorist and Disruptive Activities (Prevention) Act 1985 (Act no. 31 of 1985) and Terrorist and Disruptive Activities (Prevention) Act, 1987 (Act no. 28 of 1987) – commonly known as TADA Acts.

⁵ Swati Pandey, *Law and Counterterrorism: The Prevention of Terrorism Act in a Strategic Dimension*, IPCS Research Papers, April 2004, Institute for Peace and Conflict Studies.

Despite the irrationality of the political and human rights discourse on the subject, it is nevertheless the case that the judiciary in India has clearly recognized the gravity of the situation and the necessity and urgency of counter-terrorism legislation, and has repeatedly upheld the constitutionality of such laws. As far back as in 1994, the Supreme Court confirmed the constitutionality of the TADA '85 and TADA '87 Acts (along with a few other laws)⁶ and remarked:

Terrorism the Act (TADA) contemplates, cannot be classified as mere disturbance of 'public order' disturbing the "even tempo of the life of the community of any specified locality" but it is much more, rather a grave emergent situation... throwing a challenge to the very existence and sovereignty of the country in its democratic polity.⁷

Once again, upholding the constitutionality of the POTA, the Court further clarified:

Fight against... acts of terrorism is not a regular criminal justice endeavour... terrorism is a new challenge for law enforcement... To face terrorism we need new approaches, techniques, weapons, expertise and of course new laws."⁸

Citing the United Nations Security Council resolutions 1368 (2001) and 1373 (2001) and General Assembly resolution 56/1, which, *inter alia*, call upon Member-States to take necessary steps to 'prevent and suppress terrorist acts' and also to 'prevent and suppress the financing of terrorist acts' the Court reminds the state of its duty:

It has thus become our international obligation also to pass necessary laws to fight terrorism.⁹

The Court rulings and the pledge the Cabinet takes at the swearing-in ceremony – "to uphold the sovereignty and integrity of India"¹⁰ – required the Government to put together its legal

⁶ For all the Acts and Sections of various Acts reviewed, see *Kartar Singh v State of Punjab*, (1994) 3 SCC, p. 569, 614.

⁷ *Ibid*, p. 633.

⁸ *People's Union for Civil Liberties v Union of India*, AIR 2004 SC 456, 465. Referred to as the *POTA Case*.

⁹ *Ibid*, p. 466.

¹⁰ See *Constitution of India*, Third Schedule: Forms of Oath or Affirmations.

resources and to invite all concerned interests and groups to give their inputs, before any decision was taken to enact any new law, or to repeal POTA or allow it to die a natural death when the 'sunset clause' came into operation. Instead, hasty ordinances repealing POTA and simultaneously enacting amendments to the UAPA were promulgated, followed by the subsequent legislation to translate these ordinances into law.¹¹ The result is that no aspect of the impugned clauses in POTA has been subjected to rational scrutiny, nor, indeed, have the clauses that have been included in the amended UAPA been objectively evaluated. Among the clauses that have suffered from this arbitrary legislative impulse has been the clause relating to the admissibility, under certain prescribed circumstances, of custodial confessions – which was contained in POTA, but has been excluded terrorism related clauses in the amended UAPA.

Constitutionality of Custodial Confessions

One of the most controversial aspects of past counterterrorism laws – both TADA and POTA – has been the admissibility of a confession made to a police officer. The relevant part of Sec. 32 (1) of POTA stated:

Notwithstanding anything in the Code¹² or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police ... shall be admissible in the trial of such person....'

This language is identical to that of Section 15 of the TADA Act 1987. That the drafters of this section needed to prefix a *non-obstante* clause ("Notwithstanding") right at the beginning, bears testimony to the fact that they very well knew they were enacting a provision contrary

¹¹ The Prevention of Terrorism (Repeal) Ordinance, 2004 and The Unlawful Activities (Prevention) Amendment Ordinance, 2004 were promulgated on September 21, 2004. On December 6, 2004, Bills of the same name were passed by the House and converted to Acts.

¹² As per Sec. 2 (1) (a) "Code" means the Code of Criminal procedure, 1973 (2 of 1974).

to the law laid out in the Code and the Evidence Act, and that, by adding such a clause to Section 32, the drafters intended to preclude such established practice. This was clearly a deliberate departure from ordinary law. Having done so, POTA provided a self-contained scheme for recording the confession of an accused and its admissibility in his trial.¹³

This very departure was the basis for its constitutional challenge.

To get to the root of this debate it would be worthwhile to refer to the conflicting provisions of the Evidence Act and the Code, which Section 32 of POTA aimed to override or preclude. Sections 25 and 26 of the Indian Evidence Act, 1872,¹⁴ clash head-on with the POTA provision. Section 25 makes any confession before a police officer inadmissible in evidence. Section 26 enjoins that no confession made by any person whilst in police custody even to a person other than a police officer is admissible, unless made in the immediate presence of a Magistrate. Section 162 of the Code¹⁵ further reinforces these prohibitions. It relates to any statement recorded during an investigation and mandates that no statements so recorded by a police officer, if reduced in writing, be signed by the person making it, and that the statement shall not be used for any purpose save as provided in the Code and the Evidence Act. The ban imposed by Section 162 applies to all statements whether

¹³ *State v Nalini*, (1999) 5 SCC p. 253, pp. 404-405, p. 575.

¹⁴ Sec. 25: *Confession to police officer not to be proved.* – No confession made to a police officer, shall be proved as against a person accused of any offence.

Sec. 26: *Confession by accused while in custody of police not to be proved against him.* – No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

¹⁵ Sec. 162: *Statements to police not to be signed: Use of statements in evidence.* – (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:....

confessional or otherwise, made to a police officer, whether by an accused or not during the course of an investigation.¹⁶

To reiterate, consequently, the counterterrorism laws (TADA and POTA) envisaged a procedure which was inconsistent with the established procedure of criminal administration in the country. Based on this premise, it was argued in *Kartar Singh* that such a procedure (in this case, as prescribed by the TADA Act, 1987):

1. leads to invidious discrimination (between TADA and non-TADA offenders) and thus such a classification is arbitrary and unreasonable and without any substantial basis, and being so, falls foul of the 'equal protection of laws' clause of Article 14 of the Constitution.
2. is oppressive and violates the principle of just and fair trial offending Article 21 of the Constitution.

Before ruling on the issue of its constitutionality under Article 14, the Court reaffirmed the constitutionally established principle of legislative classification under Article 14, where under persons may be classified into groups and such groups may be differently treated if there is a reasonable basis for such difference or distinction, so that the question of unequal treatment does not really arise between persons governed by different conditions and different set of circumstances. It thus restated the rule that "unequals can be treated unequally". Moving on to the case at hand, the Court framed the issue as follows:

Coming to the distinction made in TADA Act, grouping the terrorist and disruptionists as a separate class of offenders from ordinary criminals under the normal laws and the classification of offences under TADA Act as aggravated form of crimes distinguishable from the ordinary crimes have to be tested and determined as to whether this distinction and classification are reasonable and valid within the term of Art 14 of the Constitution.¹⁷

In addition, taking into account the objective of such distinction and classification the Court ruled:

¹⁶ Other relevant provisions: Sections 24 and 27 of the Indian Evidence Act and Sections 161 and 164 of the Code of Criminal Procedure, 1973.

