"HUMAN RIGHTS NORMS AND THE LAWS OF DETENTION: A CASE STUDY OF TADA"

ABSTRACT
SUBMITTED FOR THE AWARD OF THE DEGREE OF

Doctor of Philosophy
IN
POLITICAL SCIENCE

BY
MD. TABREZ MAHBOOB

Under the Supervision of
PROF. M. MURTAZA KHAN

DEPARTMENT OF POLITICAL SCIENCE
ALIGARH MUSLIM UNIVERSITY
ALIGARH (INDIA)
2002
ABSTRACT

Human Rights, as the nomenclature suggests are inalienable and inherent in all human beings by virtue of their human beings. These are claims, which should be available to every human being. Human Rights, in one form or the other, have existed virtually in every culture and civilization, religion and philosophical tradition. But what is new about these rights is their institutionalisation, largely due to the efforts of the United Nations. The United Nations has created awareness among all human beings about their basic and inalienable rights. Everyday we are reminded of their importance—be it police atrocities, arbitrary laws, victim of Bhopal gas tragedy, victim of Gujarat tragedy or any other such calamity. The hopes and aspirations of the people move around human rights. The enactment of laws, under ordinary circumstances, striking at the roots of human rights, can hardly create an atmosphere congenial to the development of these rights. Seen in this perspective, the enactment of the Terrorist And Disruptive Activities Act, 1985 has kept aside all the international human rights norms and Constitutional safeguards of the rights of the citizens. One can understand the indispensability of such laws in emergency situation but the continuation under normal times is a bad omen for democracy and the Rule of Law. Apparently, the assassination of Indira Gandhi and its aftermath, rise of terrorism in Punjab
and a series of bomb blasts in Delhi and other places, have prompted the Government of India to come out with this extraordinary piece of legislation. It was thought that the ordinary law, hoodwinked by the laws of evidence, is not sufficient to meet the grave situation. But this is not the whole truth. The National Security Act was already in existence but it was thought a more stringent law was required for reasons, known to the authorities. Despite opposition the law was finally enacted.

The study mainly concentrates around TADA in the human rights perspective. The first chapter traces the genesis of human rights and the role played by different agencies in giving a concrete shape to the concept of human rights. With the adoption of the UDHR by the United Nations, human rights assumed universal significance as it set certain common international standards for the achievement of human rights and fundamental freedoms, which are to be observed by the Member States.

The second chapter of the thesis is a survey of the Preventive Detention Laws in India. The Constitution of India, surprisingly, provides for preventive detention in the chapter on Fundamental Rights. The purpose of these laws was to save the country from disruptive activities. To meet these challenges, the Preventive Detention Act was enacted in 1950 for a period of two years amidst acrimonious debate in
Parliament. The move was to curb the communists’ menace, as the Government claimed. The Act was unsuccessfully challenged in *A.K. Gopalan v. State of Madras*. However, J. Fazl Ali in his dissenting judgement asserted that the word “personal liberty” in Article 21 refers to all aspects of liberty provided in Article 19 of the Constitution. The dissenting judgement, however, was accepted later by the Supreme Court in *Maneka Gandhi*. Not satisfied with preventive detention the Maintenance of Internal Security Act was enacted in 1971 to curb black marketing and smuggling and provided special provisions for the foreigners. It was also unsuccessfully challenged in *Hardhan Saha v. State of West Bengal*. The biggest blow to the rights and liberties of citizens came from the emergency declared in 1975 and what was worse was that even the Supreme Court in *Shiva Kant Shukla* upheld the actions resorted to by the government during the emergency. In 1980 the Government enacted the National Security Act. Its objective is to detain such persons like black marketers, smugglers, and those who fan fare communal ill-will causing unrest and disruption in the country. But the Act was seldom directed at these elements and on the contrary, its provisions were used to settle political scores and unsettle trade union and human rights movements. The very first detainees under the Act were A.K. Roy, M.P. and K.S. Chatterjee, MLA, who were active trade union leaders. The judiciary also could not be of much help, on the contrary the Supreme Court upheld its
Constitutional validity in *A.K. Roy v. Union of India*. However, the only consolation was that the apex court issued a number of directions with a view to safeguarding the interests of the detainees. No body can dispute the utility of preventive Detention laws, if they are used for the purposes for which they are enacted; the real difficulty arises with regard to their implementation, which is totally not free from political overtones. Even a cursory glance at the preventive detention laws reveals they always tend to limit the scope of judicial review besides making in-roads into the rights of people.

The third chapter provides an insight into the Lok Sabha debates on TADA at the time of its enactment and extensions till 1995. It was only in 1993 that an amendment was incorporated in the Act providing safeguards to the detainees; the maximum period of remand during the course of investigation was reduced to 180 days from one year. This undoubtedly provided relief to thousands of detainees. On all occasions of the extension the Act, the Government emphasized its indispensability to meet the growing terrorist activities – the use of transistor bombs, bomb blast in Bombay and Calcutta, problem posed by Naxalites and LTTE and specific problem States like Punjab, Kashmir and Assam, where peace and security was often disturbed by the alleged militants. The general feeling in the country – the elite, media, was that there was no need of this kind of Act as there are ample provisions to deal with the terrorist and disruptive
activities under the ordinary law of land. What is lacking is the will to act and act swiftly. The Act far from uprooting militancy has helped the Government in assuming more arbitrary powers under the garb of combating terrorism. Needless to say that the provisions of the Act contravene international human rights standards, especially the right to freedom of expression, right to fair trail etc. In some instances, the Act failed to meet the national human right standards too and, fall short of fundamental rights guaranteed under the Constitution of India. The doctrine of presumption of innocence was wholly ignored. Especially Designated Court were constituted to try cases of TADA instead of the regular law courts. Appeals from these courts were confined to the Supreme Court only. The provision was the direct contravention of the Article 14 of ICCPR, which provides that if domestic law provides more than one instance to appeal, the convicted person must have access to each one of them. The most controversial provision of the Act was that the confession made by an accused before the police officer is admissible as evidence, which contravenes the laws of Evidence.

The fourth chapter seeks to explore the role of judiciary in protecting the rights of the persons detained under TADA. The judgement of the Supreme Court in *Kartar Singh v. State of Punjab, Hitendra Vishnu Thakur v. State of Maharashtra and Sunjay Dutt v. State through C.B.I. Bombay (II)* have been
discussed and analysed. The Supreme Court upheld the Constitutional validity of the TADA but at the same time it confirmed the abuse of the Act by the Police. However, to prevent the abuse, the Court held that the word ‘abet’ in Section 2 (1)(a)(i) should be read as including a ‘guilty mind’. The minority judgement in Kartar Singh admitted that the unreliable evidence in the form of “confessions”, were allegedly extracted by the police through illegal methods and must not admitted as evidence. Thus, Section 15 (1) of the Act was unfair, unjust and unreasonable, offending Article 14 and 21 of the Indian Constitution. The Court also issued guidelines in regard to recording of confessions under Section 15 of the Act. On the provisions of the right to appeal, the Court indeed recognized that the Supreme Court is beyond the reach of an average man. Inspite of recognizing this, the Court upheld the validity of the Section 19 of the Act. The judgement reveals that the judges accepted the loopholes of the Act but they are not in position to declare the Act as null and void. In Hitendra Vishnu Thakur and others, the Act was challenged on the basis of the 1993 Amendment in Section 20(4)(b) which modifies the bail provisions. The Court held that the Designated Court could not deny the accused’s indefeasible right to be released on bail on account of the default of prosecution to file challan within the prescribed period. The Court was also obliged to inform the accused of his right to seek release, but there was no obligation on the part of the court to order his release on
its own. In the above case the petitioner also challenged the definition of 'terrorism'. The Court expressed that it is not possible to give a precise definition of "terrorism". The Court went on to hold that the crime committed by a terrorist and an ordinary criminal often overlap and it is difficult to draw a line between the two. Justice Anand observed that "every terrorist may be a criminal but every criminal cannot be given the label of a terrorist only to set in motion the more stringent provisions of TADA." In Sanjay Dutt, the attitude of the judiciary was different from the other cases of TADA. Section 5 of the Act was challenged before the Court and the Court held that mere possession of unauthorized arms and ammunition in a notified area does not link one to the terrorist activity, the word possession means possession with the requisite mental element i.e. 'conscious possession'. Both in Kartar Singh and Sanjay Dutt, the Court did recognize the futility of the Act but could not declare it as invalid. It is these issues, which constitute the focus of study in the fourth chapter.

