

**Counter-Terrorism Measures**

***Analyzing***

**Human Rights & Criminal Jurisprudence**

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**DISSERTATION**

**Submitted To**

**National Law School of India University, Bengaluru**

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**UNDER THE SUPERVISION OF**

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HUMAN RIGHTS**

## TABLE OF CONTENTS

<b>CERTIFICATE.....</b>	<b>3</b>
<b>DECLARATION.....</b>	<b>4</b>
<b>ACKNOWLEDGEMENT.....</b>	<b>5</b>
<b>ABBREVIATION .....</b>	<b>6</b>
<b>TABLE OF AUTHORITIES .....</b>	<b>7</b>
<b>Chapter I: Introduction.....</b>	<b>9</b>
1.1 Statement of Problem .....	11
1.2 Importance of Study .....	11
1.3 Aims and Objectives .....	11
1.4 Hypothesis .....	12
1.5 Research Question.....	12
1.6 Research Methodology.....	12
1.7 Literature Review .....	12
1.8 Scope and Limitation.....	14
1.9 Chapterisation .....	14
1.10 Mode of Citation.....	15
<b>Chapter II: Concept of Terrorism.....</b>	<b>16</b>
2.1: Defining Terrorism: The Unsuccessful Attempt .....	16
2.2 The Historical Evolution .....	17
2.3 Failure to define terrorism: The Probable Reasons .....	18
2.4 Terrorism ‘by the State’ to ‘against the state’: The shift.....	19
2.4.1 Exclusion of State Terrorism .....	20
2.4.2 ‘Anything’ against State: Terrorism against State.....	21
<b>CHAPTER III: Counter-terrorism Measures.....</b>	<b>23</b>
3.1 Counter-Terrorism Measures in Absence of Precise Definition .....	23
3.2 India’s Counter-terrorism Legislations: The Ambiguities .....	24
3.2.1 Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA) .....	24
3.2.2 Terrorist Affected Areas (Special Courts) Act, 1984 (TAAA).....	25
3.2.3. Statutes for Preventive Detention .....	26
3.2.4. Prevention of Terrorism Act 2002 (POTA).....	26
3.2.5. National Investigation Agency Act, 2008 .....	27
3.2.6. Unlawful Activities (Prevention) Act 1967(UAPA) .....	27
3.3 Special Counter-terrorism Laws: Overlap with ordinary criminal law.....	29
<b>Chapter IV: Counter-terrorism Measures and Violation of Human.....</b>	<b>31</b>

4.1 The Counter-terrorism Legislation: In conflict with Human Rights.....	33
4.1.1 <i>ITADA</i> .....	33
4.1.2 <i>Preventive Detention Laws</i> .....	34
4.1.3 <i>POTA</i> .....	34
4.1.4 <i>UAPA</i> .....	35
4.2 The Dichotomy of Fundamental Rights and Anti-Terror Laws .....	38
4.3 Counter-Terrorism Legislations: Figures of Gross Failure .....	40
<b>Chapter V: Counter-terrorism Legislation Diluting Criminal Jurisprudence....</b>	<b>42</b>
5.1 Strict construction of penal statutes .....	42
5.2 <i>nulla poena sine lege/ nullum crimin sine lege</i> .....	43
5.3 Presumption of innocence until proved guilty beyond all reasonable doubts .....	44
5.4 Bail Jurisprudence: Jail and Not Bail under Anti-Terror Laws .....	45
<b>Chapter VI: Conclusion &amp; Suggestion.....</b>	<b>47</b>
<b>BIBLIOGRAPHY .....</b>	<b>49</b>

## CERTIFICATE

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This is to certify that the Dissertation titled “**Counter-Terrorism Measures: Analyzing Human Rights And Criminal Jurisprudence**” submitted by Ms. Kahkashan Jabin (ID No. 933) in the partial fulfillment of LL.M (Human Rights) Degree for the academic session 2020-21 at National Law School of India University, Bengaluru, is bona fide research work by her carried out under my guidance and supervision. It is clarified that this dissertation is not submitted to any other University for the award of any Degree or Diploma whatsoever or published elsewhere in any form.

Mr. Kunal Ambasta  
Assistant Professor of Law  
National Law School of India University  
Bengaluru

Date:

Place:

## DECLARATION

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I, the undersigned, solemnly declare that this dissertation titled “**Counter-Terrorism Measures: Analyzing Human Rights And Criminal Jurisprudence**” submitted to National Law School of India University, Bengaluru for LL.M. Degree (2020-21) is an original and bona fide research work carried out by me under the guidance and supervision of Mr. Kunal Ambasta. Where other sources of information have been used, they have been acknowledged properly. The information contained in this work is true to the best of my knowledge. This work has not been submitted anywhere for any award of degree, diploma, certificate or fellowship nor has it been sent for any publication purpose.

Date: 01-09-2021

Kahkashan Jabin

Place: NLSIU, Bangalore

LLM/933/2020

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Kahkashan Jabin  
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## **ABBREVIATION**

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- AFSPA-Armed Forces (Special Powers) Act 1958
- CAA- Citizenship (Amendment) Act, 219
- CTC – Counter Terrorism Committee
- EU- European Union
- FIR-First Information Report
- HC- High Court
- ICCPR – International Convention on Civil and Political Rights
- IPC-Indian Penal Code
- LeT- Lashkar-e-Taiba
- MISA – Maintenance of Internal Security Act
- NHRC – National Human Rights Commission
- NIA-National Investigation Act
- NSA – National Security Act
- PDA-Preventive Detention Act
- POTA – Prevention of Terrorism Act
- SIMI-Student Islamic Movement of India
- SC-Supreme Court
- SIB- Subsidiary Intelligence Bureau
- TAAA- Terrorism Affected Areas(Special Courts) Act 1984
- TADA – Terrorist and Disruptive Act
- U/S- Under Section
- UAPA – Unlawful Activities Prevention Act
- UDHR – Universal Declaration of Human Rights
- UN – United nations
- UNSC – United Nation Security Council

## TABLE OF AUTHORITIES

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### Statutes

1. The Constitution of India, 1950.
2. The Indian Penal Code, 1860.
3. The National Security Act, 1980.
4. The Preventive Detention Act, 1950.
5. The Prevention of Terrorism Act, 2002.
6. The Terrorist and Disruptive Activities (Prevention) Act, 1987.
7. The Unlawful Activities (Prevention) Act, 1967.

### Cases

1. A and Ors. v Secretary of State for the Home Department, (2004) UKHL 56
2. A.K. Roy v Union of India AIR 1982 SC 710
3. Abbasi and Anr. v Secretary of State for Foreign and Commonwealth Affairs (2002) EWCA Civ.1598.
4. Arup Bhuyan v. State Of Assam 3SCC 377(2011)
5. Asif Iqbal Tanha vs. State Crl.A. No. 39 of 2021,
6. Hamdi et al. v Rumsfeld, Secretary of Defense et. al (2004) 72 USLW 4607
7. Hitendra Vishnu Thakur v. State of Maharashtra (1994) SCC 602
8. Kartar Singh v. State of Punjab, 1961 AIR 1787
9. Mohd. Khalid v. State of W.B., 7 SCC 334. (2002)
10. Muralidhar Sarangi v. New India Assurance Co. Ltd 3 SCC 466(2000)
11. Natasha Narwal v State of Delhi NCT CRL.A. 82/2021
12. National Investigation Agency v. Zahoor Ahmad Shah Watali 2018 SCC OnLine Del 11185.
13. PUCL V. Union Of India, (2003) 4 SCC 399



14. Rasul et al. v Bush, President of the United States, et. Al. (2004) 72 USLW 4596
  15. Rumsfeld v Padilla (2004) 72 USLW 4584
  16. Sajal Awasthi v. Union of India\_WP (C) 1076/2019
  17. State of Punjab v. Sukhpal Singh, 1 SCC 35(1990)
  18. State of Rajasthan v. Balchand (1977) 4 SCC 308
  19. (The State) The National Investigation Agency v. Akhil Gogoi, Case No.:  
Crl.A./192/2020
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## Chapter I

### Introduction

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*“The guarantee of Constitutional safeguards has been sacrificed to the reigning fashion of war on terror”.*

*-Manisha Sethi*

Human Rights are minimal rights guaranteed to individuals against State for belonging to “member of human family”.<sup>1</sup> States being party to international human rights instruments such as Universal Declaration of Human Rights, International Covenant on Civil and Political Rights etc. must take measures to protect its individuals. The history of revolution has come up with framework where responsibility is imposed upon States to protect citizens from violence and cooperate internationally to bring perpetrators to justice. *At presenti* international community faces one of the most crucial challenges of protecting human rights while countering terrorism. The menace of terrorism demands counter-terrorism strategies preventing terrorist activities simultaneously protecting rule of law and human rights.<sup>2</sup> International platform acquires central stage on tactics to be adopted to combat terrorism but core of the issue which ultimately links to its repercussions is absence of any uniform definition of terrorism. Scholars strongly attribute ambiguity in meaning and scope of terrorism posing gravest threat to human rights and rule of law.<sup>3</sup> United Nations and other national and international forums adopt piecemeal approach to combat terrorism off shooting various global treaties and conventions. It was pointed out as early as in 1972 that international law direly demands precise definition of the concept ‘terrorism’ with the objective of fighting it effectively.<sup>4</sup> Research highlights angle of political advantage grasped by exploiting issue of terrorism ultimately

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<sup>1</sup>A. Kalse, *Human Rights In Constitution Of India*, Commonwealth Parliamentary Association, 2016, 1.

<sup>2</sup> Office of the United Nations High Commissioner for Human Right, *Human Rights, Terrorism and Counter-terrorism*, Factsheet 32, 2.

<sup>3</sup> M. Cherif Bassiouni, *Prolegomenon To Terror Violence*, 12 Creighton Law Review, 745, 751-753(1979).

<sup>4</sup> Secretary General, *Resolution 685, A/50/685*, (1995).

making human rights vulnerable.<sup>5</sup> Unfortunately we live in a state “democratic unfreedom”.<sup>6</sup> Neglect of civilized nations to reach a consensus on precise definition of terrorism has led states to sketch draconian anti-terror laws in its overzealous response to combat terrorism. Journey of anti-terror laws has made almost ‘every act’ of individual ‘against state’ from initiating a thought process for a literature to holding protest march about burning issues as ‘terrorist act’. These laws thwart rubric of criminal jurisprudence adorned with maxims such as presumption of innocence, strict interpretation of penal statute, *nullum crimen sine lege*, the balance of burden of proof, bail jurisprudence etc. It penalizes people for inculcating politico-majoritarian unauthorized views. Result being terrorists’ violence, dissent against government measures, and protest against human rights violations are weighed in same scales. Two faced situation has emerged in which individual- perpetrated violence is shown more draconian but state- driven anti-terrorist measures are legitimized in name of state security. Killing of individual by non-state actor and by state without any due process are at equal standard from human rights perspective.

Counter-terrorism shall not be euphemism of terrorism.<sup>7</sup> Otherwise it is in vain to expect it to be in consonance with human rights. The emerging global and local gathering around terrorism shall be analyzed for arriving at better situation to strengthen democracy and fundamental rights.<sup>8</sup> To view terrorism as a special form of violence could be an objective way of decoding the vice of terrorism without reducing state security.<sup>9</sup> If government guarantee respect as much in safeguarding human rights as in fighting terrorism it would increase its credibility among people and weaken support for anti-democratic causes.<sup>10</sup> Governments must emphasize on criminal justice model based on rule of law rather than making it uncertain ultimately naming every individual disapproving government as terrorist.

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<sup>5</sup> Pupul Dutta Prasad, *Concern For Human Rights In The Fight Against Terrorism: Challenges And Options Before India*, 58(4) *Journal of the Indian Law Institute*, 457, 460 (2016).