¹⁷ *Kartar Singh*, p. 672.

...the persons who are 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 the ordinary criminals and procedure. This distinction and classification of grouping of the accused and the offences under TADA are to achieve the meaningful purpose and object of the Act as reflected from the preamble as well as the 'Statement of Objects and Reasons'...'18

And, having already held that the Parliament was invested with legislative competence to enact TADA, it further ruled,

...we can safely hold that the procedure prescribed under this Act cannot be said to be unjust and unfair and oppressive, offending Articles 14 and 21 of the Constitution.¹⁹

As to the alleged 'invidious discrimination' contention, the Court held:

...because the classification of 'offenders' and 'offences' to be tried by the Designated Court under TADA Act ... (is) not left to the arbitrary and uncontrolled discretion of the Central Government but the Act itself has made a delineated classification of the offenders as terrorist and disruptionists in the TADA Act... as well as the classification of offences... Therefore, the complaint of incorporation of invidious discrimination in the Act has to be turned down.²⁰

Finally, the Court concluded:

All that the Court has to see is whether the power is used for any extraneous purpose, i.e. to say, not for achieving the object for which the power is granted and whether the Act (TADA) has been made on grounds which are not germane or relevant to the policy and purpose of this

¹⁸ Ibid, p. 673.

¹⁹ Ibid.

²⁰ *Kartar Singh*, p. 677. It held that the decision in *State of West Bengal v Anwar Ali Sarkar*, AIR 1952 SC 75 was not applicable to the present case.

Act and whether it is discriminatory so as to offend Article 14. In our considered opinion, the classifications have a rational nexus with the object sought to be achieved by the TADA Acts... and consequently there is no violation of Article 14 of the Constitution.²¹

The contention based on Article 21 was linked to the fact that the TADA procedure allowed confessions made to a police officer admissible in total contradistinction to the existing criminal procedure under the Evidence Act and the Code, and thus pleaded that this was unfair and unjust as against the “procedure established by law’ clause of Article 21 of the Constitution.

The counsels against TADA were severely critical of the mode and method of obtaining a confession from an accused by the police. This was something about which the Court did not need much convincing. On several earlier occasions, the Court had awarded exemplary compensation to the victims of police highhandedness. It remarked:

Whatever may be said for and against the submission with regard to the admissibility of a confession made before a police officer, we cannot avoid but saying that we – with the years of experience both at the Bar and on the Bench – have frequently dealt with cases of atrocity and brutality practiced by some overzealous police officers resorting to inhuman, barbaric, archaic and drastic methods of treating the suspects in their anxiety to collect evidence by hook or crook and wrenching a decision in their favour. We remorsefully like to state that on few occasions even custodial deaths caused during interrogation are brought to our notice. We are very much distressed and deeply concerned about the oppressive behaviour and the most degrading and despicable practice adopted by some of the police officers even though no general and sweeping condemnation can be made.²²

Nevertheless, the Court quite reluctantly ruled:

²¹ Ibid.

²² Ibid, p. 679.

Though we at the first impression thought... it would be dangerous to make a statement given to a police officer admissible (notwithstanding the legal position making the confession of an accused before the police admissible in some advanced countries like United Kingdom, United States of America, Australia and Canada, etc.) – having regard to the legal competence of the legislature to make the law prescribing a different mode of proof, the meaningful purpose and object of the legislation, the gravity of terrorism unleashed by the terrorists and disruptionists endangering not only the sovereignty and integrity of the country but also the normal life of the citizens, and the reluctance of even the victims as well as the public in coming forward, at the risk of their life, to give evidence – hold that the impugned section cannot be said to be suffering from any vice of unconstitutionality.²³

In a bench of five, though, two judges dissented and struck down Section 15. Justice Ramaswamy reasoned in his dissenting observations:

It is... obnoxious to confer power on police officer to record confession under Section 15 (1). If he is entrusted with the solemn power to record a confession, the appearance of objectivity in the discharge of the statutory duty would be seemingly suspect and inspire no public confidence. If the exercise of the power is allowed to be done once, may be conferred with judicial powers in a lesser crisis and be normalized in grave crisis, such an erosion is anathema to rule of law, spirit of judicial review and a clear negation of Article 50 of the Constitution and the constitutional creases. It is, therefore, unfair, unjust and unconscionable, offending Articles 14 and 21 of the Constitution.²⁴

Justice Sahai cautioned, similarly:

Giving power to police officer to record confession may be in line with what is being done in England and

²³ Ibid, p. 680.

²⁴ Ibid, p. 734.

America. But that requires a change in the outlook by the police. Before doing so the police force by education and training has to be made aware of their duties and responsibilities.... The defect lies not in the personnel but in the culture.... The cultural climate was not conducive for such drastic change. Even when there was no Article 21, Article 20(3) and Article 14 of the Constitution any confession to police officer was inadmissible. It has been the established procedure for more than a century and an essential part of criminal jurisprudence... A law which entitles a police officer to record confession and makes it admissible is thus violative of both Articles 20 (3) and 21 of the Constitution.²⁵

The argument put forward by Justice Sahai is interesting. No one would contest the fact that the Evidence Act (1872), which bars custodial confession, was in effect much before the Constitution (1950). But, that by itself cannot be sufficient reason for it being just, fair and reasonable. Moreover, after the enactment of the Constitution all existing laws have to be judged on the touchstone of the Constitution and not *vice-versa*. The Constitution itself does not speak on the issue of custodial confessions. Article 20(3) of the Constitution of India declares that, "No person accused of any offence shall be compelled to be a witness against himself." In our context, this would mean that the constitutional embargo is only against "compelled" confessions. It has nothing against custodial confessions if made voluntarily.

Counterterrorism laws also acknowledge that a confession made to a police officer has to be voluntary [TADA Act Section 15 (2), TADA Rules 15 (3) (b); POTA Section 32 (2) and (3)]. These laws do not validate compelled confessions. The issue specifically is whether the pre-Constitutional presumption that all confessions made to a police officer or while in police custody are "compelled" and not voluntary is also valid in the post-Constitutional era and under all conditions and circumstances? It could be argued that, back in 1872 when such a law was made,

²⁵ Ibid, p. 762 &764.

there was no other protection available to an accused, nor any remedy to the victim or access to courts in case of any high-handedness. The Constitution and the existing legislations have remedied this largely – though there can never be a perfect system. Taking into consideration the circumstances and time of the enactment of the Evidence Act, these provisions may have been rightly enacted for that era. However, in the present age – with the availability of Constitutional protection and remedy to all citizens backed with an active and aware judiciary – and given the very special nature of the crimes under discussion, there appear to be no pressing reason to continue to rely on the earlier arguments. The circumstances that prevailed in 1872 or even what is generally mentioned as ‘normal times’ cannot be compared with the menace of terrorism that confronts the nation in the twenty first century.