The use, misuse and abuse of the Act is the theme of the fifth chapter. The Act and its implementation reminds one of the colonial days when the much hated Rowlett Act (1919) was enacted to crush political opposition. The congress, which protested against the Act during the British period, did not hesitate to enact a similar law in independent India. The present National Democratic Government out-smarted the
congress in enacting an even more stringent law, the Prevention of Terrorism Act. Under both the laws, police vandalism increased, minorities were harassed as the Minister for internal security himself admitted. The Union Home Minister Buta Singh in 1987 and P. Chidambarm in 1989 also criticized the implementation of TADA and assured that it will be used only in special circumstances. Despite these assurances, the police had a gala time in detaining all and sundry not excluding blind persons, mentally retarded person, children, old aged persons and even prostitutes. Its use in Gujarat was maximum, which had neither the history of terrorism nor was classified as a problem state. Innocent people were booked under TADA for communal violence without sufficient evidence. It was alleged that 1600 people were booked in the two months during the communal violence. The indiscriminate use of TADA has made the remedy worst than the malady. Many a time judiciary has come down heavily on the police for having failed to provide sufficient evidence against the detainees in the specified time. In most of the cases, the police booked ordinary criminals under the Act in order to keep them in custody for a long period. The very fact that 80,000 (from unofficial sources) and 76,000 (from official sources) detained under the Act during the last ten years, with hardly 1 percent rate of conviction speak of the high handedness of the detaining authority. The Act was hardly used for the purposes for it was enacted. What is more
surprising is that at the time when TADA lapsed in 1995, 4528 were languishing in jails out of which 6% of the cases were dropped, 90% were under investigation, 5% were challenged and the trial were completed in about 6% cases. Despite the stringent provisions of the Act and the wide powers that it conferred on the police, the Act failed to check the terrorist activities, which was ultimately replaced by POTA. I have tried to establish that the present safeguards are inadequate to protect the rights of citizens. Therefore, to save the country from the terrorist's activities and also for the protection of the rights of the citizens some improvements like power of the Designated Court to award compensation for wrongful detentions, frequent review of detention laws, and action against the police if they act malafide, are necessary. This may help in putting some premium on the misuse of powers by the detaining authority.

The work is based on primary as well as secondary sources. The work also under takes an analysis of the major decisions of the Supreme Court in the context of fundamental rights and the international human rights standards. An attempt was also made to interview the persons detained under the Act, but without much success.
"HUMAN RIGHTS NORMS AND THE LAWS OF DETENTION: A CASE STUDY OF TADA"

THESIS
SUBMITTED FOR THE AWARD OF THE DEGREE OF

Doctor of Philosophy
IN
POLITICAL SCIENCE

BY
MD. TABREZ MAHBOOB

Under the Supervision of
PROF. M. MURTAZA KHAN

DEPARTMENT OF POLITICAL SCIENCE
ALIGARH MUSLIM UNIVERSITY
ALIGARH (INDIA)

2002
Certificate

This is to certify that Mr. Md. Tabrez Mahboob has completed his thesis entitled "Human rights norms and the laws of detention: A case study of TADA" under my supervision and is, in my opinion, suitable for submission for the award of the Degree of Doctor of Philosophy in Political Science of the Aligarh Muslim University.

(Prof. M. Murtaza Khan)
Supervisor
Acknowledgement

I bow in reverence to the Almighty Allah whose gracious blessings gave me the required courage and devotion to complete this task.

I am indebted to my reverend teacher and supervisor, Prof. M. Murtaza Khan, Department of Political Science, A.M.U., Aligarh, for his help and assistance in the completion of this task. I express my profound thanks to him. Without whose cooperation, the thesis could not have seen the light of the dawn.

I shall be failing in my duty if I do not express my gratitude to my parents for their inspiration, affection and constant encouragement, which sustained me throughout this venture.

Md. Tabrez Mahboob
CONTENTS

Table of Cases i
Preface v

Chapter 1
Introduction 1

Chapter 2
The Laws of Detention in India: An Overview 36

Chapter 3
TADA: An Analysis of the Lok Sabha Debates 74

Chapter 4
TADA And Judicial Response 107

Chapter 5
TADA: Use, Misuse And Abuse 144

Conclusion 182
Appendix 193
Bibliography 213
# TABLE OF CASES

<table>
<thead>
<tr>
<th>Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>A.D.M. Jabalpur v. Shiva Kant Shukla</td>
</tr>
<tr>
<td>A.K. Gopalan v. State of Madras</td>
</tr>
<tr>
<td>A.K. Roy v. Union of India</td>
</tr>
<tr>
<td>Abdul Ghaffar v. State of West Bengal</td>
</tr>
<tr>
<td>Abdul Razak v. Commissioner of Police</td>
</tr>
<tr>
<td>Abdul Sattar v. Union of India</td>
</tr>
<tr>
<td>Abdul v. State of West Bengal</td>
</tr>
<tr>
<td>Addl. Secretary v. Alka</td>
</tr>
<tr>
<td>Akshoy Konai v. State of West Bengal</td>
</tr>
<tr>
<td>Anant v. State of Maharashtra</td>
</tr>
<tr>
<td>Ananta v. State of West Bengal</td>
</tr>
<tr>
<td>Ashok v. Delhi Administration</td>
</tr>
<tr>
<td>Ayya v. State of Uttar Pradesh</td>
</tr>
<tr>
<td>Baidya Nath v. State of West Bengal</td>
</tr>
<tr>
<td>Balchand Chorarsia v. Union of India</td>
</tr>
<tr>
<td>Bandua Mukti Morcha v. Union of India</td>
</tr>
<tr>
<td>Banmkatlal v.State of Rajasthan</td>
</tr>
<tr>
<td>Basi Singh v. State of Assam</td>
</tr>
<tr>
<td>Bhawarlal v. State of Tamil Nadu</td>
</tr>
<tr>
<td>Bhutnath v. State of West Bengal</td>
</tr>
<tr>
<td>Binod v. State of Bihar</td>
</tr>
<tr>
<td>Birendra v. Union of India</td>
</tr>
<tr>
<td>Cf. Mehta v. Government of Kerala</td>
</tr>
<tr>
<td>Cf. Mohinuddin v. D.M.</td>
</tr>
<tr>
<td>Chotta v. State of West Bengal</td>
</tr>
<tr>
<td>Case</td>
</tr>
<tr>
<td>---------------------------------------------------------------------</td>
</tr>
<tr>
<td>Consumer Education and Research Center v. Union of India</td>
</tr>
<tr>
<td>D’Souza v. State of Bombay</td>
</tr>
<tr>
<td>Dawarika v. State of Bihar</td>
</tr>
<tr>
<td>Dayal v. District Magistrate</td>
</tr>
<tr>
<td>Dayanand Modi v. State of Bihar</td>
</tr>
<tr>
<td>Debu Mahato v. State of West Bengal</td>
</tr>
<tr>
<td>Devji v. Administrator</td>
</tr>
<tr>
<td>Dharamdas v. Police Commissioner</td>
</tr>
<tr>
<td>Dharmendra v. Union of India</td>
</tr>
<tr>
<td>Fatehchan v. State of Maharashtra</td>
</tr>
<tr>
<td>Francis C. Mullin v. Administrator, Union Territory of Delhi</td>
</tr>
<tr>
<td>G. Sdanandan v. State of Kerala</td>
</tr>
<tr>
<td>Haradhan Saha v. State of West Bengal</td>
</tr>
<tr>
<td>Hari Krishna v. State of Maharashtra</td>
</tr>
<tr>
<td>Harpeet v. State of Maharashtra</td>
</tr>
<tr>
<td>Hemlata v. State of Maharashtra</td>
</tr>
<tr>
<td>Hitendra Vishnu Thakur &amp; others v. State of Maharashtra</td>
</tr>
<tr>
<td>Hussain Ara v. State of Bihar</td>
</tr>
<tr>
<td>I.C. Golak Nath and Others v. State of Punjab</td>
</tr>
<tr>
<td>Icchu v. Union of India</td>
</tr>
<tr>
<td>Iqbal v. Union of India</td>
</tr>
<tr>
<td>Jagannath v. State of Orissa</td>
</tr>
<tr>
<td>Jagdish v. State of Bihar</td>
</tr>
<tr>
<td>Jay Narayan Shukla v. State of West Bengal</td>
</tr>
<tr>
<td>Kalawati v. Union of India</td>
</tr>
<tr>
<td>Kamlal v. State of Maharashtra</td>
</tr>
</tbody>
</table>
Kanchanlal v. State of Gujarat
Kartar Singh v. State of Punjab
Kesavan v. state of Bombay
Keshavnanda Bharti v. State of Kerala
Khagon v. State of West Bengal
Kharak Singh v. State of Uttar Pradesh
Khudi Ram Das v. State of West Bengal
Kiran Pasha v. Government of Andhra Pradesh
Kishori Mohan v. State of West Bengal
Kishorilal v. The State
Kripa Shanker Rai v. State of Uttar Pradesh
Krishna Murari v. Union of India
Kubic v. Union of India
Madhav Hayawadanreos Hoskot v. State of Maharashtra
Makhan Singh v. State of Punjab
Manick v. Union of India
Menaka Gandhi V. Union of India
Mohammed Akbar v. District Magistrate Doda, J&K.
Moti Lal v. Sate of Bihar
Nand Lal v. State of Punjab
Olga Tellis v. Bombay Corpn.
Pt Parmanand Katara v. Union Of India
Puranlal v. Union of India
Raghavendra Singh v. Superintendent, District Jail Kanpur
Rahmatullah v. State of Bihar
<table>
<thead>
<tr>
<th>Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ram Krishana v. State of Delhi</td>
</tr>
<tr>
<td>Ram Singh v. State of Delhi</td>
</tr>
<tr>
<td>Ramchandra v. Union of India</td>
</tr>
<tr>
<td>Rameshwar v. District Magistrate</td>
</tr>
<tr>
<td>Rao v. Attorney General</td>
</tr>
<tr>
<td>S.K. Sakawat v. State of West Bengal</td>
</tr>
<tr>
<td>S.N. Sarkar v. Union of India</td>
</tr>
<tr>
<td>Salim v. State of West Bengal</td>
</tr>
<tr>
<td>Salter Habib v. K.S. Dilip Singhji</td>
</tr>
<tr>
<td>Sanjay Dutt v. The State through C.B.I. Bombay (II)</td>
</tr>
<tr>
<td>Saraswati v. State of Kerala</td>
</tr>
<tr>
<td>Shakeel v. State of Maharashtra</td>
</tr>
<tr>
<td>Sita Ram v. State of Rajasthan</td>
</tr>
<tr>
<td>Srilal Shaw v. State of West Bengal</td>
</tr>
<tr>
<td>State of Bombay v. Atmaram</td>
</tr>
<tr>
<td>State of Gujarat v. Adam</td>
</tr>
<tr>
<td>State of Madhya Pradesh v. Baldeo</td>
</tr>
<tr>
<td>State of Maharashtra v. Ravi Kant Patil</td>
</tr>
<tr>
<td>State of Punjab v. Shukpal</td>
</tr>
<tr>
<td>Subhash v. District Magistrate</td>
</tr>
<tr>
<td>Triveniben v. State of Gujarat</td>
</tr>
<tr>
<td>Union of India v. Bhanu Das</td>
</tr>
<tr>
<td>Union of India v. Manoharlal</td>
</tr>
<tr>
<td>Unnikrishnan JP &amp;ors v. State of Andhra Pradesh &amp;ors</td>
</tr>
<tr>
<td>Vasisht v. State of Uttar Pradesh</td>
</tr>
<tr>
<td>Yusuf v. State of Jammu &amp; Kashmir</td>
</tr>
</tbody>
</table>
Preface