<sup>6</sup> Tapan Kumar Bose, *Global War on ‘Terrorism’ and Democratic Rights*, 31(4) *India International Centre Quarterly*, 27, 32(2005).

<sup>7</sup> Prasad, *supra*, at 480.

<sup>8</sup> Bose, *supra*, at 39.

<sup>9</sup> Prasad, *supra*, at 461-465.

<sup>10</sup> Nils Muižnieks, *Anti-terrorism and human rights*, Council of Europe, Commission of Human Rights (2014) <https://www.coe.int/en/web/commissioner/-/anti-terrorism-and-human-rights>

### **1.1 Statement of Problem**

States across the globe are at war against terrorism without knowing essentially what to fight against. Terrorism is a challenging issue that demands dynamic approach balancing state security and human rights. Formulating counter-terrorism laws in absence of precise definition leads States to delve into over responsively attitude where legislative framework becomes devoid of certainty and precision. Indian web of counter-terrorism laws is antithetical to international standard of human rights and domestic regime of fundamental rights. There are distinct evidences to the failure and abuses of TADA, POTA, and UAPA where absence of constitutional safeguards and rupture of rule of law has painted ugliest picture in terms of extra-judicial killings and police brutal torture. Arbitrary framing and subsequent misuse of counter-terrorism laws are contrary to fundamental rules of criminal justice system like presumption of innocence, strict interpretation of laws, *nullum crimen sine lege* etc. which forms the bedrock of criminal jurisprudence. Uncertainty in defining the concept has lead to equalizing actual terrorists, activists and dissenters of state. There is no limit to what could be counted under the head of terrorism. This has inevitably resulted into tagging ‘terrorism’ and ‘terrorist’ to any activity or entity which is to be condemned. Citizens are denied freedom of discussion and dissent so indispensable for democracy.

### **1.2 Importance of Study**

This research work aims to understand issues involved in combating terrorism with specific focus on counter-terrorism laws, its abuses and gross failure. Research work reveals abusive intent with which these special laws are designed within the existing framework of ordinary criminal justice system. It explores the recent as well past incidents that highlights the gravest violation of human right by the application of special counter-terrorism laws in Indian context. The work specifically argues for respect for rule of law while framing and applying counter-terrorism measures guaranteeing human right protection in consonance with existing jurisprudence of criminal justice system.

### **1.3 Aims and Objectives**

The research work aims to analyze the concept of ‘terrorism’ and trace its evolution and subsequent change in its character from ‘by the state’ to ‘against the state’. It further studies the development of counter-terrorism measures in national and

international domain. It also aims to analyze India's counter-terrorism framework in light of criminal law jurisprudence and human rights law standards.

#### **1.4 Hypothesis**

The concept of terrorism is imprecise in its domain due to absence of uniform definition. The lack of universal definition leads to formulation of arbitrary counter-terrorism laws causing violation of human rights and diluting fundamental rules of criminal jurisprudence.

#### **1.5 Research Question**

1. Whether the concept of terrorism is precise in absence of universal definition?
2. Whether absence of definition has resulted arbitrary counter-terrorism legislations?
3. Whether current counter-terrorism measures in India has violated substantial and procedural safeguards guaranteeing human rights protection under the Constitution?
4. Whether the changing concept of terrorism dilutes criminal jurisprudence?

#### **1.6 Research Methodology**

Researcher has used analytical and descriptive methodology of research. Descriptive research endeavors to describe present position. Thus for analyzing concept of terrorism and studying various counter-terrorism measures adopted by India, researcher has adopted descriptive approach. While analytical research attempts to establish how absence of any precise definition of terrorism leads to dilution of concept of terrorism from 'by the state' to 'anything against state' and how this shift has resulted into arbitrary counter-terrorism legislations in name of state security violating human rights and thwarting criminal jurisprudence.

#### **1.7 Literature Review**

Researcher has reviewed literature that shed light on concept of terrorism that emerged in absence of precise definition and subsequent development of counter-terrorism framework devoid of human rights safeguards. "Jenny Teichman, *How to Define Terrorism*, 64(250), *Philosophy* 505(1989)" particularly describes issue of definition of terrorism accepting that term is infamously difficult to define and also highlighting political angle involved when state-terrorism is justified. "Roger S. Clark, *State Terrorism: Some Lessons from the Sinking of the Rainbow Warrior*, 20

Rutgers L.J., 393(1989)” - It analyses dilution of concept of terrorism and advocating for its comprehensive definition involving both violent activities of state and non-state actors. “Pupul Datta Prasad, *Concern For Human Rights In The Fight Against Terrorism: Challenges And Options Before India*, 58(4) Journal of the Indian Law Institute, 457(2016)” regards issue of an objective understanding of terrorism, undistorted effectiveness of counter-terrorism laws, and human rights compatible response to terrorism are governing principles in policy-making. Paper underlines ‘fighting for human rights’ and ‘fighting against terrorism’ are inextricably connected. “Tapan Kumar Bose, *Global War on ‘Terrorism’ and Democratic Rights*, 31 (4) India International Centre Quarterly, 27(2005)” specifically argues the loosened concept of terrorism giving birth to anti-terror laws that vaguely defines offences and covering mainly the anti-government actions as ‘terrorism’. “Michael L. Jackson, *The Perversion of Democracy in India: The Indian Government's Handling of Dissent in the Punjab*, 9 IN PUB. Interest, 12, (1989)”- paper deals with democratic subversion in India in context of Punjab massacres suppressing Sikh dissent through extra-legal anti-terror laws. “*Kafkaland: Prejudice, Law and Counterterrorism in India* by Manisha Sethi”, deeply dives into particular instances revealing the scariest faces of authorities and torture met out in the name of security under legislative tool of anti-terror laws. “Anil Kalhan, Gerald P. Conroy, Mamta Kaushal, Sam Scott Miller, And Jed S. Rakoff, *Colonial Continuities: Human Rights, Terrorism, And Security Laws In India*, 20(1) Columbia Journal Of Asian Law, 93 (2006)” analysis comprehensively events that led to framing of TADA, POTA, UAPA, NSA, PDA etc. and portrays blatant violation of human rights. It posits the ineffectiveness of special antiterrorism laws with low conviction rates and persistence of terrorism despite these draconian laws. “Swati Mehta, *Human Rights and Anti-Terror Laws: India Sets An Example, Police Reforms Programme*, CHRI, 23, (2004)”, describes the gross failure rate of anti-terror laws and subsequent repeal of laws due to allegation of human rights violations. “George Williams, *Anti-Terrorism Laws and Human Rights*, 19 REV.Const.Stud. 127 (2015)” argues for balancing of protection of human rights against the counter-terrorism measures. It asserts risk involved to freedom of speech and association undermining democratic freedoms with particular focus on Australia anti-terrorism laws. It provides stark case study for human rights violations in absence of a national Bill of Rights. The report “*Framed, Damned and Acquitted: A*

*report' by JTSA (2013)'' depicts even the intact set of non-derogable fundamental rights cannot help innocents in securing Constitutional safeguards against draconian network of anti-terror laws. It exemplifies fragile cases framed with false evidences targeting particular community. "Kunal Ambasta, *Designed For Abuse: Special Criminal Laws and Rights of Accused*, 14 NALSAR Student Law Review (2020)'' distinctly highlights the overlap between the special laws and ordinary criminal justice system. It exposes real intention of these laws of abusing rule of law, fundamental rights and constitutional safeguards of accused. The researcher found that literature is restricted to identifying abuses and ineffectiveness of counter-terrorism legislative framework. Analyzing domestic counter-terrorism legislations within framework of criminal jurisprudence is rarely dealt with. Hence the researcher attempts to address this gap within literature regarding the concept of terrorism with respect to current counter-terrorism laws in India.*

### **1.8 Scope and Limitation**

The research work mainly deals with assessing imprecision and arbitrariness of counter-terrorism measures within Indian framework. The study is limited to analyzing human rights violations within Indian legislative framework under, TADA, POTA and UAPA and does not delve into international framework established for counter-terrorism.

### **1.9 Chapterisation**

1. **Chapter 1 – “Introduction”**: The chapter attempts to give the general idea on the issue along with statement of problem, hypothesis, research questions and literature review etc.
2. **Chapter 2 – “Concept of Terrorism”**: It deals with various general definitions of terrorism evolved from time to time and highlights the unsuccessful attempt to arrive at consensus on any uniform standard definition. It also deals with historical evolution of the terrorism and analyzes how the concept of terrorism has changed from ‘by the state’ to ‘anything against the state’ as terrorism.
3. **Chapter 3 –“Counter-terrorism Measures”**: It briefly deals with international efforts to combat terrorism and urge for over responsively

attitude of states to frame ambiguous counter-terrorism laws. It mainly confines to India's anti-terror laws covering the vague definitions of offences and stringent procedural provisions under TADA, TAAA, POTA, UAPA and detention laws.

4. **Chapter 4 – “Counter-Terrorism measures And Violation of Human Rights”**: In this Chapter the violation of human rights guarantees by the counter-terrorism measures is explored. It attempts to deal with numerous instances where violations of human rights are flagrant in the exercise of abusive powers of counter-terrorism measures. It also covers the recent incidents that highlights the unconstitutional character of anti-terror legislations and questions the utility of special laws with extremely low conviction rates.
5. **Chapter 5 – “Counter-terrorism Measures and Criminal Jurisprudence”**: This Chapter analyzes the maxims of criminal justice system that forms the bedrock of English criminal jurisprudence and its subsequent dilution by counter-terrorism legislations and its application on innocents who raise the voices against the state for certain reforms disapproving state administrative or legislative actions prejudicial to welfare of state. It also highlights the hurdles created in granting bail to arrested persons under the counter-terrorism legislations and reversing the jurisprudence of ‘bail and not jail’.
6. **Chapter 6 – “Conclusion”**: It reflects the complete study of the research work done in previous chapters.
7. **Bibliography**: It states the references to the research study.

### **1.10 Mode of Citation**

The researcher has adopted Bluebook (19<sup>th</sup> ed.) format for citation. The mode of citation is uniform throughout the research project.

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## Chapter II

### Concept of Terrorism

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#### **2.1: Defining Terrorism: The Unsuccessful Attempt**

The concept of terrorism exists in vacuum of any precise universal definition. Being critical and burdened with great deal of partisanship, it's difficult to define 'terrorism'.<sup>11</sup> Generally it is referred as "acts of violence that target civilians in pursuit of political or ideological aims".<sup>12</sup> *Black's Law Dictionary* defines 'Terrorism' as "the use or threat of violence to intimidate or cause panic, especially as a means of affecting political conduct"<sup>13</sup>. *Oxford Dictionary* defines 'Terrorism' as "the unlawful use of violence and intimidation, especially against civilians, in the pursuit of political aim". Both 'Terrorism' and 'Terrorist' are nouns of 'Terror'.<sup>14</sup> According to *Encyclopedia survey of Global Terrorism*,<sup>15</sup> "The act of terror, in its manifest expression, is an act of deadly force, directed against an innocent victim is instrumental (a means) to the furtherance of some proximate end, for example, the generation of fear or intense anxiety on the part of others. One of the most salient traits of terrorism is its indiscriminate and arbitrary character. Terrorist acts are like natural catastrophes-they strike any one, the guilty and the innocent alike." R. Higgins observed: "terrorism is a term without any legal significance. It is just a convenient approach of alluding to activities, whether of States or individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both."<sup>16</sup>

In 1994, the General Assembly's "*Declaration on Measures to Eliminate International Terrorism*", in resolution 49/60, declared that terrorism

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<sup>11</sup>Jean-Marc Sorel, *Some Questions About the Definition of Terrorism and The Fight Against Its Financing* 14(2), *European Journal of International Law*, 362,366(2003).