It must also be clear that such presumption against the validity of custodial confessions stands rebutted only in extreme and grave times; only when existing laws fail to effectively tackle or successfully address pressing dangers to society and the nation. Even under such extraordinary circumstances, this is not to argue that custodial confessions be treated on par with non-custodial confessions, but rather, to acknowledge the ‘suspect’ nature of the former, and ensure that stringent safeguards be made an intrinsic part of the scheme of such laws, and that such safeguards be scrupulously observed so as to prevent the possibility of the extortion of any false confession.

These circumstances and the need for such safeguards have been clearly recognised and the Supreme Court in the *POTA Case*, noted:

Parliament has explored the possibility of employing the existing laws to tackle terrorism and arrived at the conclusion that the laws are not capable. It is also clear to Parliament that terrorism is not a usual law and order problem.²⁶

Nevertheless, the Court emphasised, in the same breath, the need to balance the security concerns of the nation with well-established values of the civilized world, and warned:

²⁶ *POTA Case*, 467.

The protection and promotion of human rights under the rule of law is essential in the prevention of terrorism... If human rights are violated in the process of combating terrorism, it will be self-defeating. Terrorism often thrives where human rights are violated, which adds to the need to strengthen action to combat violations of human rights... The lack of hope for justice provides breeding grounds for terrorism... In all cases, the fight against terrorism must be respectful to the human rights.²⁷

This brings us to the crucial question: what safeguards does the law enact?

As already stated, the first and foremost precondition for any valid confession is mandated by Article 20(3) of the Constitution: “No person accused of any offence shall be compelled to be a witness against himself”. In addition, Section 24 of the Evidence Act²⁸ specifically bars confessions that may be the result of any inducement, threat or promise, from the courts’ consideration. Thus *any confession*, be it custodial or non-custodial, to be accepted by a court of law, should not be ‘compelled’, in other words, must be ‘voluntary’. This means that counterterrorism laws have to primarily safeguard the voluntary nature of a confession and see to it that no form of compulsion is used against the accused while extracting a confession.

What would ‘voluntary’ mean or encompass in this context? The Supreme Court in *Devender Pal Singh*,²⁹ after referring to a few legal dictionaries and cases clarified

²⁷ Ibid.

²⁸ Sec. 24: *Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.*- A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

²⁹ *Devender Pal Singh v State of NCT of Delhi*, (2002) 5 SCC, p. 234.

...the crux of making a statement voluntary is, what is intentional, intended, unimpelled by other influences, acting on ones own will, through his own conscience.³⁰

While upholding the constitutionality of Section 15, TADA Act, in *Kartar Singh*, the Supreme Court had enumerated specific guidelines

...to ensure that the confession obtained in the pre-indictment interrogation by a police officer... is not tainted with any vice but is in strict conformity with the well recognized and accepted aesthetic (*sic*) principles and fundamental fairness.³¹

The Court had also requested the Central Government to incorporate these concerns by appropriate amendments in the TADA Act and Rules.³² These guidelines were subsequently enacted as an integral part of Section 32 of POTA, which deals with custodial confessions. When the validity of this section was challenged in the *POTA Case*, the Court, while appreciating the fact that Parliament had taken into account all the guidelines suggested by the Court in *Kartar Singh* while enacting this provision, upheld its constitutionality, remarking:

...we are satisfied that the safeguard provided by the Act and under the law is adequate in the given circumstances and we don't think it is necessary to look more into this matter.³³

Safeguards provided under Section 32 POTA

Section 32 of POTA specifies the exact procedure to be followed by a police officer while recording a confession. In *Kartar Singh*, what weighed heavily with the Constitutional Bench when it upheld the constitutionality of Section 15 of TADA was that all requirements in respect of the recording of

³⁰ Ibid, pp. 259-260. Also see *Gurdeep Singh v State (Delhi Admn.)*, AIR 1999 SC 3646, 3652-3653; *Mohd. Khalid v State of West Bengal*, (2002) 7 SCC p. 334 & 357; *Nazir Khan v State of Delhi*, (2003) 8 SCC, p. 461, pp. 481-2.

³¹ *Kartar Singh*, pp. 682-3.

³² On controversy as to whether these guidelines were mandatory or directory, see, *Lal Singh v State of Gujarat*, AIR 2001 SC 746, 757; *S.N. Dube v N.B. Bhoir*, (2002) 2 SCC, p. 254 & 287.

³³ *POTA Case*, p. 478.

confessional statements should be fulfilled, which would then act as a safeguard for the accused.³⁴ The Court also emphasized that the procedure laid down for recording a confession had to be strictly adhered to and that “any confession made in defiance of these safeguards cannot be accepted by the Court as reliable evidence.”³⁵

It is, consequently, worthwhile to discuss each aspect of this procedure³⁶ and/or the safeguards separately, along with the various principles enunciated by the Court while interpreting the provision as to custodial confession.

1. Administration of Statutory Caution: The law requires that prior to recording a confession the police officer shall explain in writing to the person concerned that he is not bound to make a confession and that if he does so, it may be used against him

³⁴ *Bharatbhai v State of Gujarat*, AIR 2002 SC, p. 3620 & 3631.

³⁵ *Ayyub v State of U.P.*, AIR 2002, p. 1192 & 1198.

³⁶ POTA, Section 32, lays down the procedure for “*Certain confessions made to police officers to be taken into consideration.* –

- (1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, 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 or electronic device like cassettes, tapes or sound tracks from out of which sound or images can be reproduced, shall be admissible in the trial of such person for an offence under this Act or the rules made thereunder.
- (2) A police officer shall, before recording any confession made by a person under sub-section (1), 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:
Provided that where such a person prefers to remain silent, the police officer shall not compel or induce him to make any confession.
- (3) The confession shall be recorded in an atmosphere free from threat or inducement and shall be in the language in which the person makes it.
- (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.
- (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.

(POTA, Section 32 (1) first part). As compared to the similar provision in TADA (Section 15 (2)) the only change we notice is that, unlike POTA, TADA did not make it necessary for such a caution to be in writing.³⁷ Under TADA, the word 'explain' was not qualified by the words 'in writing'. However, TADA Rules required the police officer to whom the confession was made to attach a memorandum at the end of the confession to the effect that he had cautioned the accused as required by law. The memorandum itself was dictated by the Rule 15 (3).³⁸

Under TADA, when an issue arose before the court if the caution had really been administered, the court would refer to the memorandum attached by the police officer, the minutes of the interrogation and the deposition of the concerned police officer in court, to resolve the issue.³⁹ In other words, in this process of verification, the accused had no role. Taking into consideration the fact that the accused would be in police custody and there would be no chance of an independent witness or verification, it would be almost impossible for the accused to rebut the evidence or prove the fact of such caution not being administered. POTA, by making it mandatory that such a caution has to be in writing, appears to remedy the situation. It would follow from such a requirement that a written caution, if presented in court without being counter-signed or attached with an acknowledgement in writing by the accused, would hold no weight. Oral depositions by the police officer in court or minutes recorded by the police cannot overwrite such an acknowledgement by the accused.

It would be obvious that such a caution needs to be administered to the accused before he makes a confession. It cannot be a requirement that the officer investigating the case

³⁷ TADA '87, Sec. 15 (2): 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.

³⁸ TADA Rules '87, Rule 15 (3) (b): ... such police officer shall make a memorandum at the end of the confession to the following effect: -
'I have explained to (name) that he is not bound to make a confession and that , if he does so, any confession he may make may be used as evidence against him....'