I had to be very alert while penning down the Preface of my thesis "Human Rights Norms and the Laws of Detention: A case study of TADA" because this topic had been a challenging one, in view of the scanty material on the subject. The indiscriminate use of detention laws in India specially the TADA and now the POTA, has evoked lot of controversy as these laws hit at the human rights directly. The absence of well-documented work on TADA has also prompted me to take up this project. Criminals deserve to be punished and, if their crimes warrant it, with severity. But even harshness has its limits, which are dictated by conceptions of justice, fair play and respect for human life, dignity and rights. And so long as effective alternatives to such laws exist, there will always be doubts about its use as an instrument of state policy. Seen in this perspective, the thesis is a modest attempt to explore the various ramifications of the detention laws with special reference to TADA. The introduction to the thesis traces the origin of human rights. The western writers often trace the origin of human rights to the much-publicized Magna Carta, which was, infact, a contract with the barons and which had nothing to do with the rights of the people as such. In my opinion, the holy Qur’an is the first attempt arriving as the consolidation of human rights. The contribution of Christianity, Buddhism and other religions and the Roman law in the development of human rights cannot, however, be ignored. It is not the intention of the candidate to undermine the role played by these religions. The Glorious revolution, American
Revolution and the French revolution, guided by the teachings by Rousseau, have equally contributed to the emergence of rights—liberty, equality and fraternity. The contribution of the League of Nations was no less significant. With the creation of the United Nations, the issue of human rights, in a sense was institutionalized. The UDHR and the two covenants on human rights made these rights universal, and provided the necessary framework for States to incorporate them in their Constitutions and respective national laws to make them more universal. India also could not remain unaffected by these currents. The Constitution of India aims at upholding these rights, which are basic to all human beings. But at the same time, state expediency and compulsions of time also prompted the Government of India to enact special laws to deal with situations striking at the very existence of the nation ---smuggling, trans-border terrorism, and rise of insurgency etc. It is precisely to meet these challenges that various detention laws were enacted from time to time. But in the process, misuse and abuse of these laws have often been a regular phenomenon. The highest blow to the liberty of citizens came from the emergency declared in 1975 and what was worse was that even the Supreme Court in A.D.M. Jabalpur upheld the actions resorted to by the government during the emergency. The decision of the Court sealed all hopes of revival of human rights till the Supreme Court came out with a liberal and progressive interpretation of Article 21 in *Maneka Gandhi*. Since then, a series of decisions of the apex Court aiming at upholding the liberty has marked a new chapter as far as rights are concerned. These issues constitute the focus of study in the second chapter.
The third chapter provides an insight into the debates of the Lok Sabha on TADA. A very modest attempt has been made to analyse the various points of view expressed by the members in the House. An examination of the provisions of the TADA in the light of the UDHR and the two international covenants has also been undertaken. The fourth chapter deals with the role of Judiciary in selected cases of Kartar Singh, Hitendra Vishnu Thakur and Sanjay Datt. Other cases could not be taken up for want of space. The Courts, however, could not do much, as the Act leaves very little scope for the Judiciary to flex its muscles.

The subsequent chapter highlights the misuse and abuse of the TADA provisions especially by the police. The poor rate of convictions is a pointer towards the partisan attitude of the police in booking up people under the Act, which failed to stand the scrutiny of the courts.

The conclusion of the thesis highlights the necessity of proceeding under these laws with restraint and caution. What was more pathetic about TADA was that it was applied even in those States like Gujarat, which were not classified by the Government as 'problem states'. Nobody can deny the importance of such laws when the very sovereignty and security of the State is in danger but there is a paramount need to apply these laws after proper investigation and verification, else the future of human rights in India would be in great peril.
Chapter 1
INTRODUCTION

The world even after 54 years of the adoption of the Universal Declaration of Human Rights, by the United Nations is faced with gross violations of human rights. Far from eliminating the age-old practices of discrimination, it has led to new kinds of perversions posing a serious challenge to the entire mankind. The new threats to human freedom and dignity, which are the offshoot of the modern and technocratic society, have not been dealt with in all seriousness. This makes a reappraisal of the entire concept of Human Rights to suit to the new mornings.

The representative of twenty-six nations that were fighting against the Axis powers first used the concept of ‘human rights’ in the Declaration of United Nations on 1 January 1942. But in the view of Norberto Bobbia, the concept of Human Right is not new. Human rights are historical rights, which emerged gradually from the battles that human beings fight for their own emancipation and the transformation of living conditions. While Akrun Kaplan Rozier and many others have tried to find out the sources and justification of human rights in religion. According to them, Islam has some aspects of human rights. It is traced from the Holy Qur’an. Islam provides a ray of hope by answering all dilemmas, which the mankind faces in the way of the enforcement of Human Rights. The Qur’an has laid down some universal fundamental rights for humanity as a whole, which are
to be observed and respected under all circumstances, whether in
the time of peace or war. It explicitly provides:

"O believers, be you securers of justice, witness
for God. Let not detestation for a people move you not
to be equitable; be equitable—that is nearer to God
fearing."³

The Human Rights, which Islam gives to human beings, can
be classified in two categories.