<sup>12</sup> Supra note 2 at 5.

<sup>13</sup> *Black's Law Dictionary* 1484 (7th ed. 1999)

<sup>14</sup>B.P.Singh *et al* *Global Terrorism-socio Political and Legal Dimensions*, 59, (1995).

<sup>15</sup>R.K. Pruthi, *Encyclopaedia Survey of Global Terrorism in 21<sup>st</sup> Century*, 20, (2001).

<sup>16</sup> R. Higgins, *the General International Law of Terrorism*, 13(28), *International Law and Terrorism*, (1997).

imbibes “criminal acts intended or calculated to arouse a state of terror within the general public, a group of persons or particular persons for political purposes” and that such acts “are in any circumstances unjustifiable, whatever the concerns of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them”.<sup>17</sup> After 10 years in 2004, *resolution 1566* of Security Council, referred terrorism as “criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a Government or an international organization to do or to abstain from doing any act.”<sup>18</sup> By the time terrorism entered 1990s, it lost its rigor and became elastic. The ‘Terrorist’ as a label is used by governments to demonize those raise voice against it. The word is quite elusive in meaning and notoriously controversial. International community’s inability to arrive at consensus has augmented the confusion and consequently made it difficult to define it.

## **2.2 The Historical Evolution**

The long history of terrorism indicates its evolution from the idea of state-sponsored attack to indefinite activities of violence for whatsoever purposes. The words ‘terrorism’ and ‘terror’ was originally signified as the methods used by regimes for the purpose of controlling populations by means of aggressive reprisals and fear. The watershed moment in international progress for arriving at consensus dealing with terrorism is the attack on 11 September 2001 on the US World Trade Centre on. But terrorism always existed, in one or the other form in societies. ‘Terrorism’ and ‘terrorists’ were first clearly defined in 1798.<sup>19</sup> The word ‘terrorist’ acquired criminal connotations when Edmund Burke accused “hell-hounds” as ‘terrorists’ on letting loose on people.<sup>20</sup> Earlier Terrorism was used in context of

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<sup>17</sup> United Nations, General assembly, A/RES/49/60 (1995).

<sup>18</sup> United Nations, Security Council, S/RES/1566 (2004).

<sup>19</sup> Jonathan Fine, *Political and Philological Origins of the Term ‘Terrorism’ from the Ancient Near East to Our Times*, 46(2) Middle Eastern Studies, 271, 278(2010).

<sup>20</sup> *Id.*

Government-sponsored terrorism i.e. employing terror for suppressing rivals and maintaining power.<sup>21</sup> During 19<sup>th</sup> -20<sup>th</sup> century Anarchists introduced the notion of individual terrorism.<sup>22</sup> Contemporary form of terrorism emerged during the 9/11 attack on US.<sup>23</sup>

### **2.3 Failure to define terrorism: The Probable Reasons**

Worldwide talks on terrorism have done less to curb terrorism and more for diplomatic world politics.<sup>24</sup> At the ground level ‘terrorism’ has been used by politicians and diplomats as labels to pin their enemies. It is a suspicious question whether the world has failed to define terrorism or deliberately failed to define, especially focusing, the US dual character of labeling terrorism. The cliché *one man’s terrorist is another man’s freedom fighter* reflects this game of semantics - the violent act is terrorism if one is on victim’s side, however, violent act is anything but terrorism on perpetrator’s side.<sup>25</sup> It also highlights conflict of values emerging from *end always justifies the means*. Some countries believe that causes or political motivation for terrorism are relevant to definitional problem. Some governments posit that individual acts of violence would come under terrorism if they are used for personal gains or caprice. Acts committed with political cause, especially against colonialism or for national liberation, fall outside definition and constitute legitimate measures of self-defense. These varying approaches and clash of values has contributed much to failure of agreement on definition of terrorism in the United Nations and other international platforms.

Further the ingredients of terrorism ranges from individual acts of one person to planned operations of grouping of individuals and thereby reaches to the stage of non-international conflict.<sup>26</sup> Realizing the elastic nature of terrorism Richard Baxter (Harvard Professor and former judge of the ICJ) holds- The

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<sup>21</sup> Mark Burgess, *A Brief History of Terrorism*, Centre for Defense Information, POGO, (2015) <https://www.pogo.org/investigation/2015/02/brief-history-of-terrorism/>

<sup>22</sup> See generally D. Novak, *Anarchism and Individual Terrorism*, 20(2) The Canadian Journal of Economics and Political Science, 176-184(1954).

<sup>23</sup> Supra note 21.

<sup>24</sup> Supra note 5.

<sup>25</sup> *Id.* at 458.

<sup>26</sup> Ganor Boaz, *Defining Terrorism: Is one man’s terrorist another man’s freedom fighter*, (January 01,2010), <https://www.ict.org.il/Article/1123/Defining-Terrorism-Is-One-Mans-Terrorist-Another-Mans-Freedom-Fighter#gsc.tab=0>

term ‘terrorism’ is imprecise, ambiguous, and, furthermore, serves no operative legal purpose.<sup>27</sup> The world community has attempted to resolve the question of definition largely by ignoring it and focusing instead on identifying particular criminal acts to be prevented and punished and on particular targets to be protected.

#### **2.4 Terrorism ‘by the State’ to ‘against the state’: The shift**

20<sup>th</sup> century confronts transformation of terrorism.<sup>28</sup> Earlier terrorism was recognized as violent activities of State. In contemporary context it’s referred to as violent activities of non-state actors targeted against State. The *Oxford English Dictionary* defines terrorism as “government by intimidation as directed and carried out by the party in power in France during the Revolution of 1789-94.”<sup>29</sup> Its origin is marked by the French Revolution signifying essentially the state aggressive actions.<sup>30</sup> In contrast, in 1937 League of Nations “*Draft Convention for the Prevention and Punishment of Terrorism*” referred terrorism as “All criminal acts directed against a State and intended or calculated to create state of terror in minds of particular persons or a group of persons or the general public.”<sup>31</sup> The Convention was never implemented but essentially laid down framework for future course of action that later culminated ‘terrorist act’ as ‘every act against state’.<sup>32</sup>

The shift to ‘against the state’ from ‘by the state’ occurs in the mid of nineteenth century.<sup>33</sup> Ideology of ‘against the state’ underlines state’s absolute powers in the name of security. The British Prevention of Terrorism Act of 1974 defined terrorism as “the use of violence for political ends including the use of violence for the purpose of putting the public or any section of the public in fear”.<sup>34</sup> In 1983 the US Department of Defense

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<sup>27</sup> Jody Greene, *Hostis Humani Generis*, 34(4) Critical Inquiry, 683 683 (2008).

<sup>28</sup> Roger S. Clark, *State Terrorism: Some Lessons from the Sinking of the Rainbow Warrior*, 20 Rutgers L.J., 393, 394 (1989).

<sup>29</sup> 11 Oxford English Dictionary 216 (1933) cited in Clark, *supra*, at 394.

<sup>30</sup> Clark, *supra*, at 394.

<sup>31</sup> League of Nations Convention For The Prevention And Punishment Of Terrorism 1937, art.1, <https://dl.wdl.org/11579/service/11579.pdf>

<sup>32</sup> Javier Ruperez, *The United Nations In The Fight Against Terrorism*, 2, [https://www.un.org/sc/ctc/wp-content/uploads/2017/01/2006\\_01\\_26\\_cted\\_lecture.pdf](https://www.un.org/sc/ctc/wp-content/uploads/2017/01/2006_01_26_cted_lecture.pdf)

<sup>33</sup> Jenny Teichman, *How to Define Terrorism*, 64(250), *Philosophy* 505,508-509, (1989).

<sup>34</sup> *Id.* at 509.

defined terrorism excluding State terrorism as ‘the use of force by revolutionary organizations’.<sup>35</sup> India treads the same path by targeting activities of non-state actors and groups under its counter-terrorism legislations. Media has contributed in crystallizing this shift by leaning in state’s favor by emphatically portraying non-state actors in conflict with government.<sup>36</sup> When National Human Rights Commission (NHRC) pursuant to SC orders, investigated approx two thousands cases of involuntary disappearances in Punjab in 1980s, famous Indian newsmagazines denoted human rights campaigner who assisted the Commission as agents of Khalistani terrorists.<sup>37</sup>

This shift is double-edged sword. It legitimizes State counter-terrorism activities through broad embraces of draconian legislations and secondly it pushes human rights violation by state outside the scope of terrorism. The Indian Judiciary has also retained only ‘against the state’ by describing terrorism in its various judgments as “unlawful acts of violence committed in an organized attempt to overthrow a government”<sup>38</sup>; “Terrorism is one of the manifestations of increased lawlessness and cult of violence. Violence and crime constitute a threat to an established order and are a revolt against a civilized society”<sup>39</sup>; “Terrorism means the act of terrorizing; unlawful acts of violence committed in an organized attempt to overthrow a government or like purposes.”<sup>40</sup> These interpretations tend to exclude state terrorism which then is considered as legalized form of state actions in name of state security.

#### **2.4.1 Exclusion of State Terrorism**

Unfurling various definitions of terrorism in aforesaid sections makes it clear that individual or association of individuals are sinister but states are excluded from its domain howsoever grave injustice might occur under its authority. The grey area in the definition ultimately excludes state brutal acts. It has created red zone in every country highlighting grave human right

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<sup>35</sup> *Id.*

<sup>36</sup> Bose, *supra*, at 30-32.

<sup>37</sup> *Id.* at 3.

<sup>38</sup> Muralidhar Sarangi v. New India Assurance Co. Ltd. 3 SCC 466(2000).

<sup>39</sup> Mohd. Khalid v. State of W.B., 7 SCC 334. (2002).

<sup>40</sup> State of Punjab v. Sukhpal Singh, 1 SCC 35(1990).

violations but addressed in none. State unaccountable actions are not, but should be, tagged as state terrorism. There is no justification for treating terrorism against state differently from terrorism perpetrated by state.<sup>41</sup> This exclusivity is due to magnification of one aspect of terrorism by non-state actors in which the other actor becomes dormant. Terrorism by State is infinitely more consequential than terrorism by non-state actors. State terrorism is worse as it's pursued under garb of state security and human rights protection.

There is misconception that State-terrorism involves only state's arbitrary actions while combating terrorism. However this form of "state terrorism is without a fig leaf".<sup>42</sup> State's actions that are devoid of legal justifications like illegal and arbitrary arrests, custodial torture, deaths and rape, involuntary disappearances, forcible relocation of populations, racial/religious minorities and social classes massacres, false encounters, kidnapping and assassination of political opponents, incarceration of citizens in concentration camps etc. must come under state-terrorism.<sup>43</sup> Brutal state oppressions marginalize democracy. Taking lives and creating fear among population are elements of terrorism. Therefore, state acts objectively qualify as terrorist activities.<sup>44</sup> However such claim is not feasible if object is to constrain the domain of terrorism. But such deductions demands revisiting the domain of terrorism otherwise it would imbibe every act of non-state actor by homogenizing terrorism contextually.

#### **2.4.2 'Anything' against State: Terrorism against State**

State exercise unimpeded powers by means of legislative framework *mala fide*ly suppressing anti-state voices. Today's government's image reflects colonial regime who saddled black laws to repress movement against repression. Political application of counter-legislations for suppression of

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<sup>41</sup> Prasad, supra at 476.

<sup>42</sup> C. V. Subbarao, *State Terrorism*, 26(50), Economic and Political Weekly, 2904 (1991).

<sup>43</sup> Randhir Singh, *Terrorism, State Terrorism and Democratic Rights*, 27(6) Economic and Political Weekly, 281, 286 (1994), see also, Bose, supra, at 29.