³⁹ *Nazir Ahmad Bhatt v State of Delhi*, (2002) 1 SCC, p. 674 & 677.

administers the caution every time he meets the accused during the period of interrogation.⁴⁰

Where there is a time gap between the administration of the caution along with the ascertaining of the fact that the accused is confessing willingly and voluntarily, on the one hand, and the recording of confession that follows, on the other, it was held, that they cannot be regarded as two independent and separate parts and have to be treated as one confessional statement. Thus, it would suffice to administer the caution right at the beginning and the same need not be administered again before recording the confession.⁴¹

2. Cooling Time: This is a judicial concept introduced in some decisions but stands unrecognized by POTA, or its predecessor, TADA. The courts, too, have not been very clear on this issue. Simply speaking, it raises the issue whether there should be a time gap between the administration of the caution and the recording of the confession. Moreover, if so, what should be the period or length of such a time gap? The concept seems to have arisen from the belief that the accused should be granted some time “to coolly think over whether he wanted to voluntarily make a confessional statement despite knowing the consequences thereof.”⁴²

The Court is clear about the fact that the law does not mandate such a requirement:

Neither Section 15 nor Rule 15 contemplates... giving time to the person making a confession to think over and reconsider whether he still wants to make it in spite of being told that he is not bound to make it and that it can be used against him.⁴³

Nevertheless, the Court does seem to encourage this practice and leaves it to the good judgment of the recording officer to act on it or not:

...in case the recording officer of the confessional statement on administering the statutory warning to the accused forms a belief that the accused should be

⁴⁰ Ibid.

⁴¹ *S. N. Dube*, p. 284.

⁴² *Simon v State of Karnataka*, (2004) 1 SCC, p. 74, pp. 81-82.

⁴³ *S. N. Dube*, p. 284.

granted some time to think over the matter, it becomes obligatory on him to grant reasonable time for the purpose to the accused... depending on facts, the recording officer without granting anytime may straightway proceed to record the confessional statement but if he thinks it appropriate to grant time, it cannot be a mechanical exercise for completing a formality.⁴⁴

In other words, once granted, the cooling time has to be reasonable. It is for the officer to decide what would be reasonable, depending on the facts and circumstances of the case but “it cannot be mere farce for the sake of granting time.”⁴⁵

In the same case, the Court held “in the facts and circumstances” that the grant of half an hour as cooling time was unreasonable.⁴⁶ In another case where the accused was granted “time not exceeding 48 hours” the Court, without commenting on reasonableness or otherwise of the time granted, accepted the statements to be admissible.⁴⁷ Where an officer deposed in court that, as a matter of practice, he granted five minutes to any accused produced before him and after expiry of these minutes if the accused still wanted to make a confession he used to proceed and record the statement, the Court declared the practice adopted by the officer to be illegal.⁴⁸ Sufficient time being given to the accused for reflection before making a confession, merely because it was recorded a day or so before the police remand was to expire would not make it involuntary.⁴⁹

3. Confession: Although Section 15 of TADA and Section 32 of POTA dealt with confessions, nowhere in the Acts is the term ‘confession’ defined, neither does the Evidence Act offer a definition. It has, however, been held by the Court that the judicial principles enunciated by the courts concerning the meaning and content of ‘confession’ under the Evidence Act shall

⁴⁴ *Ranjit Singh v State of Punjab*, AIR 2002 SC, p. 3247 & 3250. Also see, *Simon*, pp. 81-82.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, p. 3252.

⁴⁷ *S.N. Dube*, pp. 284-5. Also see, *State of Maharashtra v Bharat Chaganlal Raghani*, AIR 2002 SC, p. 409 & 423.

⁴⁸ *Simon*, pp. 81-82; *CBI v Ashiq Hussain Faktoo*, (2003)3 SCC, p. 166 & 171.

⁴⁹ *Nalini*, pp. 399-400.

apply to the TADA.⁵⁰ According to the Court, “a ‘confession’ has either to be an express acknowledgement of guilt of the offence charged or it must admit substantially all the facts which constitute the offence.”⁵¹ Broadly speaking, it is an admission made at any time by a person charged with crime, stating or suggesting the inference that he committed that crime.⁵² Where, on the reading of a confessional statement, it was found that the maker of the statement specifically exculpated himself from the crime, it was held that the document could not be treated as a confession because “the basic ingredient of a confession i.e. admission of guilt”, was absent in the contents of the document.⁵³ The Court must have a proper confession before it and not a merely circumstantial narrative or information which could be incriminating.⁵⁴

According to both the Acts, only a confession made before ‘a police officer not lower in rank than a Superintendent of police’ is valid.⁵⁵

4. Voluntary and True Confessional Statement: Section 15 (2) of the TADA Act required that the “police officer shall not record such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily.”

Furthermore, as per Rule 15 (3) (b) the memorandum to be signed and attached by the police officer at the end of the confession had to, *inter alia*, include the statement “I believe that this confession was made voluntarily.”

As compared to this, POTA, makes no mention as to the voluntary nature of the confession but provides that:

- (a) The accused has a right to remain silent (Sec. 32 (2) proviso),
- (b) The police officer shall not compel or induce the accused to make any confession (Sec. 32 (2) proviso); and

⁵⁰ *Sahib Singh v State of Haryana*, (1997) 7 SCC, p. 231, pp. 241-2.

⁵¹ *Ibid*, p. 242.

⁵² *Devender Pal Singh*, p. 261.

⁵³ *Jameel Ahmed v State of Rajasthan*, III (2003) SLT, p. 481 & 483.

⁵⁴ *Mohd. Khalid*, p. 357.

⁵⁵ Sec. 32, POTA; Sec. 15, TADA Act 1987.

(c) The confession shall be recorded in an atmosphere free from threat or inducement (Sec.32 (3))

Does that mean that Section 32 does away with the requirement that a confession be voluntary? The Court in the POTA case cleared any doubts – if these ever existed: “It is settled position that if a confession was forcibly extracted, it is a nullity in law. Non-inclusion of this obvious and settled principle does not make the Section invalid”.⁵⁶

Thus, it is clear, that only voluntary confessions are acceptable by law. As discussed above, this is mandated by Article 20 (3) of the Constitution and Section 24 of the Evidence Act. This very principle was enforced by Section 15 of the TADA Act read along with Rule 15 of the TADA Rules and its successor POTA reinforces it in Section 32. The wordings in TADA and POTA may vary, but the judicial principles enunciated in the cases relating to what constitutes a voluntary confession under TADA cannot be denied application when interpreting POTA’s Section 32. The right to remain silent, not to be compelled or induced to make a confession and that a confession be recorded in an atmosphere free from threat or inducement have long been accepted as requirements of a free and voluntary confession. Section 32 merely records the guidelines as recommended by the Court in *Kartar Singh*⁵⁷ to put to rest the controversy (mandatory or declaratory?)⁵⁸ as to the status of the guidelines, and does not change the substantive content of the law in application even prior to POTA.