(1) The basic Human Rights which Islam lays down
for a man as human being.

(2) The rights, which Islam gives to different classes
of people in accordance with the peculiar situations, status
and position.

Right to protection of Life:

According to the Qur'an, human life is sacrosanct. There
are several verses, which affirm the inviolability of human life
except for just cause. The Qur'an says; ".... Whose killed a soul
not for retaliation for a soul slain, nor for corruption done in the
land, shall be as if he had slain mankind altogether; and who so
gave life to it, shall be as if he had given life to mankind
altogether."⁴

"Nor take life which God has made sacred except for just
cause."⁵
“Do not kill a soul which Allah has made sacred except through the due process of law.”

“The first among the basic right which Islam grants is the right to life and respect for human life.” The Qur’an regards killing of a human being as equivalent to killing of all mankind. Islam has clearly laid down the cases and the situations where human life can be taken away. Destruction of human life unwarranted by circumstances spelled out in the Qur’an is regarded as the greatest sin after polytheism. Islam confers rights on every human irrespective of race, nationality or religion. The Prophet (PBUH) is reported to have said, “One who kills a man under covenants (A non-Muslim citizen of Islamic State) will not smell even the fragrance of Paradise.” The Prophet (PBUH) has also prohibited killing of those persons, of an un-Islamic State, which is at war with an Islamic State, who are not involved in the war. The Prophet (PBUH) in his address on the occasion of farewell of Hajj had said “your lives and properties are forbidden to one another till you meet your lord on the day of resurrection.”

Islam also provides for the rights of the child in the womb of his mother. The Prophet (PBUH) had postponed once the capital punishment of a woman, for protection of the right of life of the child within her womb. The extent to which this right was protected by the state can be seen from the treaties and the
ordinances promulgated by Caliphs and their Governors. The treaty on the conquest of Azabaijan by the army of Islamic State during the Caliphate of Hazarat Umar reads, “Their lives, properties and the religious laws are all safe.” The treaty made by Hazarat Umar on the conquest of Jerusalem, stipulates, that “This security extends to there live (non-Muslim), properties, churches crosses of all their healthiest and sick....”

The Right to privacy is also accorded special status by the Qur’an. It provides, “O ye who believe! Enter not the house other than your own until, you have asked leave and saluted the inmate’s thereof. That is better for you, that you may be heedful. And if you find no one therein, do not enter there until you are given permission. And if it be said to you, ‘Go back’, then go back; that is purer for you. And Allah knows well what you do.” It further declares “and spy not each other” thereby forbidding undue interference or encroachment on the private lives of other persons. The Prophet (PBUH) has gone to the extent of instructing his followers that a man should not enter his own house suddenly. He should some how or the other inform or indicate to the dwellers of the house that he is coming. The state is also prohibited to intervene in the private affairs of citizens. The Prophet (PBUH) said, “When a ruler begins to search for causes of dissatisfaction among his people he spoils them.” Thus when Caliph Umar once heard a man singing inside a house, he suspected some mischief and started peering into the
Introduction

house where there was a woman and some wine along with a man. He started demonstrating them but on being reminded of the fact that he was violating their right of privacy, he gave up the idea of punishing the man and accepted his fault. He let the man free after taking oath from him that he would live a pious life in further. It is clear that neither bugging devices can be fixed in the private house to trap the conversation-taking place behind the closed door nor can the letters be censored while in transit, as is done in modern civilized States.

Islam has laid sound foundations for the civil freedoms, asserting that every individual, man or woman, is a free and responsible agent, free to handle and decide his or her personal affairs, including financial matters, without any undue interference or hindrance. Every person, according to Islam, is master of himself, with an independent personality. Each person has the right to make a will and to get married. He is entitled to anything that (he believes) will realize his personal or common interests. The Qur’an is equally explicit on Political freedoms. It provides that each individual who is of sound mind has a right to participate in determining the policy of his Government, and, watching over, and criticizing its executive departments. Islam has guaranteed this right and made obligatory sharing in the running of the affairs of the Government through consultation. The Holy Quran reads: “...And consult with them upon the
conducted affairs."^{18} ".... And those whose affairs are (determined by) consultation among themselves."^{19}

It enjoins what is proper and forbid what is improper.^{20} Islam gives the right of freedom of thought and expression to all human beings. However such freedom is to be used for propagation of virtue, truth and not for spreading evil or wickedness.

The Qur'an proclaims, "let there be no compulsion in religion."^{21} Muslim can invite non-Muslim to Islam but they cannot compel them to embrace Islam. Muslim cannot persuade any one to accept Islam by moral, social or political pressure and that "there should be no coercion in the matter of faith."^{22} Every individual has the right to choose his path. No one can be forced to follow a particular path. The right to protest which forms the basis of democracy is recognized by Islam century before the advent of democracy. The Qur'an says: "God does not love evil talk in public unless it is by some one who has been injured thereby."^{23} The Prophet (PBUH) has regarded the protest against a tyrant ruler to be the best form of jihad.^{24} That the right to protest against a tyrant and his arbitrary laws and orders contravening the principles of Islamic justified. Abu Bakr in his first address as a Caliph said; "Obey me! As long as I obey Allah and his Prophet (PBUH) when I disobey him and his Prophet
The Qur'an also provides safeguards against arbitrary arrest or imprisonment. It provides,

“No bearer of burdens shall be made to bear the burden of another.” That every man is responsible for his action if other man has not shared his actions then he cannot be held responsible for it, nor can he be arrested even though he may be clearly related to the wrong doer. The relatives of an accused person who has been found guilty of an offence cannot be arrested or punished for him. This provides the basis for the modern notion of the criminal liability of an individual.

The genesis of human rights can be treated to Islam and the Qur'an, which has systematically provided for a code of rights and obligations. The purpose being the establishment of justice as Qur'an says, “we verily sent our messenger with clear proofs, and reveals with them the scripture and balance, that the mankind may observe right measures; and revealed iron, where in is mighty power and many uses from mankind.” Muslims are enjoined to establish justices, even if their own interests are in danger.

“O ye who believe! Be ye staunch injustice, witness for Allah, even though it is against yourselves or (your) parents or (your) kindred, whether the case is of a rich man or a poor man, Allah is nearer unto both (then ye are). So follow not passion,
lest ye lapse (from truth) and if ye lapse or fall among, then Lo!
Allah is even enforced that ye do.”

There is no concept of Court fee in Islam as it is function of
the State to establish, maintain and deliver justice. The modern
notion of free legal aid is perhaps the offshoot of the Islamic
concept of justice. Therefore there is no question of anyone being
deprived of justice on account of his inability to pay the Court
fees. There is no scope of lawyers being paid by clients in an
Islamic setup. In an Islamic setup, the Government will pay the
fees of lawyer. Their work is only to give free legal opinions to
people. The English doctrine that the “King can do no wrong” is
seen to Islamic Jurisprudence.

Historians trace the origin of human rights from Magna
Carta (1215 A.D.) that granted certain rights. They ignore the
contribution of Islam in the development of these rights. On
close examination, it would be seen that Magna Carta was a
petition urging the King to concede certain rights to the Baroons.
Its contents neither had the universality of application nor direct
relevance to common man’s basic freedoms. We find some hints
of human rights in the twelfth century teachings of Thomas
Aquinas. Human Rights, as it is commonly believed are
depicted as a new version of natural rights. Macfarlane argues
that the concept of human rights emerged out of the much earlier
conception of ‘natural right’, which initially was no more than a
derivative element in the medieval Christian doctrine of natural law. John Locke developed the concept of the natural rights and summed them up as right to life, liberty and property. According to him, the natural rights had a metaphysical or moral status derived from human nature. The doctrine of natural rights viewed man as a self-determining and self-directing agent living in an environment that offered him ample resources and opportunities to pursue his own goals and choose his own actions free from interference from others. It placed great emphasis on liberty, freedom and independence of man. According to Carl J Friedrich, in the doctrine of natural rights, man was believed to have a fixed and unalterable nature, to be endowed with reason, which gives him certain rights without which he ceased to be a human being.