<sup>44</sup> Prasad, supra at 476.

protests and civil rights activism is not new.<sup>45</sup> Terrorism is now known as euphemism of dissent against state. State shreds off its obligation of addressing real issues by de-legitimizing such protests. Tagging any kind of violence as terrorism is first move of two-part move, which denies existence of broader political crisis, violence being clearly reflective of it; second move is response by use of force to such political conflict labeled as 'terrorism' and not enquiring into its causes.<sup>46</sup> Consequently resentment comes under terrorism especially against repressive regimes.<sup>47</sup>

Democracy is mocked when human rights activists, journalists, writers, poets, physicians, teachers, students, trade unionists, lawyers targeting state's irrational activities become accused under anti-terror laws. Recent incidents strengthen this argument where people were booked for criticizing government administrative or legislative policies and advocating for welfare reforms and changes. The proposition is not that security concerns are not necessary but it cannot take away already vulnerable civil rights. Security without liberty or extremely curtailed liberty blurs the line between democracy and dictatorship.<sup>48</sup>

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<sup>45</sup> Singh, *supra*, 281-283; see also, *India: Dalit Rights Activists Detained End Politically Motivated Use of Counterterrorism Law*, Human Rights Watch, (2018) <https://www.hrw.org/news/2018/06/24/india-dalit-rights-activists-detained>, *Who is an urban naxal, asks Romila Thapar*, The Hindu, (2018 16:30 IST) <https://www.thehindu.com/news/national/who-is-an-urban-naxal-asks-romila-thapar/article25088465.ece>

<sup>46</sup> Prasad, *supra* at 475.

<sup>47</sup> Bose, *supra* at 29.

<sup>48</sup> Swati Mehta, *Human Rights and Anti-Terror Laws: India Sets An Example, Police Reforms Programme*, CHRI, 23, (2004).

## CHAPTER III

### Counter-terrorism Measures

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Domain of Terrorism does utter injustice by convicting and penalizing innocents under criminal law without defining precisely what the offence is. Broad definition legitimizes diverse opinion contrary to international human rights standards. *Human Rights Watch Report* highlights states more than 130 anti-terror legislations are vague. These fail to define words, have ambiguous definitions and no clarity as to what are the constituent elements of terrorist act.<sup>49</sup> This creates “terror hysteria”<sup>50</sup> on one hand and dilution of its scope on the other hand.

#### **3.1 Counter-Terrorism Measures in Absence of Precise Definition**

*“International Instruments Related to the Prevention and Suppression of International Terrorism”* compiles International conventions adopted between 1963 and 1999 pursuant to Security Council *Resolution 1373* to combat terrorism.<sup>51</sup> These Conventions do not define terrorism but only recognizes particular activities forming the scope of it. *1985 Resolution of General Assembly* “[u]nequivocally condemns, as criminal, all acts, methods and practices of terrorism...which jeopardize friendly relations among States and their security”<sup>52</sup>. The *acts, methods, and practices* are wide-ranging and indefinite way to refer to terrorism. *Resolution 1373 of the United Nations Security Council*<sup>53</sup> whistleblower post US 9/11 attack, urged - “States shall take the necessary steps to prevent the commission of terrorist acts” and not terrorism thereby made it an open ended concept. This tendency has triggered numerous international instruments – “Inter American

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<sup>49</sup> In the Name of Security Counterterrorism Laws Worldwide since September 11, Human Rights Watch, 18 (June 2012) <https://www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11>

<sup>50</sup> Bose, supra at 27.

<sup>51</sup> Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols, United Nations, V.03-85663 (E), 2 (2003).

<sup>52</sup> General Assembly Resolution, A/RES/40/61 9 December 1985.

<sup>53</sup> United Nations, Security Council Resolution 1373, S/RES/1373 (2001).



Convention against Terrorism (2002) and Eleventh SAARC Summit Declaration”, “ASEAN Declaration on the Joint Action to Counter Terrorism (2001)”, “OSCE Bucharest Plain of Action for Combating Terrorism and Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism (2004)”; to target terrorism sans its precise definition.<sup>54</sup>

### **3.2 India’s Counter-terrorism Legislations: The Ambiguities**

Uncertainties of scope of terrorism exaggerate threat forcing governments across the globe to frame counter-terrorism legislations with uncertainty using very broad terms. Muddled lines put heavy cost on lives of innocents by blurring difference between perpetrators of terrorism and victims of counter-terrorism legislations. Intensity of abuse caused by counter-terrorism legislations could not be justified by international pressure that led countries to come up with. States’ anti-terrorism measures attribute terrorism with its own baggage of political, historical, racial, cultural and regional troublesome ideologies. Terrorism engulfed ordinary crimes under its expanded account and unguided government’s discretionary powers in terms of arresting, detaining, investigating and prosecuting individuals jeopardizing life and liberty. The black laws framework in India include “Terrorist and Disruptive Activities (Prevention) Act 1987”, “Terrorist Affected Areas (Special Courts) Act, 1984”, Prevention Detention Laws, “Prevention of Terrorism Act 2002”, “Unlawful Activities (Prevention) Act 1967”.

#### **3.2.1 Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA)**

It was the first counter-terrorism law passed in India. It was passed to deal with peculiar conditions prevailing in Kashmir, Punjab, and parts of north-east.

TADA penalized committing “terrorist act, conspiracy, attempt to commit, advocate, abet, advise or incite, or knowingly facilitate commission of a terrorist act or any act preparatory to a terrorist act; harbor or conceal, or attempt to harbor or conceal any person knowing that such person is a terrorist; to hold property that has been derived or obtained from commission

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<sup>54</sup> Bose, supra, at 28.

of any terrorist act or that has been acquired through the terrorist funds.”<sup>55</sup> It defined “disruptive activity”<sup>56</sup> as “any action by speech or act...which (i) questions, disrupts... sovereignty and integrity of India’ or (ii) is intended to bring about or supports any claim...for cession...or secession of any part of India...” It defines “abet”<sup>57</sup> to include a wide range of activities for which individual need not be even remotely complicit in a ‘terrorist or disruptive act’.<sup>58</sup> Statute severely restricted free speech. All in all criticism of government was culpable.

Its procedural rules were contrary to ordinary rules of law of evidence and criminal procedure. The confessions to police officers were authorized as admissible evidence.<sup>59</sup> It imbibed strict bail parameters with extraordinary procedures to be applied by special courts.<sup>60</sup> NHRC in its report along with a letter<sup>61</sup> to Parliament prohibited its renewal.<sup>62</sup> It lapsed in 1995.

### **3.2.2 Terrorist Affected Areas (Special Courts) Act, 1984 (TAAA)**

It was another right-violating legislation in response to Sikh dissent for which “Operation Blue Star”<sup>63</sup> was conducted to curb terrorism.<sup>64</sup> It established special courts to adjudicate terrorism related offences in government specified terrorist affected areas. Under it accused was presumed guilty until proven innocent and burden of proof was upon accused to prove his innocence.<sup>65</sup> Trials were held in camera, and authorized courts to keep witness identities secret.<sup>66</sup> It abrogated the right of confrontation viz. fundamental to democracy. It is indeed a travesty of justice when any person, innocent or guilty, is put to death by the state after having been legislatively precluded from contesting the conviction. Like TADA it had stringent bail

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<sup>55</sup> Terrorist and Disruptive Activities (Prevention) Act, 1987, §3.

<sup>56</sup> *Id.* at §4.

<sup>57</sup> *Id.* at §2(1)(a).

<sup>58</sup> Michael L. Jackson, *The Perversion of Democracy in India: The Indian Government's Handling of Dissent in the Punjab*, 9 IN PUB. Interest, 12, 14 (1989).

<sup>59</sup> Terrorist and Disruptive Activities (Prevention) Act, 1987, §15.

<sup>60</sup> *Id.* at §§9-19.

<sup>61</sup> National Human Rights Commission Annual Report 1994-1995, 53-57.

<sup>62</sup> *Id.* at 8-10, (para 4.1-4.6).

<sup>63</sup> “An operation involving a massive offensive by the army and central paramilitary forces against militants in the Harmandir Sahib complex” Kalhan, *supra*, at 142.

<sup>64</sup> Jackson, *supra* at 13.

<sup>65</sup> Terrorist Affected Areas (Special Courts) Act, 1984 §20.

<sup>66</sup> *Id.* at §12.

standard under which prosecution could object to release of an accused and extended the time of detention pending investigation from ninety days to one year.<sup>67</sup>

### **3.2.3. Statutes for Preventive Detention**

After few weeks of enforcing the Constitution of India giving fundamental rights to its citizens, Parliament enacted the Preventive Detention Act, 1950 (PDA) to curtail those rights authorizing detention up to twelve months with limited procedural protections.<sup>68</sup> It was enacted to control violent activities of communists in West Bengal, Hyderabad and Madras. It lapsed in 1969 but returned the form of Maintenance of Internal Security Act 1971 (MISA) within two years. The National Security Act 1980 (NSA) is another draconian law containing provisions similar to PDA, MISA, TADA and POTA. It permits preventive detention up to twelve months.<sup>69</sup>

### **3.2.4. Prevention of Terrorism Act 2002 (POTA)**

The stringent provisions of TADA were transplanted into POTA pursuant to Security Council *Resolution 1373* which counseled states “to establish terrorist acts as serious criminal offences under domestic laws”.<sup>70</sup> Statute phraseology focused preventing terrorism but real intention was to instill fear and achieve easier conviction. It impinged dissenters’ freedom of speech and expression and other interrelated actions. It further legalized imputations of ordinary crimes as terrorism-related offenses and police torture and brutal investigations. It incorporated special measures inconsistent with ordinary criminal justice system, like extended police custody<sup>71</sup>, intrusive police investigation, and admission of police confessions<sup>72</sup>. Legislation met with same fate as TADA of being repealed in 2004 for antithetical to human rights.

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<sup>67</sup> *Id.* at §15.

<sup>68</sup> Preventive Detention Act, 1950 §11A.

<sup>69</sup> The National Security Act, 1980, §13.

<sup>70</sup> Security Council Resolution 1373, S/RES/1373 (2001), Para 2(e).

<sup>71</sup> The Prevention of Terrorism Act, 2002 §49.

<sup>72</sup> *Id.* at §32.

### **3.2.5. National Investigation Agency Act, 2008**

After 2008 Mumbai attack of 26/11 National Investigation Agency (NIA) was setup under the Act to coordinate, investigate and prevent criminal actions. It acts as Central Counter Terrorism Law Enforcement Agency empowered to deal with terrorism under “The Unlawful Activities (Prevention) Act, 1967”, “The Atomic energy Ac, 1962”; “The Suppression of Unlawful Acts against Safety of Civil Aviation Act, 1982”; “The Anti-Hijacking Act, 1982”; “The Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002”; “The SAARC Convention (Suppression of terrorism) Act, 1993”; “The Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005”; and offences under Chapter VI of IPC and Sec.489-A to 489-E of IPC.

### **3.2.6. Unlawful Activities (Prevention) Act 1967(UAPA)**

After the scourges of TADA, POTA Parliament implanted POTA provisions in UAPA (in force at present) by 2004 amendment. The Act is infamous for vague and arbitrary wordings.<sup>73</sup> Intellectuals have been continuously questioning it.<sup>74</sup> The Act defines “unlawful activity”<sup>75</sup> employing elastic words like “*disclaim*”, “*disrupt*”, “*question*” and “*disaffection*”. After 2008 Mumbai attacks, definition of ‘terrorist act’ was expanded to include terror funding, counterfeiting Indian currency and procurement of weapons. It made easy for the authorities to put charges in FIRs with the sketchiest possible details.<sup>76</sup>

The Act penalizes “*unlawful associations*”.<sup>77</sup> “Association” is defined as “any combination or body of individual”.<sup>78</sup> This is bizarre as a group of friends or casual relations developed on visits to *dhabas* over tea or on

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<sup>73</sup> The Unlawful Activities (Prevention) Act, 1967, §15.