Nevertheless, even if it is argued that the judicial recognition of what constitutes a voluntary confession cannot be whittled away by changing the wordings of the section on custodial confession, the procedural safeguards provided in POTA are much inferior to those provided by the TADA Act and Rules. The TADA safeguards were in consonance with Section 164 of the Code of Criminal Procedure, which prescribes the procedure to be followed by a Magistrate while recording a confession or statement. Thus, what TADA had done was to vest authority in a

⁵⁶ *POTA Case*, p. 478.

⁵⁷ *Ibid*, p. 682.

⁵⁸ See *Lal Singh v State of Gujarat*, AIR 2001 SC, p. 746 & 757; *S.N. Dube v N.B. Bhoir*, (2002) 2 SCC, p. 254 & 287.

police officer to record a confession hitherto enjoyed only by the judicial officer, but at the same time had taken care not to compromise the safeguards provided by the Code in normal times. Thus, due to the exigencies at hand, a power was being transferred from the judicial wing to the executive, but without neutralizing the procedural safeguards. Moreover, the guidelines recommended by the Supreme Court in *Kartar Singh*, were in addition to the ones already available under the TADA Act and Rules. The guidelines were not intended to replace the existing law but were supposed to be ‘incorporated’ in the section or rule⁵⁹. The suggested guidelines were to strengthen the already available procedural safeguards in TADA. However, totally misunderstood by the Parliament, what stands today as Section 32 of POTA contains only the guidelines suggested by the Court devoid of the foundation provided by TADA, on which the Court was trying to build. Thus, in effect the procedural safeguards as available under TADA were severely compromised by POTA.

‘Voluntary’ means that the accused makes the statement “out of his own free will inspired by the sound of his own conscience to speak nothing but the truth”,⁶⁰ it should not be the “result of any tutoring, compulsion or pressurization.”⁶¹

As to the value of a free and voluntary confession as compared to other evidence, it has been held that it deserves the highest credit, because it is presumed to flow from the highest sense of guilt.⁶² Conviction on ‘confession’ is based on the maxim “*habemus optimum testem, confitentem reum*” which means that confession of an accused is the best evidence against him.⁶³ In Monir’s *Principle and Digest of the Law of Evidence*, it is noted:

...whereas the evidence in proof of a confession having been made is always to be suspected, the confession, if once proved to have been made and made voluntary, is one of the most effectual proofs in law.”⁶⁴

⁵⁹ *Kartar Singh*, p. 682.

⁶⁰ *Gurdeep Singh*, p. 3652; *Mohd. Khalid*, p. 357; *Nazir Khan*, p. 481; *Devender Pal Singh*, pp. 259-60.

⁶¹ *Mohd. Khalid*, p. 359.

⁶² *Nazir Khan*, p. 482.

⁶³ *Sahib Singh*, p. 242.

⁶⁴ Quoted in *Nazir Khan*, p. 482.

The question whether a confession is voluntary or not is always a question of fact. If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the 'voluntariness' of the confession, the court may refuse to act upon the confession, even if it is admissible in evidence.⁶⁵

Whenever an accused challenges that his confessional statement is not voluntary, the initial burden is on the prosecution to prove that requirements warranted by the counterterrorism law have been complied with. Once the prosecution has fulfilled its initial duty the burden shifts to the accused. Then it is for the accused to show and satisfy the court that the confessional statement was not made voluntarily.⁶⁶ The prosecution is not required to show why the accused wanted to make the confessional statement.⁶⁷

However, the initial burden on the prosecution does not arise on a mere allegation that requisite procedures or safeguards were not observed, or that the statement was recorded under duress or coercion. Such allegations would be of no consequence as they can be made by the accused in every case after making a confessional statement. Under Section 114 of the Indian Evidence Act,⁶⁸ there is a statutory presumption that, when an official act is proved to have been done, it will be presumed to have been regularly performed. The presumption that a person acts honestly applies as much in favour of a police officer as of other persons. It is not the judicial approach to distrust and suspect the police officer until there are good grounds to do so.⁶⁹

Though the specific requirement that 'the confession shall be recorded in an atmosphere free from threat or inducement' (POTA Section 32 (3)), did not form a part of the TADA Act or Rules, it was however brought into effect indirectly as forming

⁶⁵ *Nazir Khan*, p. 482; *Devender Pal Singh*, p. 261.

⁶⁶ *Gurdeep Singh*, p. 3653; *Devender Pal Singh*, p. 261; *Nazir Khan*, pp. 482-3. Also, see *Bharatbhai*, p. 3625.

⁶⁷ *Devender Pal Singh*, p. 270.

⁶⁸ Sec.114. *Court may presume existence of certain facts*: The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

⁶⁹ *Devender Pal Singh*, p. 265 citing *Aher Raja Khima v State of Saurashtra*, AIR 1956 SC, p. 217.

one of the constituent elements of the overall concept of a 'voluntary confession' in *Gurdeep Singh*. In this case, the appellant was in handcuffs while the confessional statement was recorded. There was another policeman in the room at some distance from the appellant holding the chain of his handcuff. Armed guards stood outside the room in which the confessional statement was being recorded. The Court had to decide: whether this set of circumstances could be construed to be such as to infer that the confessional statement recorded was not voluntary. The Court held:

...keeping the administrative exigencies under which an accused is kept under handcuff with armed guards etc. which may be for the antecedent activities of the appellant as terrorist, for the purposes of security, then this could in no way be constituted to be a threat or coercion to the accused for making his confessional statement.⁷⁰

Drawing a distinction between trials under TADA Act and other criminal trials the Court ruled that it was for the police administration to decide what measures had to be taken if they felt that the former required greater security and to make provisions accordingly.

Keeping an accused under police custody in what manner with what precautions is a matter for the police administration to decide. It is for them to decide what essential measures are to be taken in a given case for the purpose of security. What security, in which manner are all in the realm of administrative exigencies and would depend on the class of accused, his antecedents and other information etc. The security is also necessary for the police personnel keeping him in custody or other personnel of the police administration including the public at large.⁷¹

However, besides 'administrative exigencies', the Court took into consideration two other important factors to arrive at its decision. First, that all other requirements of law had been complied with;

⁷⁰ *Gurdeep Singh*, p. 3654.

⁷¹ *Ibid.*

and second, that before the making of the statement there was no inducement, threat or promise by any other word or deed made to the appellant which resulted in his making the said confession.

Although as per Section 32 POTA (as also Sec 15, TADA), the voluntary nature of a confession is sufficient to make it admissible in court, the judiciary has gone a step further. The Supreme Court requires a court to “apply a double test for deciding the acceptability of a confession i.e. (i) whether the confession was perfectly voluntary, and (ii) if so, whether it is true and trustworthy”.⁷² The Court stated, “Satisfaction of the first test is a *sine qua non* for its admissibility in evidence... If the first test is satisfied, the court must, before acting upon the confession reach the finding that what is stated therein is true and reliable”.⁷³ This means that, although a voluntary confession made to a police officer is admissible in a court of law, the court will not act or rely on it unless it is further proved to be ‘true and trustworthy’.