In the ancient times there was no concept of the rights and liberty, as it is understood today. Plato, therefore, does not say anything directly about the rights. But he provided an idea of Justice, Functional Specialization, Communism of wives and property, Emancipation of women etc. He also emphasized the importance of education. His assertion that the society is always 'a unity amidst diversity' and the every member of society should perform his duties to the best of his capacities can be linked in a broad way to the concept of Separation of Powers. He emphasized that every member of society should perform the functions of which he was best fitted by his aptitude and training.
His assertion that “all things are produced more plentifully and easily and of better quality when one man does one thing which is natural to him and does at the right time and leaves other things. He favoured rule of wise and wanted the state to be ruled by virtue. He paved the way for the emancipation of women by insisting that they should be given necessary education on equal terms with men and be permitted to take active part in the affairs of the state.  

Aristotle was the first pragmatic thinker whose work and conclusions were based upon data, facts, and figures and provided a scientific outlook to the study of Politics. He is considered as the father of the modern conservatives. He, for the first time made a successful bid to reconcile the principle of liberty and authority. He rejected the notion of the liberty as consisting of living as one likes and asserted that individual’s salvation lies in constitutional rule. To him, liberty is “subject to unselfish and constitutional authority and obedience to right and proper law.” He said, “The state came into existence for bare needs of life and continues in existence for the sake of good life.”

According to Thomas Hobbes, the absolute and unlimited character of sovereignty follows that the citizen or subjects do not enjoy any generous measures of liberty under the Leviathan. To him “liberty implies absence of external impediments which
impediments may off takes part of man’s power to do what he would do.” He subject to a cold and logical discussion the claims made on behalf of individual liberty by the opponents of monarchy. The individual has no rights or claims against the sovereign ruler to whom he surrendered all his natural rights. The only liberty that Hobbes allows the members of the Commonwealth can be summed up fewer than two heads. Firstly they have the freedom to do what laws of the state do not forbid. Secondly, they retain the right to do that, which cannot be surrendered under any covenant. The liberty under the first category does not amount too much; it does not constitute any limitation on the rights or powers of the sovereign. Under the second class, Hobbes allows the individual the right to disobey the state if he is asked to do anything, which involves danger to his life or body. Hobbes hardly recognizes the right to private property, the right to freedom of expression, freedom of conscience and other rights on which democrats generally lay stress. It would however be wrong to infer from this that there is and can be no liberty under the Leviathan.\textsuperscript{34} There is liberty but only such as can be enjoyed under the protection of laws. According to Hobbes, the laws do not bar the people from doing voluntary action; their aim is to ‘direct and keep them in such a motion, as not to hurt themselves by their own impetuous desires, rashness or indiscretion; as hedges are set, not to stop travellers, but to keep them in the right way’\textsuperscript{35} Hobbes established the
relationship between rights and authority and maintained that there could be no rights without the existence of authority.

Montesquieu's idea on liberty is visible in his Great Treatise.\textsuperscript{36} To him, the end or the objective of all governments is the maintenance of 'liberty'. He held that drawing up of a bill of rights and making it part of the formal constitution of the state does not ensure the attainment of liberty by the citizens. Paper declaration has little value; what matter is not the letter of the law, but the spirit in which it is applied. Rights recognized by the constitution are valueless, unless the law is put into action. For securing liberty it is not necessary that the laws should necessarily be right; what is required is that the citizen should know the law, and should be punished only when they violate the law. The degree and the nature of liberty enjoyed by the citizens might vary with the nature and type of law, but if there were no law whatsoever, one would have no security and no liberty; one would be adrift on an unsheltered sea. In so far as uniform and fixed law is the condition for the enjoyment of liberty. The central point of his theory is that liberty signifies subjection to law as distinguished from subjection to man.\textsuperscript{37}

The individualist liberal tradition, developed by Hobbes, Locke, and other philosophers of the 17\textsuperscript{th} and 18\textsuperscript{th} century, was influenced by the theory of natural rights. Liberalism cherished the realization of individual liberty, his development and
progress through the principle of rule of law, limited government and constitutionalism. Towards the end of 18th century and in the 19th century, the idea of natural rights as a source of human rights was challenged. Philosophers such as Bentham and Marx simply rejected it.

Bentham attacked the concept of natural law and natural rights and asserted that right is the child of law. “Rights, asserts Bentham, are the fruits of law and of law alone. There are no rights without law—no rights contrary to law—no rights anterior to law.” Bentham had no love for individual liberty. He argued that what men need is security and not liberty. He looked at each law as a restraint on individual liberty. He did not think liberty important for the happiness of the largest number of people. "The chief care of law is security; and the principle of security extends to the maintenance of all those expectations which law itself has created." Security, one may say, is a necessity for social life and for moderate degree of human happiness; equality is rather a luxury, which legislation could promote when it does not interfere with security. As for liberty, it is not one of the principle objects of law, but a branch of security, and a branch which law cannot help pruning. In simple words, Bentham laid great emphasis on obedience to law because obedience alone provides permanence and effectiveness to law, which enable it to promote the “greatest happiness of the greatest number,” which should be the chief aim of all laws.38
J. S. Mill was the great champion of the individual liberty and stood for restricting government interference in the life of the individual to the minimum possible extent. He held that democracy, public opinion and collectivism were dangerous to individual liberty and must be kept within their sphere of activity. He believed that if every individual is allowed to develop his personality as he wishes, it would enrich the world by a variety of characters. This way alone the human being shall be able to get the maximum happiness. Mill argued that so long the action of an individual concerned him alone and did not in any way prejudice the interest of others, he should be free and there should not be any limitation on him. However, he permitted the state to impose restrictions on the liberty of the individual if it resulted in an injury to the interests of other members of the community. It will be observed from the above statement of Mill that he divides the individual's action into two parts viz. self-regarding and other-regarding. He permits the individual complete freedom with regard to actions falling within the first category. But he permits the state or the society to put necessary restriction on those actions of an individual, which affects other members of the community. Further, even Mill permits the state to interfere in the self-regarding actions of an individual in his own interest. In doing so, Mill argues, the state actually promotes the self-interest of the individual and this action does not constitute denial of liberty in any way. This contention of
Mill has met with severe condemnation; because once we allow the state to interfere in individual's liberty there is no end to it. In this regard Mill made the classic statement on individual liberty in his essay 'On Liberty'. "The sole end for which mankind is warranted individually and collectively in interfering with the liberty of action of any of their number is self-protection. The only purpose for which power can be rightly exercised over any member of a civilized community against his will is to prevent harm to others. His own well, either physical or moral, is not sufficient warrant. The only part of conduct of any one, which he is amenable to society, is that which concerns others. In the part, which merely concerns him, his independence is, of right, absolute over himself, over his own body and mind the individual is sovereign."  

The doctrine of natural rights has profoundly influenced the English, American and French Revolutions. All these revolutions laid the foundation of human rights. The American Declaration of Independence, 1776, states "all men are created equal, that their creator endows them with certain inalienable rights, among those are life, liberty and pursuit of happiness." The US Bill of Rights also contains enumerable rights of people. Likewise French Revolution gave birth to the Declaration of Rights of Man and Citizens in 1789. It echoed the feeling of liberty, equality and fraternity, a glimpse of which is found in the Preamble to the Constitution of India. It declared certain rights of man as natural,
Imprescriptible and inalienable. A catalogue of rights has now become standard features of the constitutional apparatus of all contemporary States. From the beginning of the nineteenth century, attention was directed more to the rights of individual, than the powers of the State. Bouandel argues that the clash between liberalism and socialism in the later part of nineteenth and early twentieth century added new dimensions to the understanding of human rights. Socialist thinkers stressed the need to suppress a number of individual rights to achieve higher rights for mankind as a whole. Marx recognized that civil and political rights are meaningless unless economic and social rights (which are called 'the rights of second generation' by the human rights activists) are guaranteed.

The 20th century saw tremendous efforts in the formation of new principles and procedures to transfer the protection of basic rights of man from the hands of nation-states to a supernatural organization. The covenant of the League of Nations and the International Labour Organization touched some aspects of human rights. In 1929, the Institute of International law, New York, prepared a Declaration of Human Rights and Duties. The Second World War marked a turning point in the development of international concern for human rights with the birth of United Nations. The untold atrocities committed on political and ethnic minorities by the Axis powers activated the awareness and concern for human rights. The crime committed by Hitler and
other Axis powers were described as crime against humanity. At that point of time, the inter-American conference passed a resolution in 1945, seeking establishment of an international forum for the furtherance of human rights. Under these circumstances, the United Nations prepared the historical document, the Universal Declaration of Human Rights in 1948 with a purpose, to set a standard of human rights for the future. The United Nation made the subsequent documents such as International Covenant of Civil and Political Rights, International Covenant of Economic, Social and Cultural Rights, and its Optional protocol in 1966. These documents made the human rights more universal. New rights were added to these documents to make them people oriented.