<sup>74</sup> Gautam Bhatia, *Bhima Koregaon and the Fault in our Laws*, The Hindu, (2018, 23:54 IST), <https://www.thehindu.com/opinion/lead/bhima-koregaon-and-the-fault-in-our-laws/article24305910.ece>, see also Arun Ferriera and Vernon Gonsalves, *Fifty Years of Unreasonable Restrictions Under the Unlawful Activities Act*, The Wire, (09/MAR/2017) <https://thewire.in/rights/uapa-anti-terrorism-laws>

<sup>75</sup> The Unlawful Activities (Prevention) Act, 1967, cl.(o) §2

<sup>76</sup> Manisha Sethi, *Kafkaland, Prejudice, Law and Counterterrorism in India*, 5 (2014).

<sup>77</sup> The Unlawful Activities (Prevention) Act, 1967, §10.

<sup>78</sup> *Id.* at cl.(a)§2.

visiting libraries may well be read within definition of association.<sup>79</sup> Article 2(3) of “*European Commission’s Framework Decision on Combating Terrorism*” doesn’t categorize suddenly constituted group for instant committing of offence which don’t have distinct parts for each individual to play as ‘terrorist group’; rather denotes “terrorist group” as a “structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences”.<sup>80</sup>

The Act further penalizes “membership”<sup>81</sup> of terrorist organization without circumscribing it within certain limits which take in its ambit individuals possessing pamphlets, books or sympathizing for ‘organization members’ however not having relation as such. Supreme Court reminded that “mere membership of a banned organization will not incriminate a person unless he resorts to violence or incites people to violence or does an act intended to create disorder or disturbance of public peace by resort to violence.”<sup>82</sup> Authorities ignore such judgments to push innocents in jails before they could establish their innocence by struggling to secure a further judgment.

By multiple amendments UAPA targets loose concept of terrorism by imposing burden of proof on accused to executing extra-territorial arrests. 2008 Amendments added procedural sections 43A to 43F. Section 43D (2) extends detention period up to 180 days and sections 43D (4) and (5) made it hard-core task to get bail. Comparing these with other countries, the British Parliament proposal(post London terror attack in July 2007) to increase period from 14-19 days for pressing charges in terror related offences got defeated by resounding majority, twenty-eight days was settled as a temporary measure and finally in 2012 it fixed fourteen days.<sup>83</sup> The 2011

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<sup>79</sup> Vicky Nanjappa , *Rights activists slam amendments to UAPA*, rediff.com, (December 04, 2012 12:04 IST) <https://www.rediff.com/news/report/rights-activists-slam-amendments-to-uapa/20121204.htm>

<sup>80</sup> Directive (Eu) 2017/541 Of The European Parliament And Of The Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (15 March 2017) <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32017L0541&rid=6>

<sup>81</sup> The Unlawful Activities (Prevention) Act, 1967, §38.

<sup>82</sup> Arup Bhuyan v. State Of Assam, 3SCC 377, 379 (2011)

<sup>83</sup> Justice Aftab Alam, “*A Performance Audit and Some Thoughts on UAPA*”, Live Law, (7 Aug 2021 4:29 AM) <http://www.livelaw.in/columns/justice-aftab-alam-former-sc-judge->

Report by Lord Carloway shows that in Scotland detention during criminal investigation before charges pressing is taken in hours, with extreme limit of 24 hours in extra-ordinary cases.<sup>84</sup> The Report underlines similar practices in Ireland, Western Europe and UK.

The irrational provisions create a sliding scale of punitive acts ranging from mere speech criticizing government, to sedition, to damage to public property, to terrorism.<sup>85</sup> An illustration would bring out statute irrationality - Individual makes a bona fide speech rationally criticizing government giving quoting Constitutional and legal provisions. Others carry out peaceful march, few others sets violent protest. Then an unlawful or terrorist organization makes statement supporting that cause and few individuals throw a bomb. Now going by the overbroad definitions of UAPA, and the sliding scale that it establishes all these events, from throwing bomb to giving just a criticizing speech would constitute a single conspiracy and the bona fide maker of speech would be labeled as terrorist.

### **3.3 Special Counter-terrorism Laws: Overlap with ordinary criminal law**

The acts penalized under UAPA could easily be accommodated under Indian Penal Code 1860 (IPC) with certain amendments. UAPA arbitrarily authorizes government to proclaim any association as an “unlawful association”.<sup>86</sup> It defines “unlawful association”<sup>87</sup> as an association that has an object of “unlawful activity”<sup>88</sup> that comprises of “to cause or intended to cause disaffection against India”. It is to greater extent resembles with “sedition” u/s 124A IPC. At the same time another similarity that could be compared is with section 141 IPC(except the element of ‘at least five person’) as UAPA denotes ‘association’ as ‘unlawful association’ if its object is commission of an offence punishable u/s153A or 153B IPC.<sup>89</sup> S.141 describes criminal objects that makes an assembly an “unlawful assembly”,

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speech-for-democracy-dissent-and-draconian-law-uapa-and-sedition-webinar-by-cjar-hrda-livelaw-179093

<sup>84</sup> The Carloway Review Report and Recommendations, 17 November 2011, 12-13, 46.

<sup>85</sup> Supra note 83.

<sup>86</sup> The Unlawful Activities (Prevention) Act, 1967, §3.

<sup>87</sup> *Id.* at cl.(p) §2.

<sup>88</sup> *Id.* at sub-cl. (iii)cl.(o) §2.

<sup>89</sup> *Id.* at sub-cl.(ii)cl.(p) §2 .

one of the object u/s 141 is “to commits any offence”<sup>90</sup> that clearly includes section 153A & 153B of IPC. It thus gives state discretionary powers for treating differently the similar transactions of activities by notifying one among them as “terrorist organization” under the I Schedule UAPA. Thus the question arises as to the utility of these legislations that could be answered by the argument that these legislations are designed essentially for abusing them.<sup>91</sup>

If the legitimacy of counter-legislation lies in shielding security and integrity of India by punishing those who fulfill the ingredients of sec.153A/153B IPC then individuals putting state integrity at risk by making provocative speeches against human rights activists or state bona fide dissenters shall be put at the same place however absence of ‘against the state’ does not constitute any liability. The subject against which act is done is determinative factor for culpability and not the offence as such. Though ‘against the state’ is justified to reasonable extent but section 122,123, 124A of IPC under are sufficient unless State wants to eradicate ‘anything against it’ and for that special legislations are prerequisite. So the legality is placed in excluding all ‘anti-state’ activity. *Human Rights Watch Report* states that anti-terror legislations comprise of those activities which have already been covered within ordinary laws of countries criminal justice system.<sup>92</sup> Therefore it adds nothing in the fight against terrorism but certainly heightens citizens’ difficulties to proof his innocence against the state under special investigation procedures and trial mechanism.

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<sup>90</sup> Indian Penal Code, 1860 cl.(3) §141.

<sup>91</sup> See Generally, Kunal Ambasta, *Designed For Abuse: Special Criminal Laws and Rights of Accused*, 14 NALSAR Student Law Review, (2020).

<sup>92</sup>Supra, at note 49.

## Chapter IV

### Counter-terrorism Measures and Violation of Human

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Human rights violations under counter-terrorism measures occupy the most heated debate across the globe. It embarks upon the deliberations of balancing between protection of human rights and concerns for national security. The rise of fundamentalism and international terrorist organizations has made out the case for stringent measures for safety and security of people. Measures countering and preventing terrorist acts confront issue of human rights protection for accused as well as for people at large. ‘Global War on Terror’ pursuant to 9/11 attacks, led to torturous interrogation techniques, irregular rendition and prolonged incommunicado detention.<sup>93</sup> Prior 9/11 incident international terrorism was dealt as criminal law matter emphasizing crime prevention through intelligence or law enforcement means and if prevention failed, on the apprehension, prosecution and punishment of the perpetrators. Later criminal justice approach was deemphasized and supplanted with military means. Urge by international society to counter terrorism, without precise definition leaves it to countries to give its definition according to its own socio-political needs. This carries potential threat to human rights by deliberate misuse of the term. States simply adopts ‘shoot-to-kill’ techniques in response to its designed perception of terrorist threats.<sup>94</sup>

Human rights standards warrants State to detain persons suspected of terrorist activity in absolute compliance with national and international human rights law. Deprivation of individual’s liberty should be in consonance with fair trial and due process. “*United Nations Global Counter-*

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<sup>93</sup> David P. Stewart, *Terrorism And Human Rights*, Middle East Institute, 10, 12-13 (2018).

<sup>94</sup> “Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur, Philip Alston” (E/CN.4/2006/53, paras. 44–54) and “Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin” (A/HRC/4/26, paras. 74-78).



*Terrorism Strategy*” by General Assembly in its resolution 60/288 recognizes respect for rule of law as fundamental basis in fight against terrorism.<sup>95</sup> This position was reaffirmed in “*The World Summit Outcome*”, adopted by General Assembly in 2005, The Security Council Resolution 1456 (2003), 1624 (2005) and A/60/825 (2006) report “*Uniting against terrorism: recommendations for a global counter-terrorism strategy*”.<sup>96</sup>

The Security Council’s *Counter-terrorism Committee*, established in 2001 emphasizes that States counter-terrorism measures must comply with obligations under international law particularly international human rights law, refugee law, and humanitarian law, along with coordinating with OHCHR. Office of Counter-Terrorism is established within the UN Secretariat to assist States in employing “*UN Global Counter-terrorism Strategy*”. One of its mandates is to prevent vicious extremism in consonance with 2006 *Global Counter-terrorism Strategy* focusing consistency with human rights norms.<sup>97</sup>

In *Abbasi and Anr. v. Secretary of State for Foreign and Commonwealth Affairs*<sup>98</sup>, the Court of Appeal (Queen’s Bench) expressed fretfulness on condition of Guantanamo Bay British detainees held by US for waging war against it. US Supreme Court embarks security protection measures must not impinge human rights of detainees.<sup>99</sup> In this case foreign nationals were incarcerated for an indefinite period under English Anti-terrorism, Crime and Security Act 2001 following 9/11 attacks. In American cases<sup>100</sup> Court has stressed on fair trial by balancing interests of detainees rights and national security. Effective counter-terrorism measures and protection of human rights are complementary. States must pursue these mutually reinforcing objectives contemporaneously.

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<sup>95</sup> Supra, note 2 at 20-21.

<sup>96</sup> *Id.*

<sup>97</sup> David, supra at 14.

<sup>98</sup> (2002) EWCA Civ.1598.

<sup>99</sup> A and Ors. v. Secretary of State for the Home Department, (2004) UKHL 56.

<sup>100</sup> Rasul et al. v. Bush, President of the United States, et. Al. (2004) 72 USLW 4596 Hamdi et al. v Rumsfeld, Secretary of Defense et. al (2004) 72 USLW 4607 and Rumsfeld v. Padilla (2004) 72 USLW 4584.