Where it was found, on facts, that the confessional statement did not admit even substantially the basic facts of the prosecution story, inasmuch as, in the confessional statement, no role was assigned to the appellant, while in the prosecution story an active role was assigned to him, the Court held that the confessional statement was not truthful.⁷⁴

5. Language: TADA Rules necessitated that the confession shall invariably be recorded in the language in which such a confession is made. In case this was not practicable, there were two options – it could be recorded either in the language used by such police officer for official purposes or in the language of the Designated Court.⁷⁵ Further, it provided that if the maker of the

⁷² *Mohd. Khalid*, p. 359 quoting *Shankaria v State of Rajasthan*, (1978) 3 SCC, p. 435.

⁷³ *Ibid.* Also, see *Gurdeep Singh*, p. 3654; *Sahib Singh*, p. 243.

⁷⁴ *Sahib Singh*, p. 244.

⁷⁵ TADA Rules, 1987, Rule 15. *Recording of confession made to police officers*.- (1) A confession made... shall invariably be recorded in the language in which such confession is made and if that is not practicable, in the language used by such police officer for official purposes or in the language of the Designated Court...

confession did not understand the language in which it was recorded, it be interpreted to him in a language he understood.⁷⁶

This seemed to be a simple provision, but has, at times, led to quite complex situations. In one case, the accused did not know the language of the recording officer (Kannada) and neither did the recording officer know the language of the accused (Tamil). The interpreter provided turned out to be the investigating officer of the case. *Per se*, there was no illegality in the recording of the confession as per Rule 15 (1) and (2), but the question arose as to its fairness and validity. Although, the confession was ruled to be invalid on many counts, the Court did record that, “the person so actively associated with the recording of the statement was none other than the investigating officer who by nature of things is interested in the success of the prosecution” and “who alone knows what is stated by the accused as the Superintendent of Police does not know Tamil.” The Court also ruled, “...it becomes the bounden duty of the recording officer... to make an attempt to arrange an independent interpreter.”⁷⁷

Possibly, to avoid such situations, POTA prescribes that the confession shall be recorded in the same language in which the person makes it (Section 32 (3)), and leaves no other options as provided by TADA. It could be argued that this takes care of any error or manipulation that may creep into the confession through the process of interpretation. On the other hand, if the Superintendent of Police does not know the language spoken by the accused, who will record the confession? In a situation where there is no other Superintendent of Police or higher-ranking officer in the district or area who knows the language of the accused, how long will the accused wait in custody? As the confession has to be recorded by an officer not lower in rank than a Superintendent of Police and the confession has only to be recorded in the language in which it is made, this could lead to

⁷⁶ TADA Rules, 1987, Rule 15 (2): The confession so recorded shall be shown, read or played back to the person concerned and if he does not understand the language in which it is recorded, it shall be interpreted to him in a language which he understands and he shall be at liberty to explain or add to his confession.

⁷⁷ *Simon*, pp. 83-84.

administrative difficulties for the Police as well as unwarranted prolonged detention for the accused.

Moreover, another valuable right of the accused provided by TADA Rule 15 (2), that a 'confession so recorded shall be shown, read or played back to the person concerned... and he shall be at liberty to explain or add to his confession' does not find place in the POTA.

6. Recording of Statement: The law provides that the confessional statement shall be recorded "either in writing or any mechanical or electronic device like cassettes, tapes or soundtracks from out of which sound or images can be reproduced" (Sec.32 (1) POTA). This is the verbatim replication of the relevant provision in the TADA Act (Section 15 (1)), except for the addition of the word 'electronic'. According to both these provisions only a police officer not lower in rank than a Superintendent of Police can record the confession.

The Court in *Kartar Singh* looked at the recording of the confession on a mechanical device very suspiciously. Agreeing to the appellant's counsel that such a device could be "tampered, tailored, tinkered, edited and erased etc.," the Court said "we strongly feel that there must be some severe safeguards which should be scrupulously observed while recording the confession... so that the possibility of extorting any false confession can be prevented to some appreciable extent".⁷⁸

There had also been a controversy about the meaning of the words 'in writing'. The matter came up in appeal to the Supreme Court from a Sessions Judge's ruling who interpreted the words 'in writing' to mean in the handwriting of the police officer who records the statement. Rejecting such a contention, the Court held that what the legislature intended was that the police officer should not leave the work of recording the confession to his subordinates and that everything in connection with the confession should be done in his presence and hearing and under his direct supervision and control. Thus, finding no justification to restrict the meaning of the words 'in writing' to mean the

⁷⁸ *Kartar Singh*, p. 681. Also, see *Mohd. Ayubdhar v State of NCT of Delhi*, (2001)10 SCC, p. 296.

handwriting of the police officer, it validated a typewritten confessional statement.⁷⁹ Extending the same logic, a confessional statement dictated to a steno and then typed on a typewriter⁸⁰ and statement recorded in a computer⁸¹ has been held valid.

Could the investigating officer or the officer supervising the investigation record a confessional statement? The Court answered:

For deciding this contention, we have to refer to Section 15 of the TADA Act and flush out from our minds the concept evolved because of provisions of Evidence Act. The confessional statement recorded by the Investigating Officer is not admissible in evidence because of specific bar under Sections 25 and 26 of the Evidence Act. When the bar is lifted by the Legislature, it would be difficult to hold that such confessional statement is inadmissible.⁸²

As to the overall recording process, emphasizing the fact that the fate of the accused hinges on the confessional statement recorded by the police officer, the Court has pointed out that,

...a statement cannot be recorded in a mechanical manner. All the safeguards provided in the Act and the Rules have to be strictly adhered to. There can be no room for any latitude in the matter and manner of recording of a confessional statement. Any material discrepancy will be fatal unless satisfactorily explained by the prosecution.⁸³

It was, however, also clarified that a confessional statement cannot be discarded or its authenticity doubted on non-observance of procedural requirements that can be considered as a minor deficiency and do not cause prejudice to the accused.⁸⁴

⁷⁹ *State of T.N. v Sivarasan*, (1997) 1 SCC, p. 682 & 692.

⁸⁰ *CBI*, p. 172.

⁸¹ *Devender Pal Singh*, p. 264.

⁸² *Lal Singh*, p. 756; *S.N. Dube*, p. 283.

⁸³ *Bharatbhai*, p. 3625. Also, see *Simon*, p. 84.

⁸⁴ *CBI*, p. 172.

7. Role of the Magistrate: The role designated to the Magistrate under the TADA Rules⁸⁵ was superfluous, and it is a mystery why such a provision was ever enacted. A judge had questioned whether a Magistrate under this Rule was expected to take the position of a superior postman – in the sense that he had only to receive the confessional statement and forward the same to the TADA Court by putting it in another envelope.⁸⁶ The Rule stated that every confession, after being recorded by the police officer, should be sent forthwith to the Chief Metropolitan Magistrate (CMM) or the Chief Judicial Magistrate (CJM) having jurisdiction over the area in which such a confession had been recorded. In turn, such a Magistrate shall forward the confession so received to the Designated Court, which may take cognizance of the offence. The Supreme Court held that the transmission of the recorded statement to the CMM or the CJM under Rule 15 (5) is only directory and not mandatory. The Rule did not ascribe any role to the Magistrate of either perusing the said statement or making any endorsement or applying his mind to the statement. The object of such a rule, as per the court was to safeguard the interest of the maker of the confession by directing that the confessional statement be taken out of the hands of the Police so that there could be no subsequent interpolation and also that the statement would have a safer probative value. It acquiesced with the criticism that the Rule “merely converts the said Courts into a post office”.⁸⁷ Thus, even bypassing the Magistrate and sending a confessional statement directly to the Designated Court was held by the Court not to be an “incurable illegality” as it did not cause any prejudice to the accused but was only a “procedural irregularity” which did not vitiate the trial.⁸⁸ Even the term ‘shall be sent forthwith’ (Rule 15 (5)) was given a liberal interpretation “in the case of non-compliance of such procedure, the concerned

⁸⁵ TADA Rules, 1987, Rule 15 (5): Every confession recorded under the said Section 15 shall be sent forthwith to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate having jurisdiction over the area in which such confession has been recorded and such Magistrate shall forward the recorded confession so received to the Designated Court which may take cognizance of the offence.