On April 25, 1945 the Charter of United Nations was adopted at the San Francisco Conference. The rights expressed in different treaties found a place in the U.N. Charter. Prior to coming into force of the U.N. Charter, human rights movements were confined to abolition of slavery, humanitarian laws of warfare, and protection of minorities. These rights however did not satisfy the hopes and aspirations of the people, hence the need for a Universal Declaration under the auspices of the U.N. It was an innovation in the sphere of international peace and security that human rights were indispensable. The realization was written large that respect for human rights was intimately connected with the preservation of international peace and
security. The way human rights were trampled upon by the totalitarian states during the Second World War, it became imperative for the world organization to take stock of the ground realities and spell out rights of the people in a comprehensive manner.

In its preamble, the Charter, *inter alia*, reaffirms its “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.” To this end, the Charter enjoins “to practice tolerance and live together in peace with one another as good neighbors” and “to employ international machinery for the promotion of the economic and social advancement of people.” The achievement of international co-operation “in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.” The Charter enjoins that the General Assembly shall initiate studies and make recommendations for the purpose of assisting in the realization of human rights and fundamental freedoms. It further calls upon to work for the promotion of “universal respect for the observance of these rights and freedoms in the sphere of international economic and social co-operation as a pre-requisite for the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations. The Economic and Social Council is empowered to make recommendations for the purpose
of promoting respect for, and observance of human rights and fundamental freedoms for all. The council has power to set up a commission for the promotion of human rights.

Since the inception of the Charter, there has been a controversy whether the human rights provisions are mere platitude or they create some obligations on the part of member States to give them practical shape. Irrespective of the controversy, the fact remains that these rights are not spelled out with clarity. Despite that the very fact that these provisions exist in a multilateral treaty and to which nations often take recourse whenever and wherever breach of human rights takes place, is in itself an achievement. Articles 55 and 56 of the Charter do impose an obligation upon the United Nations to promote universal respect for and observance of human rights, and on individual members to take joint or individual action in co-operation with the United Nations for the achievement of Universal respect for, and observance of, human rights. The greatest achievement of the movement of human rights is that human rights are no longer confined to the realm of domestic jurisdiction; they operate beyond the national canons.

An Overview of the UDHR: -

The beauty of the Declaration of Human Rights is that it is neither addressed to nations nor to member states of the United Nations but to every individual, and is not a legal declaration in
the sense that it is not a legal instrument having binding force on its ratifiers, yet it has a great impact on the nations and has, infact, influenced the national Constitutions of several States, including India, which have incorporated most of these rights. Article 29(2) of the Declaration provides that, "in the exercise of his rights and freedoms, everyone shall be subjected only for such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others, and of meeting the just requirements of morality, public order, and the general welfare in a democratic society".

While adopting the Declaration, the General Assembly proclaimed that "this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction." To sum up, the Declaration of Human Rights has not been conceived as law but as a common standard of human rights, which everyone, every State, should endeavour to achieve.
In its thirty Articles, the Declaration dwells on civil, political, economic, social, and cultural rights. Its first two Articles are of general nature spelling out the universality of human rights. In the category of civil and political rights, are listed the traditional rights, such as right to life, liberty and security of person; equality before law and equal protection of laws; freedom of movement within and outside the country; right to own property; freedom of opinion and expression; freedom of peaceful assembly and to form associations and unions; freedom of thought, conscience and religion; right to seek and enjoy asylum. It is further laid down that no one shall be held in slavery or servitude; no one shall be subjected to torture or cruel treatment or degrading and inhuman behavior and punishment. It lays down that no one can be arrested and detained arbitrarily. No interference will be made in one's privacy, family life and correspondence. No one will be subjected to attack on his honour and reputation. Men and women of full age shall have the right to marry and to found family, right to nationality, right to take part in Government of one's country, and equal access to employment in public service.

In the category of economic, social and cultural rights are included, right to social security, right to work, right to just and favourable conditions of work, right to equal pay for equal work, right to fair remuneration, right to form and join trade unions;
right to maximum working hours and periodic holdings with pay, right to leisure and rest, right to adequate standard of living for oneself and one's family, including food, clothing and shelter, right to medical care and right to special protection and assistance to motherhood and childhood; right to education (at least free elementary education), right to equal access to all to higher education on the basis of merit; right of participation freely in cultural life of the community, and right to enjoyment of the art & culture and to share in scientific advancement and its benefits. The Declaration of Human Rights has been universally accepted as the charter of minimum international standard, which should be respected by all. The European Convention on Human Rights of 1950 reflects a clear impact of the Declaration. Its impact can also be seen on the Peace Treaty of Japan, 1951, international agreement on Free Territory of Trieste of 1954. Similarly, it has impact on several constitutions of post second war countries. The Declaration has also been cited in the judicial decisions of several countries and international court of justice.

Undoubtedly, the UDHR is a very important document of human rights. But it is not the end. In the opinion of Peter Jones, it should not be regarded as the definite statement of human rights. He apprehended the existence of human rights, which go unrecognized in the UN Declaration. He says, "it is still a rather ramshackle document and it should not be treated as the
touchstone by which the whole doctrine of human rights is to be judged. In the similar vein, Bobbio states that the Universal Declaration represented only the initial step in the final stage of the universal politicization of human rights. He emphasized the proliferation of human rights as a feature of the current phase in the development of the theory and practice of these rights. In this process, there is a shift of emphasis from the rights of general people to the rights of special category on the basis of various criteria of differentiation: sex, age and physical condition. This proliferation through specialization has mainly occurred in the field of social rights.

**Overview Of The Covenant On Civil And Political Rights:**

The covenant on Civil and Political Rights incorporates the traditional human or fundamental rights conceived and proclaimed in the wake of the success of the Industrial Revolution. These rights are right to life and liberty, freedom from torture, or inhuman and degrading treatment, freedom from slavery and slave-trade, servitude and forced labour, right to liberty and security of the person, freedom from arbitrary arrest and detention, right of detenu to be treated with humanity, freedom from imprisonment only on ground of failure to fulfill contractual obligation, liberty of movement, freedom to choose residence and freedom to leave one’s country and return to it, right to equality before law and courts and tribunal, freedom from *ex post facto* laws, right to recognition
as person, right to privacy of home and correspondence, and protection from unlawful attack on honour and reputation, right to freedom of thought, conscience and religion, right to freedom of speech and expression, prohibition by law of any propaganda for war, racial discrimination and hatred, right to peaceful assembly, right to freedom of association, right to marry, and right to equality of rights and responsibilities of spouses and protection to children on dissolution of marriage, right to every child to protection by family, society and the State, and to acquire nationality, right to opportunity to take part in the conduct of public affairs, right to vote and right to be elected by the secret ballot, right to equality before law and equal protection of law, right to minorities for the protection of their lives, right of people to self-determination.

Again, rights recognized under the covenant are not absolute, as they cannot be absolute in the social scenario of the world. Article 4(1) of the covenant lays down that in the times of public emergency, which threatens the life of the nation and the existence of which (emergency) is officially proclaimed, the State concerned may take "measures derogatory from their obligations under the Covenant to the extent strictly required by the exigencies of the situation, provided such measures are not inconsistent with other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin." Broadly
speaking, the Covenant lays down that restrictions should be only those specified by the law and necessary to protect national security, public order, and public health.

**Overview Of The Covenant On Economic, Social And Cultural Rights:**

The outstanding feature of the Covenant is that it begins by saying that the State parties to the Covenant 'undertake to take steps,' individually and through international assistance and cooperation especially economic and technical, to *maximum of its available resources*, with a view to progressively achieving the full realization of the rights recognized in the Covenant by all appropriate means, particularly by legislative measures. Each article of the Covenant begins with the words, "Each state party to the present Covenant undertakes to respect and ensure..." The Covenant lists following rights such as, right to work freely chosen, right to enjoyment of just and favourable conditions of work, right to form and join trade unions, right to social insurance, right to family, right to protection of motherhood and childhood, right to marriage and to have family, right to adequate standard of living, right to health—highest attainable standard of physical and mental health, right to compulsory primary education freely available to all, right to participate in cultural life and enjoy the benefits of scientific progress.
In the 20th century, tremendous efforts have been made through the formation of new principles and procedures to transfer the protection of basic rights of man from the hands of nation-states to a supernatural organization. The covenant of League of Nations and the International Labour Organization touched some aspects of human rights. In 1929, Institute of International Law, New York, prepared a Declaration of Human Rights and Duties. The inter-American conference passed a resolution in 1945, seeking establishment of an international forum for the furtherance of human rights.