#### **4.1 The Counter-terrorism Legislation: In conflict with Human Rights**

India's counter-terrorism legislative framework knitted with arbitrary provisions has hallmarks of abusive stories. Statutes fall prey to irrationality due to absence of human rights safeguards. Extra-judicial killings are grave concern under the domestic regime.<sup>101</sup>

##### **4.1.ITADA**

There is no faltering to impute broad definition of 'terrorist act' and 'disruptive activity' for its blatant misuse. Abovementioned TADA's arbitrary powers were employed not for curbing actual terrorism, but for extortion, illegal arrests and detentions, torture, extrajudicial killings, justifying thousands civilian death and disappearances and other human rights violations by police, paramilitary, and armed forces.<sup>102</sup> TADA attacked political opponents, and arbitrarily prosecuted conventional offenses having nothing to do with terrorism.<sup>103</sup> Expression determined culpability targeting indigenous peoples, lower caste people, trade unionists, religious minorities, activists, intellectuals and journalists.<sup>104</sup> Human Right Watch Organization commented that TADA caused tens of thousands of politically motivated detentions, torture, and other human rights violations.<sup>105</sup> Low conviction rate reflects thousands wrongful incarceration.<sup>106</sup> This kind of human rights violation is gravest. The age, the time and the opportunities that are lost can't be undone. The stigma of being a terrorist never fades away from the societal lens no matter the person is set free from state constraints. Failure of TADA could be evidenced by conviction rate below 1.5% - out of approximately 76,000 detained people, only 35% gone through trial process

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<sup>101</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns A/HRC/23/47/Add.1.

<sup>102</sup> Kalhan, supra at 141-147, see also, Subbarao, supra.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> 'Anti-Terrorism Legislation' Human Rights Watch (20 November 2001) <https://www.hrw.org/legacy/background/asia/india-bck1121.htm>

<sup>106</sup> Bhamati Sivapalan and Vidyun Sabhaney, *In Illustrations: A Brief History of India's National Security Laws*, The Wire (27 July 2019), <https://thewire.in/law/in-illustrations-a-brief-history-of-indias-national-security-laws>

and out of those 95% were released on acquittal, and 25% were discharged.<sup>107</sup>

#### **4.1.2 Preventive Detention Laws**

After independence the incidents of emergency shocked democratic conscience by major Sikh massacres subverting constitutional principles. More than 111,000 individuals incarcerated under MISA and like laws without any criteria and basis.<sup>108</sup> Political opponents were detained; freedom of expression was restricted by banning four main independent news agencies replacing with a state-run agency, prior censorship of newspapers and confiscation of foreign publication.<sup>109</sup> In Punjab Sikh dissent was crushed by conducting huge massacres through legal systems. Government 'White Paper', official report on Golden Temple attack, said that Sikhs started firing and intrusion took place on 3 June however eyewitnesses claimed that forces began heavy shelling on 1 June.<sup>110</sup> NSA was amended in 1984 for more aggressive application in Punjab, stretching detention period 1 to 2 from years, deadline for referring to Advisory Board was extended from three to four-and-a-half months, and dispensing Advisory Board review under certain circumstances.<sup>111</sup>

#### **4.1.3 POTA**

POTA diluted terrorism from violent activities against state to holding up of posters showing disapproval about events happening in the society.<sup>112</sup> Farmers, labors, students, Muslims for the duration of Gujarat riots and tribal children and women of Jharkhand became subject of state abusive powers.<sup>113</sup> Individuals holding posters in Delhi Jamia Millia campus were incarcerated.<sup>114</sup> In Gujarat, above 2,000 Muslims were extra-judicially killed and hundreds arrested.<sup>115</sup> *Human Rights Watch Observer* commented that

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<sup>107</sup> Mehta, supra, see also Kalhan, supra, at 148.

<sup>108</sup> Kalhan, supra at 138.

<sup>109</sup> *Id.*

<sup>110</sup> Jackson, supra at 13.

<sup>111</sup> Kalhan, supra at 143.

<sup>112</sup> Bose, supra, at 36, 37.

<sup>113</sup> Mehta, supra, see also Kalhan, supra, at 173-181.

<sup>114</sup> Bose, supra, at 36.

<sup>115</sup> *Id.*

POTA violated due process rights secured under International human rights treaties, most significantly, ICCPR and the Indian Constitution.<sup>116</sup>

#### **4.1.4 UAPA**

In the war against terrorism UAPA has delved into berserk ways, attacking people, and framing them with whim or caprice with sheer impunity.<sup>117</sup> It labels activists, journalists, physicians, students, writers, poets, teachers, lawyers, trade unionists as terrorists. After 9/11 attacks many people were detained for being members of banned student organization SIMI which India designated as terrorist group.<sup>118</sup> In Jaipur 2008 bombing, 14 men were detained for more than three years on evidence of their SIMI membership.<sup>119</sup> The report “*Framed, Damned, Acquitted: Dossiers of a ‘Very’ Special Cell*”, reported frail nature of registered cases. It reflects the traumas of people arrested under UAPA. The process exacted heavy toll first of illegal detention and torture then of incarceration and trial. Family members suffered humiliation, businesses were destroyed, mental sufferings, and children abandoned studies while parents died heartbroken. Open and shut cases of young people, where the prosecution had no solid legal stand stretched for 10- 14 painful long years. It enquires into 16 cases that simply failed judicial scrutiny. Few instances are- (i) FIR against Abdul Rajjak (2008) for pro-SIMI slogans and engaging in illegal activity,<sup>120</sup> (ii) Case against: Sorab Ahmed, Abdul Razzaq, Muneer Uz Zama Deshmukh, Mohd. Aleem, Khalid Naim and Maulana Arshad Ilyas Ahtesham for pasting posters containing “provocating feelings” (sic) published by SIMI. The police considered the text of the poster which was a verse from the Quran to be offensive,<sup>121</sup> (iii) FIR against Maulana Arshad Ilyas Ahtesham for defying ban on SIMI and appealing Muslim community to unite in favor of Islam,<sup>122</sup> (iv) FIR against Muneer Uz Zama on production of certain suspected

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<sup>116</sup>Supra, note 105.

<sup>117</sup> A report by Jamia Teachers’ Solidarity Association, *Framed, Damned and Acquitted: Dossiers of a Very Special Cell*, 8.

<sup>118</sup> Supra note 31.

<sup>119</sup> *Id.*

<sup>120</sup> FIR No. 159/08; P.S. M.G. Road; u/s 3,10,13, Unlawful Activities (Prevention) Act, 1967

<sup>121</sup> FIR No. 537/00; P.S. Taliyya; u/s 153-A, 153-B, IPC

<sup>122</sup> FIR No. 574/01; P.S. Shahjahanabad; u/s 153-A, 153-B, IPC and Section 10, Unlawful Activities (Prevention) Act, 1967

documents.<sup>123</sup> He was convicted for “committing acts detrimental to national integration and outraging the feelings of a religious group” even after original seizure memo, case diary was lost and evidence were illegible photocopies and hostile key witness, (v) Police arrested accused at Misroad railway station for possessing magazine “Tehreek Tehreek-e-Millat” (not banned literature) and receipt of SIMI, dated 25.01.2006, no. 003359.,<sup>124</sup> The receipt was in name of “Kumari Ashiya Khan”, which was recovered from her in FIR 256/2006, on April 16, 2006. It casted shadow of suspicion that material was planted to implicate accused. In certain cases, courts not only disparaged police authorities for incompetency and apathy in complying due process but have rebuked them for evidence fabrication.<sup>125</sup>

Recent events further highlights draconian nature of UAPA where people were charged for raising voices against government- arrest of four activists in 2017 in Chennai for holding candle-light vigil for Tamils killed in Sri Lankan civil war,<sup>126</sup> arrest of students Umar Khalid-JNU alumni and activist, PhD student-Meeran Haider, MPhil student-Safoora Zargar for CAA protests;<sup>127</sup> arrest of journalist in 2019 in Imphal for posting video criticizing Manipur’s Chief Minister and Prime Minister<sup>128</sup>; arrest of an NRI for tweeting that he hadn’t been screened for COVID-19 at the Ahmedabad international airport in 2020<sup>129</sup>; arrest<sup>130</sup> of Varavara Rao<sup>131</sup>, Sudha

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<sup>123</sup> FIR No. 626/01; P.S. Habibganj; u/s 153-B, 295-A, IPC

<sup>124</sup> FIR No. 302/2008; PS Misroad.

<sup>125</sup> *Guilty by Association-UAPA cases in MP*; a report by Jamia Teacher’s solidarity Association, November, 2013

<sup>126</sup> *Goondas Act slapped on pro-Eelam activists in Chennai, four held*, Indian Express, (30th May 2017 05:50 AM) <http://cms.newindianexpress.com/states/tamil-nadu/2017/may/30/goondas-act-slapped-on-pro-eelam-activists-in-chennai-four-held-1610667.html>

<sup>127</sup> *Delhi Riots: Police Now Book Jamia Students, Umar Khalid Under UAPA*, The Wire, (2020) <https://thewire.in/government/delhi-riots-meeran-haider-safoora-zargar-umar-khalid>

<sup>128</sup> Hemant Kumar Nath, *Manipur journalist, activist arrested over Facebook posts on BJP leader’s death saying cow dung won’t cure Covid*, India Today, (May 18, 2021 16:19 IST) <https://www.indiatoday.in/india/story/manipur-journalist-activist-booked-under-nsa-over-facebook-posts-on-bjp-1804020-2021-05-18>

<sup>129</sup> *Preventive Detention: Illustrations on the “no vakil, no appeal, no daleel” model*, Bar and Bench (06 Jun, 2021, 11:03 pm), <https://www.barandbench.com/news/preventive-detention-india-illustration>

<sup>130</sup> *Arrest of Sudha Bharadwaj*, Frontline Defenders, <https://www.frontlinedefenders.org/en/case/arrest-sudha-bhardwaj>

<sup>131</sup> Activist for human rights issues, writer and Academician.

Bharadwaj<sup>132</sup>, Gautam Navlakha<sup>133</sup>, Arun Ferreira<sup>134</sup>, Vernon Gonsalves<sup>135</sup>, Sudhir Dhawale<sup>136</sup>, Mahesh Raut<sup>137</sup>, Surendra Gadling<sup>138</sup>, Shoma Sen<sup>139</sup> and Rona Wilson<sup>140</sup> in connection with Bhima Koregaon cases,<sup>141</sup> arrest of Anand Teltumbde on accusation that he is an ‘urban naxal’ as he advocated for those activist who were toiling for securing rights to indigenous community and depressed class.<sup>142</sup>

The recent death of priest Stan Swamy (eighty-four years of age tormenting with Parkinson’s disease) - country’s oldest prisoner under UAPA and tribal rights activist reveals abusive character of anti-terror law. NIA had alleged his involvement in Maoist conspiracy in Bhima Koregaon incident.<sup>143</sup> His health condition deteriorated so much in jail that he neither write nor go for a walk nor could eat by himself.<sup>144</sup> In words of Justice Lokur ‘soft torture’ caused his demise.<sup>145</sup> His death without trial questions existing counter-terrorism measures in world’s largest democracy. Sections 43D or 43E of UAPA trumped against his dying need of getting bail for medical treatment.

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<sup>132</sup> Lawyer for human rights, particularly focusing for Chattisgarh tribal and indigenous community.

<sup>133</sup> Journalist and activist for human rights issues.

<sup>134</sup> Lawyer and human rights campaigner. He has advocated in favor of Bhima-Koregaon connected human rights activists.

<sup>135</sup> Academician, Writer, Trade unionist and activist. He raises voice for issues like prisoner’s rights, prison conditions, and rights of depressed lower caste and indigenous community.

<sup>136</sup> Poet and Writer. He advocates for issues like health, labor, education, land, and caste issues.

<sup>137</sup> Alumni of Tata Institute of Social Sciences, Mumbai and human rights defender of indigenous people of Gadchiroli.

<sup>138</sup> Lawyer advocating for political prisoners. He fights for rights of indigenous people. He also represented G.N.Saibaba, DU professor.

<sup>139</sup> Professor of English at Nagpur University and women rights activist.

<sup>140</sup> Social activist.