⁸⁶ *State of Maharashtra*, p. 422.

⁸⁷ *Jameel Ahmed*, p. 491; Also, see *State of Maharashtra*, p. 422.

⁸⁸ *Wariyam Singh v State of U.P.*, (1995) 6 SCC, p. 458 & 462.

Court should examine on the facts of that case whether the delay if any, in sending the confessional statement to the concerned Designated Court has given rise to any doubt as to the genuineness of the confessional statement”.⁸⁹ There was not even a maximum period or outer limit prescribed by the Court for a confession to reach its destination.

Unlike the TADA provision, POTA bestowed a proactive role to the Magistrates. Section 32 (4) provided that the maker of a confession be produced before a Magistrate (CMM or CJM) along with the original statement of confession within 48 hours after having his statement recorded. Under Section 32 (5) such a Magistrate is under a duty to record the statement, if any, of the person produced before him and get his signature or thumb impression on it. In case there is a complaint of torture by the person, the Magistrate shall direct a medical examination of the person by a Medical officer not lower in rank than an Assistant Civil Surgeon and, thereafter, such a person shall be sent to judicial custody.

Both these provisions are an outcome of the guidelines suggested by the Court in *Kartar Singh*.⁹⁰ Later, when the constitutionality of POTA came up before the Court in the *POTA Case*, commenting on the necessity and importance of Clauses (4) and (5) of Section 32, it held:

If the recording of confession by police is found to be necessary by Parliament and if it is in tune with the scheme of law, then an additional safeguard under Section 32 (4) and (5) is *a fortiori* legal. In our considered opinion, the provision that requires producing such a person before the Magistrate is an additional safeguard. It gives that person an opportunity to rethink over his confession. Moreover, the Magistrate’s responsibility to record the statement and the enquiry about the torture and provision for subsequent medical treatment makes the provision safer. It will deter the police officers from obtaining a confession from an accused by subjecting him to torture.⁹¹

⁸⁹ *Jameel Ahmed*, p. 491.

⁹⁰ *Kartar Singh*, p. 682.

⁹¹ *POTA Case*, p. 478.

In the Court, the Attorney General had contended that the provisions of POTA were “an improvement of TADA by virtue of enactment of Section 32 (3) to 32 (5)” and “that the provisions which entails the Magistrate to test and examine the voluntariness of a confession and complaint of torture is an additional safeguard”.⁹² It was hoped that the CMM and the CJM would actively carry out the role designated to them by the law and as envisaged by the Attorney General.

8. Admissibility, Corroboration & Conviction: Unlike under the TADA Act, Section 15 (1), wherein conditions fulfilled, a confession was admissible in a trial of the confessor or co-accused, abettor or conspirator, Section 32 (1) of POTA restricts the admissibility of such a confession to only the trial of person confessing.

It appears that, from the very start, the legislature was not too comfortable with the issue of extending the admissibility of a confession from its maker to a co-accused, etc. The initial position taken by the TADA Act in 1987 was quite drastic. The Designated Court had a duty to presume that an accused had committed the offence if his co-accused had, in a confession, involved the former [Section 15 (1) read with 21 (1)]. This meant that the court would treat the confession as substantive evidence against the former, and in the absence of proof to the contrary, could also convict a co-accused on its basis. However, in 1993, by an amendment (Act 43 of 1993) such a presumption was removed by deleting Sub-Clauses (c) and (d) of Section 21 Clause (1) and Section 15 Clause (1) was amended to bring it in conformity with Section 30 of the Evidence Act.⁹³ Under POTA, a confession to a police officer is only admissible against its maker. Possibly, because such a provision is an exception to ordinary criminal law principles, its use has been restricted to the essential minimum.

9. Other Considerations: These procedural safeguards do not exhaust the protection offered to the accused. Though custodial confessions are admissible in evidence, it is still for the court to

⁹² Ibid, p. 477.

⁹³ See *Kartar Singh*, p. 680.

decide on its acceptability or evidentiary or probative value. Under the appropriate circumstances, however, the evidentiary value of custodial confessions is held to be unimpeachable. It was often argued that a confessional statement being recorded by a police officer is a weak type of evidence and must always be corroborated before basing a conviction. In a series of cases, the Supreme Court has held that once the confessional statement is found to be voluntary and truthful, it becomes substantive evidence and does not require any corroboration, and the maker of a confession can be convicted on such uncorroborated confession.⁹⁴

Though it is entirely for the court trying the offence to decide the question of admissibility or reliability of a confession in its judicial wisdom strictly adhering to the law, it must, while so deciding the question, satisfy itself that there was no trap, and no importune seeking of evidence during the custodial interrogation and all conditions required are fulfilled.⁹⁵

One argument raised against POTA, which does apply to custodial confessions as well, is that it is open to misuse or abuse. The Court noted, however, that it had “repeatedly held that mere possibility of abuse cannot be counted as a ground for denying the vesting powers or for declaring a statute unconstitutional.”⁹⁶ It refused to look into and examine the ‘need’ for POTA, as it was a matter of policy, holding that, “Once legislation is passed the Government has an obligation to exercise all available options to prevent terrorism within the bounds of the Constitution”.⁹⁷

This does not mean that the Court has given a free hand to the police in such cases. Against discarding the evidence of police officials merely on the ground that they belong to the police force and thus are either interested in the investigation or the prosecuting agency, the Court warned, “...their evidence needs to be subjected to strict scrutiny and as far as possible corroboration

⁹⁴ *Jameel Ahmed*, p. 489; *Jayawant Dattatray Suryarao v State of Maharashtra*, AIR 2002 SC, p. 143 & 165; *S.N. Dube*, p. 281; *Gurdeep Singh*, p. 3654; *Devender Pal Singh*, p. 263; *Bharatbhai*, p. 3625. Also, see *Ravinder Singh v State of Maharashtra* AIR 2002 SC, p. 2241; *State v Nalini* (1999) 5 SC, p. 253.

⁹⁵ *Kartar Singh*, p. 683.

⁹⁶ *POTA Case*, p.468.