The evolution of human rights has gone through a dialectical process. The first stage is to be found in religion, which guaranteed certain rights to their followers and as well as for others. The second stage is to be found in philosophical works. Locke's 'theory of natural rights' and Rousseau's idea of 'Man is born free, however, but everywhere he is in chains' and other such ideas which ultimately culminated in universal rights. The third stage is marked as the transition from theory to practice. Through this transition, the assertion of human rights acquires concreteness but loses its universality. Rights are then protected as only positive rights, but they are only valid within the state, which recognizes them. The 1948 Declaration commenced the third and last stage in which the assertion of human rights is both universal and positive. They are universal in the sense that the principles, the Declaration contains no longer
Introduction

cconcern only the citizens of a particular state, but all human beings and positive in the sense that it initiates a process not only to recognize but also to protect these rights, even against the state which violates them. But the peace with which these rights are moving forward is slow and tardy. The very fact that the two Covenants were adopted after 18 years of the Universal Declaration of Human Rights is a testimony to the lukewarm attitude of the international community to the issue of rights. But, better later than never, the United Nations did generate awareness among people about their inherent rights and succeeded in mobilizing the nations to pay attention to the misery and sufferings of the people.
REFRENCE:


3. Quran, 5:8


5. Quran Bani Israel, X. VII, 33.

6. Quran VI, 151.

7. Quran V: 32

8. Sahih Bhukari from Kitabul Zimma.

9. Sahih Bhukari from Kitabul Zimma.


11. Shibli-Nomani Al Farooque (English Edition), P. 268


14. Surah Noor, 27


18. Quran, III, 159

19. Quran, XLII, 38

20. Hadith from Abu Daud Mishkat Kitabul Imarah-Wal-Qaza


22. Quran, 2:256.


25. Quran Al-Imran: 165


27. Al Baqarah

28. Al Imaran, 103-104


42. We the peoples of the United Nations determine to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, and for these ends to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, have resolved to combine our efforts to
accomplish these aims Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations. (Preamble of the United Nations Charter).


44. The United Nations Charter Article 55 provides, With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

45. The United Nations Charter Article 56 provides, All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

46. Majority opinion in the International Law Commission in its 25th meeting (1949) held that these are binding obligations.

47. For details see, *UDHR*, Article 3

48. Ibid., Article 7.


64. *Ibid.*, Article 21(2).


70. *Ibid.*, Article 27(1).
74. Bobbio, Norberto, *op. cit.*, p. 18
76. For details see, ICESCR, Article 6.
85. Ibid., Article 15.
86. Ibid., Article 16.
87. Ibid., Article 17.
88. Ibid., Article 18.
89. Ibid., Article 19.
90. Ibid., Article 20.
91. Ibid., Article 21.
92. Ibid., Article 22.
93. Ibid., Article 23.
94. Ibid., Article 24.
95. Ibid., Article 25.
96. Ibid., Article 26.
97. Ibid., Article 27.
98. Ibid., Article 28.
99. For details see ICCPR, Article 6.
100. Ibid., Article 7.
101. Ibid., Article 8.
102. Ibid., Article 9.
103. Ibid., Article 10.
104. Ibid.

105. Ibid., Article 11.

106. Ibid., Article 12.


108. Ibid., Article 14 and 15.
Chapter-2
THE LAWS OF DETENTION IN INDIA:
AN OVERVIEW

Introduction:

Law is a nutshell to justify any action of the person whether it is wrong or right. It also gives power to the authority to classify the wrong action. During emergency and sometimes even during ordinary times every country is subject to laws and regulations providing for detention of citizens without trial on the subjective satisfaction of the executive authority. The idea behind such detention is to safeguard peace, security, and territorial sovereignty of the Nation. During the British period, the statutory power for such detention was vested in the Governor General-in-Council. These regulations designed in the wake of war, insurgency, revolt and rebellion with a view to intimidating the subject people to submission to colonial rule, survived till the adoption of the Constitution. It is rather unfortunate that the provision of preventive detention was provided in the Chapter of fundamental rights. In the Constituent Assembly, Ambedkar said, "it has to be recognized that in the present circumstances of the country it may be necessary for the executive to detain a person who is tempering either with public order or with the Defense Service of the Country. In such case I do not think that the exigencies of the liberty of the individual shall be placed above the interest of State."
The Preventive Detention (PD) is the negation of the right to personal liberty. It envisages detention without trial, which is against the basic canons of criminal jurisprudence. At a time when the liberty of the individuals crosses the limits and threatens the very existence of the state and at that point of time it fails to control the enjoyment of individual’s liberty, then the state can resort to preventive detention. However, there was a difference in the exercise of the said power; some countries tried to handle this measure carefully and cautiously. They adopted it casually and only in grave situation affecting the very existence of the state. In other countries it became a part of the life of the country, like India.

Now coming to the Indian experience, before independence, the British regime in order to establish a strong foothold in India resorted to such preventive detention laws for an indefinite period by the Defense of India Act 1915 and 1939, the Government of India Act 1919, the Rowlett Act 1919 and the Bengal Criminal Law (amendment) Act 1925. Under some of these detention Acts a person can be detained for six months without informing him of the ground of detention. Only if the detention period was to be extended beyond six months would the detenu be informed of the grounds of his detention and the case be referred to a tribunal. This was the serious violation of human rights but at that time there were no consensus about the human rights. When India got independence and the new Constitution came into force, several provincial Acts and Ordinances providing preventive detention
became void because the Constitution of India duly recognize the concept of human rights in its preamble and these laws were inconsistent with the Part III of the Constitution of India, which guaranteed fundamental rights and liberties to the citizens. Freedom from arbitrary arrest is a basic human right which is usually secured by the provision that any one who is arrested must be immediately produced before a judicial magistrate/body which can then pronounced on the legality of the arrest, and, in appropriate cases, authorize for continued detention\(^2\). Article 22(1) and (2) of the Indian constitution does confer such protection\(^3\). But unfortunately Article 22, which guarantees protection against arrest and detention, laid down the scheme under which preventive detention law could be enacted even in normal times, Which is violative of the human rights standards set forth in the Universal Declaration of Human Right and the two Covenants. This raises the issue whether the concept of human rights enshrined in the Indian Constitution has any meaning. An ansory glance at the use and misuse of Article reveals beyond any doubt that human rights are often violated with impunity and even eroded by the political power in the name of national security and unity.\(^4\)

It is strange that in these days, the governing agency is suppressing the concept of human rights by encroaching upon the civil liberties of the people. During the operation of internal emergency Government use the preventive detention measures on wide scale.\(^5\) Laws like the Defense of India Act, the Unlawful
Activities Act, the National Security Act, the Maintenance of Internal Security Act, the Terrorist And Disruptive Activities Act (TADA), and various other acts and provisions of Indian Penal Code have presented a sordid picture of human rights and a dismal mosaic of democratic life in the country.