<sup>141</sup> Aarefa Johari, *A poet, a lawyer, a professor: These are the five activists held for sparking Bhima Koregaon clashes*, scroll.in, (2018 01:03) pm <https://scroll.in/article/881849/a-poet-a-lawyer-a-professor-these-are-the-five-activists-held-for-sparking-bhima-koregaon-clashes>

<sup>142</sup> *India’s Unforgivable Laws*, Economic & Political Weekly, (2018) <https://www.epw.in/engage/article/indias-unforgivable-laws>

<sup>143</sup> KAY Dodhiya, *Had great respect for Stan Swamy’s work, says high court at his ‘bail hearing’*, Hindustan Times, (JUL 19, 2021 07:45 PM IST) <https://www.hindustantimes.com/cities/mumbai-news/had-great-respect-for-stan-swamy-s-work-says-high-court-at-his-bail-hearing-101626703228133.html>

<sup>144</sup> Sonam Saigal, *Fr. Stan Swamy passes away in custody*, The Hindu (July 05, 2021 14:47 IST ) <https://www.thehindu.com/news/national/other-states/fr-stan-swamy-passes-away/article35143941.ece>

<sup>145</sup> *UAPA can’t remain in current form, sedition law must go: Former SC judges*, Hindustan Times, (JUL 25, 2021 12:02 AM IST), <https://www.hindustantimes.com/india-news/uapa-can-t-remain-in-current-form-sedition-law-must-go-former-sc-judges-101627151536429.html>

U.N. Special Rapporteur on Human Rights Defenders- “Mary Lawlor”, and EU Special Representative for Human Rights-“Eamon Gilmore”, stated that he was imprisoned on false accusation of terrorism and described charges as unfounded’ and were continuously raising his case with Indian authorities.<sup>146</sup> Legislative framework has perturbed fundamentals of criminal law by equalizing terrorists’ violent activities, dissenters’ harmless voices and even the thought process of individuals contrary to majoritarian view within scope of terrorism. In the largest democracy of India with deep diversities legroom for thriving different ideologies shall be there around ‘rule of law’ domain of and outside crime prevention model.

#### **4.2 The Dichotomy of Fundamental Rights and Anti-Terror Laws**

The golden trio of Article 14, 19 and 21 of the Constitution is being violated by ambiguous anti-terror laws perpetrated by states for cementing its electoral hold by targeting one group against another. ‘Terrorism’ is handy tool to homogenize agitations. Labeling rebels in Nagaland, Maoists in Chhattisgarh, jihadist elements, and separatists in Kashmir as ‘terrorist’ sheds light on the specificities of their respective contexts, and clouds the root causes of these problems.<sup>147</sup> All these instances are just clear case of infringement of fundamental rights.

These laws violate citizens’ right to expression u/a 19 (1) (a) of Constitution of India by not allowing dissent, questioning public debate, curtailing freedom of press. Culpability lies under UAPA for expressing, creating, developing and possessing literary works. Across the country hundreds of men are incarcerated solely on the basis of seized literature. One of the glaring examples is of holding physician Binayak Sen- who provided his services to poor indigenous people for more than 30 years, guilty on evidence of possession of certain literary works and books.<sup>148</sup> The Amnesty International Executive Director accused authority of squeezing freedom of

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<sup>146</sup> *Fr. Stan Swamy was jailed on false charges, says top U.N. official*, The Hindu, (July 05, 2021 21:54 IST)<https://www.thehindu.com/news/national/other-states/fr-stan-swamy-was-jailed-on-false-charges-says-top-un-official/article35156145.ece>

<sup>147</sup> Prasad, *supra*, at 475.

<sup>148</sup> Aman Sethi, *Lawyers, activists shocked by Binayak Sen verdict*, The Hindu, (Dec.4,2010 15:07 IST) <https://www.thehindu.com/news/national/Lawyers-activists-shocked-by-Binayak-Sen-verdict/article15606998.ece>

expression beyond reasonable restrictions when J&K police charged journalist Masrat Zahra for uploading anti-government posts on Facebook u/s 13 UAPA and Peerzada Ashiq for uploading stories on COVID testing kits diversion and against those individuals who accessed social media by VPNs during internet ban imposed upon repealing Article 370 of the Constitution.<sup>149</sup>

Further UAPA bypass fundamental rights and procedural safeguards enshrined under it by detaining up to 180 days<sup>150</sup> pending investigation directly violating Article 21 of the constitution which provides that “no person shall be deprived of life and personal liberty except according to the procedure established by law”. These long investigations are coupled with painful torture in “chambers of ATS and Grey Hounds with their paraphernalia and contraptions of belt, chairs...screw drivers”.<sup>151</sup> UAPA authorizes “special courts”<sup>152</sup> to hold closed-door hearings along with use of secret witnesses jeopardizing rules of fair trial.<sup>153</sup> Due process clause of article 21 is given death blow by *Unlawful Activities (Prevention) Amendment Act, 2019* which authorizes government to ‘notify’ individuals under Schedule IV as *terrorist* if it *believes* his involvement in terrorism without any trial u/s 35 and 36 of the Act. It also appoints a ‘Review Committee’ constituted by Central Government, to ‘denotify’ the individual notified as a terrorist thereby scrapping all the opportunities for judicial review.<sup>154</sup> Former PM Vajpayee in 1993 alleged on RSS being declared as unlawful association that by such measures government would announce every opposition faction as unlawful.<sup>155</sup> Thus this Amendment reflects real intention of anti-terror laws viz. to *mala fide*ly curtail socio-democratic voices by penalizing ‘ideology’ and ‘association’ under veil of ensuring public order in the name of security. This argument is not novel as depicted

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<sup>149</sup> *Id.*

<sup>150</sup> The Unlawful Activities (Prevention) Act, 1967, §43D.

<sup>151</sup> Sethi, *supra* at 90.

<sup>152</sup> Constituted under section 11 or under section 21 of the National Investigation Agency Act, 2008.

<sup>153</sup> The Unlawful Activities (Prevention) Act, 1967, §44.

<sup>154</sup> *Id.* §36.

<sup>155</sup> Deepali Bhandari and Deeksha Pokhriyal, *The Continuing Threat of India’s Unlawful Activities Prevention Act to Free Speech*, Jurist, (JUNE 2, 2020 05:56:20 PM) <https://www.jurist.org/commentary/2020/06/bhandari-pokhriyal-uapa-free-speech/>



by Punjab disappearances and killings with subsequent half eaten bodies by crocodiles or just bones left which were fished out through canals to Rajasthan under its strict compliance of TADA, NSA, AFSPA which inverted the principles of natural justice, shift of burden of proof, admission of confession, secret trials in absence of accused.<sup>156</sup>

### **4.3 Counter-Terrorism Legislations: Figures of Gross Failure**

NCRB Report<sup>157</sup> shows conviction rate under UAPA of less than 2%. Total number of persons arrested during 2019 was 1948; Manipur recorded the highest number of 306 cases (386 persons arrested) while in Uttar Pradesh 498 individuals arrested in 81 cases. Only 155 of the 7,840 people arrested were convicted. In 2015, 2016, 2017, 2018 and 2019 the ratio of arrested persons to convicted persons were - 1128/23, 999/24, 1554/39, 1421/35 and 1948/34 respectively. Report shows charge-sheeting rate at 42.5% and pendency rate at 77.8%.<sup>158</sup> The Report shows trial pendency of 95%. If calculated alongside the number of registered cases or arrested individuals then conviction pendency goes up to almost 98%.<sup>159</sup> After the 2020 riots in Delhi police registered 763 FIRs and named more than 3,300 suspects.<sup>160</sup> These figures shows coming out of incarceration would take 8-14 years of life and would give a terrorist tag, broken life and practically no future.

The human costs levied by unjust detentions shall be calculated and accountability be fixed on investigating authorities along with punitive charges for abusive exercise of power.<sup>161</sup> The States' Human Rights

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<sup>156</sup> Sethi, supra at 91.

<sup>157</sup> *Crime in India 2019*, Statistics Volumes II, National Crime Records Bureau, <https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%202.pdf> Table 10A.5, pages 855-858

<sup>158</sup> *Id.* at Table 10A.3, pages 847-850

<sup>159</sup> *Parliamentary proceedings 2.2 % of cases registered under the UAPA from 2016-2019 ended in court conviction*, The Hindu (February 10, 2021 22:50 IST) <https://www.thehindu.com/news/national/22-of-cases-registered-under-the-uapa-from-2016-2019-ended-in-court-conviction/article33804099.ece>

<sup>160</sup> Rahul Tripathi, *Below 2% of those arrested under UAPA convicted in 2015-19: NCRB*, The Economic Times (Jun 18, 2021, 08:44 AM IST) <https://economictimes.indiatimes.com/news/politics-and-nation/below-2-of-those-arrested-under-uapa-convicted-in-2015-19-ncrb/articleshow/83624754.cms?from=mdr>

<sup>161</sup> *UAPA can't remain in current form, sedition law must go: Former SC judges*, The Hindustan Times (JUL 25, 2021 12:02 AM IST) <https://www.hindustantimes.com/india-news/uapa-can-t-remain-in-current-form-sedition-law-must-go-former-sc-judges-101627151536429.html>, Manu Sebastian, *UAPA Wrecking Lives : What Is The Human*

Report<sup>162</sup> further strengthens the argument for seeking accountability of state for violation of fundamental rights for its people. Report signals major human rights issues that includes unlawful and arbitrary killings, torture by prison authorities; extrajudicial killings perpetrated by police; ruthless and life-threatening conditions in prison; political prisoners; arbitrary arrest and detentions; restrictions on freedom of expression, press, along with violence, unwarranted arrests of journalists, criminalizing speech on social media, site blocking and censorship; brutalities against religious minorities etc.

If there is no utility of such horrendous laws shown by their extreme low conviction rates and their explicit misuse rendering fundamental rights of citizens nugatory then what are grounds upon which Supreme Court upheld constitutionality of anti-terror laws like TADA,<sup>163</sup> POTA,<sup>164</sup> NSA,<sup>165</sup> and rational of still retaining UAPA. Terrorism in the name of fighting terrorism can never succeed for the same reasons that terrorism does not succeed as these are contrary to human rights standard. The right to fight against terrorism is not inclusive of right to create state terror. Countering terror is appreciable only if state takes measures consistent with human fundamental rights and freedoms.

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*Cost?*, Live Law (10 July 2021 4:55 AM) <https://www.livelaw.in/columns/uapa-wrecking-lives-what-is-the-human-cost-177234>

<sup>162</sup> India 2019 Human Rights Report, Executive Summary (2019),1  
<https://www.state.gov/wp-content/uploads/2020/03/INDIA-2019-HUMAN-RIGHTS-REPORT.pdf>

<sup>163</sup> Kartar Singh v. State of Punjab, 1961 AIR 1787.

<sup>164</sup> PUCL V. Union Of India, (2003) 4 SCC 399.

<sup>165</sup> A.K. Roy v Union of India AIR 1982 SC 710.

## Chapter V

### Counter-terrorism Legislation Diluting Criminal Jurisprudence

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The bedrock of criminal jurisprudence consist of fundamental rules like *nulla poena sine lege*, *nullum crimen sine lege*, strict interpretation to the criminal laws presumption of innocence, and proof beyond reasonable doubt. Open ended scope of terrorism is responsible for imprecise anti-terror laws.<sup>166</sup> They thwart principle of legality requiring law to define criminal offenses with sufficient precision to prevent arbitrary enforcement which is a non-derogable obligation under ICCPR.<sup>167</sup>

#### **5.1 Strict construction of penal statutes**

The sacred interpretation principles require strict and narrow interpretation of penal provisions so that individual who was not intended to be covered by legislature is not wrapped within penal statute. Stringent the penal provision is the more strictly it is construed. Unfortunately vague definitions like ‘terrorist activity’ under UAPA make it herculean task to construe its penal provision strictly.