⁹⁷ *Ibid.*

of their evidence in material particulars should be sought.”⁹⁸ Such evidence has to inspire confidence and in the absence thereof, conviction cannot be sustained.⁹⁹

Another contentious issue related to the admissibility of a valid confession recorded under the counterterrorism law in a trial of offences under the Indian Penal Code or other Acts, even though the accused has been acquitted of offences under the counter terrorism law. The Court, in *Bilal Ahmed Kaloo*, ruled that “there is no question of looking into the confessional statement ... much less relying on it since he was acquitted of all offences under TADA”.¹⁰⁰ The logic put forward was “Any confession made to a police officer is inadmissible in evidence as for these offences and hence... the said ban would not wane off in respect of offences under the Penal Code merely because the trial was held by the Designated Court for Offences under TADA as well.”¹⁰¹ However, in a later case, the Court, without referring to the above case ruled, “We have... absolutely no doubt that a confession, if usable under Section 15 of the TADA, would not become unusable merely because the case is different or the crime is different.”¹⁰² The Court drew strength from the fact that there was “no statutory inhibition”¹⁰³ against such use as well as the ruling in *State of Rajasthan v Bhup Singh*,¹⁰⁴ where a similar objection was raised in the context of the admissibility of a confessional statement under Section 27 of the Evidence Act. The matter was unequivocally laid to rest when the Court specifically overruled *Bilal Ahmed Kaloo* in *State v Nalini*,¹⁰⁵ where the Court pointed out that the former case had not taken into consideration the implications of Section 12¹⁰⁶ vis-à-vis Section 15 of TADA

⁹⁸ *Pradeep N. Madgaonkar v State of Maharashtra*, (1995) 4 SCC, p. 255 & 261. Also, see *Kalp Nath Rai v State (through CBI)*, (1997) 8 SCC, p. 732 & 757.

⁹⁹ *Simon*, p. 81; Also, see *Sahib Singh & Wariyam Singh* for ‘related’ or ‘interested’ witnesses.

¹⁰⁰ *Bilal Ahmed Kaloo v State of A.P.*, (1977) 7 SCC, p. 431 & 434.

¹⁰¹ *Ibid.*

¹⁰² *State of Gujarat v Mohammed Atik*, (1984) 4 SCC, p. 351 & 354.

¹⁰³ *Ibid.*

¹⁰⁴ (1977) 10 SCC, p. 675 cited in *State of Gujarat*, p. 355.

¹⁰⁵ (1995) 5 SCC, p. 253.

¹⁰⁶ TADA 1987, Sec. 12. *Power of Designated Courts with respect to other offences.-*

while dealing with the issue. It ruled that the *Bilal Ahmed Kaloo* did not lay down the correct law and that a duly recorded confessional statement would continue to remain admissible for other offences under any other law which were tried along with the TADA offences, even if the accused was acquitted of offences under TADA in that trial.¹⁰⁷ Nevertheless, the ghost of *Bilal Ahmed Kaloo's* decision seems to still haunt the Court's corridors. In *Gurprit Singh vs. State of Punjab*, possibly by oversight, the Court, once again relying on the case, ruled that confessional statements recorded during investigation in TADA cannot be used for convicting an accused for any offence under the Indian Penal Code.¹⁰⁸ However, since this was a decision by a two-Judge Bench, it would not have held much weight for future decisions.

Tackling terrorism is a serious business and the Parliament and Supreme Court have invested a high level of confidence in the Police. Clearly, urgent measures needed to be taken to justify the confidence reposed in them. At times, failure to secure convictions has resulted due to police inadequacy and slackness.¹⁰⁹ Lack of awareness of the procedure prescribed by the law has been another cause of procedural irregularities.¹¹⁰ Such instances cannot be

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- (1) When trying any offence, a Designated Court may also try any other offence, with which the accused may, under the Code be charged at the same trial if the offence is connected with such other offence.
 - (2) If, in the course of any trial under this Act, of any offence, it is found that the accused person has committed any other offence under this Act or any rule made thereunder or under any other law, the Designated Court may convict such person of such other offence and pass any sentence authorized by this Act or such rule or, as the case may be, such other law, for the punishment thereof.

POTA, Section 26 dealt with the same matter.

¹⁰⁷ In spite of the fact that all three Judges on the Bench wrote their own judgment and differed on many issues in this case, they concurred on this issue. *State v Nalini*, p. 304 (Thomas, J.), 401 (Wadhwa, J.), 570 (Quadri, J.).

¹⁰⁸ *Gurprit Singh v State of Punjab*, AIR 2002 SC, p. 2390.

¹⁰⁹ Convictions failed to materialize just because the officer did not attach a 'memorandum' (TADA Rule 15 (3) (b)) as required by the law- *Sharafat Hussain Abdul Rahaman Shaikh v State of Gujarat*, (1996) 11 SCC 62, 64; or the recorded statement did not show that he had followed the guidelines - *Ayub*, 1199; or a statement recorded in 1992 was produced before the Designated Court in 1997 or a copy of the confession was not supplied to the accused for nearly seven years! - *Simon*, p. 82.

¹¹⁰ Even high-level officers have confessed to ignorance of the modalities of recording a confession. A Superintendent of Police confessed to the court that he was not aware of the statutory requirements of the TADA Act and

justified under any circumstance and very stringent action needs to be taken by the department against the erring officials to sustain the trust in the police and the legal system. These are, strictly speaking, instances of dereliction of duty, which should not go unpunished.

At the same time, it has to be acknowledged that terrorism is a new challenge for law enforcement. The fight against terrorism is not a regular criminal justice endeavour. To face terrorism we need new approaches, techniques, weapons, expertise and, necessarily, new and stringent laws. It is a fact that the highest court of the country has accepted the necessity of custodial confessions, along with the accompanying procedural safeguards, in combating the menace of terrorism. It has upheld the constitutional validity of such confessions repeatedly. It is well known that highly motivated, committed and well organised criminal groups commit crimes of this nature, and witnesses are not only reluctant but altogether unwilling to depose at the risk of their own lives. Having regard to the objectives which the anti-terrorism legislation must have in view, and the policy underlying such legislation, a departure from the ordinary procedure is certainly justified as the best means of giving effect to the object of the legislature. The exigencies of the prevailing situation warrant the strengthening of counterterrorism laws along with well-balanced safeguards, strong deterrents for misuse, use of technology to sustain convictions, and a well-trained police force. Instead, we have the recurrent abandonment of the law itself.

Unfortunately, the present Government appears to be oblivious of the essentials of the debate. With the repeal of POTA and the enactment of the diluted Unlawful Activities (Prevention) Amendment Act, it has lost out on the advantage so painfully achieved over the past years. No country with a record of as prolonged and lethal terrorist attacks as India can really afford to be without any special and effective anti-terrorist legislation.

Rules until he recorded his first confession. He “admitted that he had inadvertently committed breach of the TADA Rules while recording those confessions”. *S.N. Dube*, p. 281. There is also an instance where ‘got-up’ witnesses were produced before the court by the police. *Pradeep N. Madgaonkar*, p. 261. Also, see *Krishna Mochi v State of Bihar*, AIR 2002 SC, p. 1965; *Bihari Manjhi v State of Bihar*, AIR 2002 SC, p. 1832; *State of Rajasthan v Mahendra Singh*, AIR 1995 SC, p. 2326. Also see, *Simon*, p. 81.