The ambiguity in the framing of provisions is evidenced by Guwahati High Court judgment<sup>168</sup> releasing Akhil Gogoi who was detained for anti-CAA speeches in 2019. Court held that accusation of civil disturbance can’t be charged under UAPA unless it qualifies as an act of terror coupled with intention to commit terrorist act u/s 15(1). Any other unlawful act even acts of arson causing disturbance or law and order issues that could be penalized under ordinary criminal law cannot qualify as ‘terrorist activity’. Though provocative speeches could come under unlawful activity u/s 2(1)(o) but it should be with intention to cause death, injury, loss, destruction or damage to

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<sup>166</sup> Mark B. Baker, The Western European Legal Response to Terrorism, 13 BROOK. J. INT’L L. 1, 2 (1987).

<sup>167</sup> International Covenant on Civil and Political Rights, 1966, art. 4 r/w 15.

<sup>168</sup> (The State) The National Investigation Agency V. Akhil Gogoi, Case No. : CrI.A./192/2020

property intending to disturb unity, integrity, sovereignty and security of India.<sup>169</sup>

The Delhi High Court while granting bail to students<sup>170</sup> arrested for Delhi riots remarked that definition of ‘terrorist act’ under UAPA is “wide and even somewhat vague” and that ‘terrorism’ or ‘terror’ is not defined under UAPA so ‘terrorist act’ u/s 15 cannot be carelessly imposed to offences covered under ordinary criminal law definitions.<sup>171</sup> It must be carefully applied with absolute literal sense and not lightly to trivialize atrocious crime of ‘terrorist act’ diluting difference between terrorism and conventional crimes.<sup>172</sup> Earlier Supreme Court has remarked in *H.V.Thakur v. State of Maharashtra*<sup>173</sup> that “every terrorist is a criminal but every criminal can’t be tagged as ‘terrorist’ only to employ horrific TADA provisions.” Thus ‘Terrorist activity’ does not mean causing disturbance of law and order but something beyond the capacity of ordinary law enforcement agencies to tackle it under ordinary penal law.

### **5.2 nulla poena sine lege/ nullum crimin sine lege**

Terrorism has become placate zone for legislature as prefixing ‘terrorism or terrorist’ easily makes ‘any act’ to qualify as ‘offence’. It dispenses responsibility to place words with exactness. Widened scope of terrorism with ‘anything against state’ at its centre has started labeling people’s thoughts going beyond the scope of criminal law jurisprudence, that is generally referred as ‘thought crimes’<sup>174</sup>. The conviction professor of DU, G

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<sup>169</sup> Prabin Kalita, *Civil disturbance can’t be UAPA offence’: HC upholds bail to Akhil Gogoi*, The Times of India, ( Apr 14, 2021, 03:49 IST) <https://timesofindia.indiatimes.com/india/civil-disturbance-cant-be-uapa-offence-hc-upholds-bail-to-akhil-gogoi/articleshow/82057918.cms>

<sup>170</sup> JNU student Natasha Narwal and Devangana Kalita; Jamia Millia Islamia student Asif Iqbal Tanha.

<sup>171</sup> Asif Iqbal Tanha vs. State CrI.A. No. 39 of 2021, Natasha Narwal v. State of Delhi NCT CRL.A. 82/2021

<sup>172</sup> Soibam Rocky Singh, *All terrorists are criminals but not all criminals are terrorists: Delhi HC* The Hindu( JUNE 15, 2021 18:05 IST) <https://www.thehindu.com/news/cities/Delhi/all-terrorists-are-criminals-but-not-all-criminals-are-terrorists-delhi-hc/article34822426.ece>

<sup>173</sup> (1994) 4 SCC 602.

<sup>174</sup> Deepali Bhandari and Deeksha Pokhriyal, *The Continuing Threat of India’s Unlawful Activities Prevention Act to Free Speech*, Jurist, (2020 05:56:20 PM) <https://www.jurist.org/commentary/2020/06/bhandari-pokhriyal-uapa-free-speech/>, see also, *What is the UAPA?*, India Civil Watch <https://indiacivilwatch.org/uapa/>

N Saibaba (90% disabled), is evidence of penalizing thought process.<sup>175</sup> The provision challenges principles of criminal justice system wrapped around maxim *nulla poena sine lege*. It penalizes acts that are not even close to the ‘preparation’, the loose verbatim smudges the difference between concrete ‘preparation to commit terrorist acts’ and acts that in essence are not culpable but placing ‘terrorist’ prior to ‘act’ can easily result into heinous offence.<sup>176</sup> Thus anti-terror laws charges and punishes people in vacuum of just, fair, and reasonable law breaking the framework of *nullum crimiin sine lege*.

### **5.3 Presumption of innocence until proved guilty beyond all reasonable doubts**

Criminal jurisprudence puts burden of proof upon prosecution to proof guilt of accused beyond all reasonable doubts and makes presumption of innocence in favor of accused. Standard of the proof required for refuting presumption becomes higher as the gravity of crime intensifies. In application of terror laws principles of natural justice are ignored blatantly violating due process, and give prosecution benefit of doubt instead of accused. Framing, damming and convicting is today’s indisputable reality. The case of *Ishrat Jahan*, 19 year old- fuzzy LeT associate, reflects the cruel reality where SIB made it clear by using words (terrorist and not suspect) and actions (fake encounter) that Constitution, rule of law, criminal jurisprudence are being diluted.<sup>177</sup> Value of human life is reduced to animal with the emergence of ‘controlled killing’ justifying extra-judicial killings and torture.

The 2019 Amendment to UAPA gave silent death to jurisprudence of *presumption of innocence*. It authorizes Central Government to add individual’s name in IV Schedule on its belief of individual’s involvement in terrorism.<sup>178</sup> Belief of Government is ground to tag any individual ‘terrorist’ sans any trial. S.15 UAPA defining ‘terrorist act’ is already loose to accuse anyone although he has not essentially committed any act as verbatim of s.15

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<sup>175</sup> Susan Abraham, *Misuse of the Unlawful Activities (Prevention) Act*, 12(52) Economic & Political Weekly, (2017).

<sup>176</sup> George Williams, *Anti-Terrorism Laws and Human Rights*, 19 Rev. Const. Stud., 127, 130-131, (2015).

<sup>177</sup> Sethi, *supra* at 85-93.

<sup>178</sup> The Unlawful Activities (Prevention) Act, 1967, §35.

uses phrase like “likely to threaten” or “likely to strike terror in people”. So he would be a ‘terrorist’ without advocating for his innocence. Petition has been filed in the Supreme Court challenging the amendment questioning arbitrary state discretion infringing right to dignified life without due process and extremely curtailing freedom of expression frustrating Article 14, 19 and 21 of the Constitution.<sup>179</sup> A further petition is filed by the APCR (Association for Protection of Civil Rights) challenging unguided arbitrary powers of government violating Article 14.

#### **5.4 Bail Jurisprudence: Jail and Not Bail under Anti-Terror Laws**

The purpose of jail is to prevent the arrested person from influencing investigation and fleeing from justice. If that could be secured without detaining then accused has to be released on bail. *Grundnorm* of bail jurisprudence ‘bail and not jail’<sup>180</sup> requires Court to lean in favor of granting bail and not in detaining person in jail. Death of Stan Swamy and similar instances reveals reversal of rule of ‘Bail and not jail’ when charges are framed under anti-terror laws. Courts struggle to overcome the barriers of sec. 43D UAPA for releasing people on bail in those cases also which are groundless and are not even close to constitute a ‘terrorist act’. It provides that an accused shall not be at large on bail if court thinks that allegation is *prima facie* true. This requirement under UAPA with ambiguous definitions requires no efforts to establish *prima facie* case. Possessing a copy of War and Peace would constitute evidence of terrorism.

SC in case of *National Investigation Agency v. Zahoor Ahmad Shah Watali*<sup>181</sup> laid down that e at the time of deciding bail application court can’t examine merits of the case or admissibility of evidence. It lowers bar to examine veracity of agency’s case . Former SC judge Justice Gowda urged that Section 43D (5) UAPA requires either amendments or should be interpreted entirely different to stop police to keep people incarcerated without trials.<sup>182</sup> Thus getting bail under UAPA with strict restrictions is

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<sup>179</sup> Sajal Awasthi v. Union of India, WP (C) 1076/2019.

<sup>180</sup> State of Rajasthan v. Balchand (1977) 4 SCC 308

<sup>181</sup> 2018 SCC OnLine Del 11185.

<sup>182</sup> Supra, note 159.

almost impossible. It negates safeguards guaranteed under the Constitution protecting right to life, personal liberty and speedy trial simultaneously diluting 'presumption of innocence' jurisprudence.

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## Chapter VI

### Conclusion & Suggestions

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Counter-terrorism measures corrodes rule of law, good governance and human right which are fundamental pillars of democracy. Such measures are counterproductive to national and international efforts to combat terrorism. Forfeiting human rights in the fight against terrorism is a grave mistake with far-reaching consequences. Trauma caused by major terrorist attacks is perpetuated by current anti-therapeutic, counter-terrorism responses.<sup>183</sup> Tyranny and marginalization of human rights becomes a fertile ground for breeding terrorism. In UAPA process is itself punishment. A strong state security argument does not justify police torture, extraordinary investigating agencies powers and infringement of fundamental rights. Anti-terrorism legislations make both- the accused framed under counter-terrorism legislations and victims of terrorism- sufferers of human right violations; former at state's hands and latter of non-state actors. Australia claims that because of absence of bill of rights in the Constitution it is easy for anti-terrorist laws to violate fundamental human rights.<sup>184</sup> Perusing above records evidences that fundamental rights intact under Constitution failed to prevent rupture of rule of law under black law regime.

Mechanism to combat terrorism must have a focus on human rights. Adopting an objective definition is one safeguard against vices of ordinary usage of term, excessive relativism, ever-widening breadth, calumnious insinuations and the pervasive double standards, which puts human rights at grave risk.<sup>185</sup> Scholars have defined terrorism but no authorities pay heed to it which cast doubt on their political interest. Any comprehensive definition of terrorism must include actions both by state and by non state actors. Individual perpetrator must not be shielded behind doctrines of act of states or superior orders. A democratic model of terrorism prevention, inspired by

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<sup>183</sup> *Id.* at 550.

<sup>184</sup> See generally Williams, *supra*.

<sup>185</sup> Prasad, *supra* at 465.



therapeutic jurisprudence, should include communication and education on scientific thinking independent from ideological distortions as important elements.<sup>186</sup> Talking would contribute to resolution of issue that violence intensifies.<sup>187</sup> The war against terrorism should be firm and relentless but should be consistent with human rights and rule of law framework of criminal justice system.<sup>188</sup> The principles of criminal jurisprudence shall be strict followed respecting the Constitutional safeguards. When considering bail plea Court must not deny it for the purpose of ingratiating the raucous blood lust of society existing on social media or to pander to public perception.

State terrorism violating human rights and setting aside criminal jurisprudence is no answer to terrorism. Terrorism emerged as 'by the state' changed into 'against the state' and expanding towards 'anything against state.' Concept of 'Terrorism' loosened in its criminal domain and tightened in its dilute form. It's so elastic that today it's difficult to call a person thief if he possesses suspicious articles but a word of dissent gives strong ground to call him terrorist. Law-abiding state yields law abiding citizens. Vague legislation, with blatant misuse and intensification via media constructs terrorism in such a way that it expands circle of terrorism and narrow circle of democracy. Shift of 'terrorism against state' to 'anything against state' is a shift from democracy to autocracy.

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<sup>186</sup> Edgardo Rotman, Therapeutic Jurisprudence and Terrorism, 30 T. Jefferson L. REV. 525, 546 (2008).

<sup>187</sup> *Id.*

<sup>188</sup> *Human rights violations root-cause of conflicts, terrorism: Justice Anand*, National Human Rights Commission, India, <https://nhrc.nic.in/press-release/human-rights-violations-root-cause-conflicts-terrorism-justice-anand>.

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