The constitution of India in Part III makes provision for safeguards against Preventive Detention. Article 22(4) to (7) deals with these safe guards. It provides for an Advisory Board to consider the cases of detention for more than three months. Article 22(4)(a) deals with constitution of an Advisory Board. It says that an Advisory Board shall consists of persons who are, or have been, or are qualified to be appointed as, judges of a High court. The words 'or are qualified to be appointed as' may provide the opportunity to the Government to appoint their own party men or Member of Parliament as the member of Advisory board. The lacunae was, however, removed by the Forty fourth Amendment Act 1978 and made it mandatory for the board to consist of sitting or retired High Court Judges selected by the Chief Justice of the appropriate High Court, with a view to guarding against the board being packed with government henchmen, but this statutory amendment, enacted in 1978, has not yet been brought into force. The detainee has no right to be represented by a lawyer before the Board, but if the detaining authority is legally represented, the detainee cannot be denied a lawyer. The hearing cannot possibly be compared with that in an ordinary criminal court, as the detainee has no right to legal
representation or to cross-examine the parties on whose complaints or statements the order of detention was based. He need not always be given an oral hearing, and the Advisory Board is not required to pass a speaking order. Though the Constitution of India provides for important safeguards under Article 22(4), against these extraordinary measures yet the continuous emergency in India had resulted in the deprivation of the protection against Preventive detention measures. The continuation of emergency became a part of the Indian life and the protections of article 22(4) and (5) suffered a great set back. The last and most sever attack on the provisions of article 22 came on June 27th 1975, when the President of India imposed a blanket ban on its enforcement. The Supreme Court in its majority judgment in the Habeas Corpus Case validated these measures, where the Court gave its micro fine approach in protecting the safeguards available to a detenu. On the one hand, recourse of judicial protection was completely shut and on the other, the executive and the legislative authorities were given clean chit to deal with Preventive detention cases. And it was this state of affairs that was mainly responsible for the 'nineteen months' suffering to the persons detained under the extraordinary measures who were denied not only the basic human rights but also basic requirements. And, therefore, unless the emergency provisions are amended in this connection the safeguards in the article 22 (4) and (5) will always remain ineffective.
A brief survey of the working of the Preventive detention laws is necessarily a limited one since information about the role of Advisory Boards under Preventive detention laws is legislatively declared to be confidential and is not revealed and most of the detention operation are hush hush. These Preventive detention laws are of a quasi-criminal nature and the violation of the Human Rights norms. Chief Justice Gjendragodkar in the case *G. Sdanandan v. State of Kerala* Justice Hedge in the case *Moti Lal v. State of Bihar*, warned that “the continuous exercise of such a power would make the conscience of the authority exercising those powers blunt to the basic rights of the citizens and would ultimately pose a serious threat to the basic values on which the democratic way of life in India was founded.”

**Preventive detention Act 1950:**

The Act is violative of Human Rights as stated in the Universal Declaration of Human Rights but generally follows the provision of the existing laws on the subject; it conforms to the Article 22 of the Constitution of India, a section of which defines exception to an important fundamental right. On February 26, 1950, Sardar Patel, the sponsor of the Bill (Preventive Detention), described it as the “minimum evil” necessary to safeguard democratic institutions in India from the “communist menace.” The only alternative to the Bill was to get the President’s order to declare an emergency in India. Such a course would be very bad and unnecessary. The Bill was presented in the Parliament
because of the fact that "in the west Bengal, 350 detenus had applied to the Calcutta High Court for the cancellation of the detention orders passed against them and their application was to be decided on Monday (27th Feb. 1950). The intention of the Government was, thus, to thwart the communist.

Under Article 22 of the Constitution of India, there are two sets of provisions relating to preventive detention. One set of provision authorize the detention of any person for a longer period than three months if an Advisory Board certify that there was a sufficient cause for the detention. The other set of provision authorize parliament to make law under which a person might be detained for a longer period than three months without obtaining the opinion of the Advisory Board. The proposed Bill covers both type of cases. Under clause 7 of Article 22, Parliament may prescribe the circumstances of detention, the maximum period for which a person may be detained and the procedure to be followed by Advisory Boards in the course of an inquiry. During the debate in the Lok Sabha A.P.Jain pointed out that, the Bill does not cover the maximum period of detention, even in the cases where the Advisory Board recommended continuation of the detention. In reply the Attorney General of India said that under the Constitution, it was not obligatory to provide a maximum period. The maximum period had not been provided in the present bill because it would expire on 1st April 1951. But unfortunately the Act was amended thrice to give some more protection to the persons detained under the Act. In the
beginning, the act was renewed every year; thereafter, every two years and finally every three years. Sardar Patel, who piloted the first Bill with respect to Preventive Detention, conceded that he had two sleepless nights before introducing such a Bill in the Parliament\textsuperscript{22}. But the detenu had several sleepless nights after enactment of the Bill.

**Objective of the Bill:**

The objective of the Preventive Detention Act 1950 was, to prevent persons from acting in a manner prejudicial to the defense of India, the relations of India with foreign powers, the security of India or a state, the maintenance of public order or the maintenance of the supplies and services essential to the community\textsuperscript{23}. Commending on the Bill, Sardar Patel said; our fight is not with the communists but with those whose avowed object is to create disruption, dislocation, and tamper with communication and making it impossible for normal Government to function. And that it is difficult to deal with them under the provisions of ordinary laws. And to check its misuse the bill provides that after a period of six months of the original detention period, the Government would review the cases after consultation with judicial authority\textsuperscript{24}.

The preventive detention Act 1950 bestows wide power on the executive and the possibility of its abuse or misuses are, therefore, greater. In case of executive action effecting preventive detention on two grounds, the Supreme Court quashed the
detention order of Kishori Mohan and Akshoy Konai on the ground that in the light of detention on the two disjunctive grounds the authority making the order of the detention did not apply its mind, which was required by the Act. When the most valuable right of personal liberty is at stake, the Legislature should carefully and scrupulously enact a law relating to preventive detention.

Role of Advisory Board:

There were cases when persons were detained on insufficient grounds. In Ram Krishana v. State of Delhi the Court found that the grounds are vague. In Hari Krishna v. State of Maharashtra the detention order were based on irrelevant grounds. In Dayanand Modi v. State of Bihar the detention were based on non-existent grounds. In Debu Mahato v. State of West Bengal authorities were not satisfied. In Mohammed Akbar v. District Magistrate Doda the Court found that authorities did not apply their minds. While in G. Sadanandan v. State of kerala there were malafide considerations. These cases were, infact, considered by the Advisory Boards but only when the Court discovered loopholes, they were quashed. In such cases one can only presume that the Advisory Board either did not consider these cases seriously or the board had acted under pressure.
Role of Judiciary:

The constitutional validity of the preventive detention Act was challenged in the *A.K. Gopalan v. State of Madras*. The Court held that the section 14 of the Act abridged the rights given under Article 22(5) and therefore ultravires of the Constitution. It was further said that invalidity of this Section did not affect the rest of the Act.

In *A.K. Gopalan*, the Supreme Court of India was called upon to interpret many provisions of part III of the constitution, which deals with fundamental rights. The constitution guaranteed seven freedoms under Article 19, namely, (a) freedom of speech and expression, (b) freedom to assemble peacefully and without arms; (c) freedom of association; (d) freedom to move within the territory of India; (e) freedom to reside and settle in any part of the territory of India; (f) freedom to acquire, hold and dispose of property; and (g) freedom to carry on any trade, business, occupation or profession. Under Article 21 of the constitution, it provided that no person shall be deprived of his life or personal liberty except according to procedure established by law. The Constitution, however, provides for preventive detention of persons under Article 22(3)(b). These laws of the preventive detention authorized the executive to detain a person on mere suspicion of wrongdoing. The Constitution did, however provide some safeguards against the arbitrary use of power under clause (4) to (7) of Article 22.
A.K. Gopalan was a communist leader who had been detained under the Preventive Detention Act. The validity of detention was challenged on the ground that it is violative of Article 19. It was further contended that the procedure prescribed by the law in question did not conform to the principle of natural justice, which provides minimum norms of fair procedure. The issue before the Court was, whether detention of a person could be challenged only with reference to Article 21 or whether it could also be examined with reference to the rights guaranteed under Article 19; and whether the procedure established by law 'implied a fair and just procedure'. The majority of judges held that Article 19 and 21 had to be read exclusively. They held that the words 'personal liberty' in the Article 21 did not include the freedom guaranteed by Article 19. According to them, a person who was free could only enjoy freedoms given by Article 19, they could not be invoked by some one who had been deprived of his liberty by being arrested under a Penal Law or a Law authorizing Preventive Detention. Therefore, whenever a person was deprived of his liberty, such deprivation had only to stand the test of article 21 and need not examined with reference to Article 19. The court went on to observe that the words 'procedure established by law' meant such procedure as was laid down by law. The Court could not examine whether such procedure was just or fair. Gopalan's lawyer had challenged the law of Preventive Detention on the ground that procedure laid down hereunder violated the principle of natural justice. The majority
of judges said they could not import those principles within the meaning of the words 'procedure established by the law'. The Court refused to consider fundamental rights in terms of the spirit of the Constitution. However, Justice Fazl Ali gave a dissenting judgment. He held that the words 'personal liberty' include all those aspects of liberty, which were mentioned in Article 19. One reason why the law of preventive detention could not be challenged under Article 19, according to the majority view, was that if preventive detention could be challenged, then punitive detention would also be open to such challenge on the ground that their fundamental rights under Article 19 were violated. Rejecting this reasoning, Fazl Ali, J. declared, “I agree with one of the learned judges of the High Court, Calcutta, in his remark that 'no calamitous or untoward result will follow even if the provisions of the Penal Code become justifiable'. I am certain that no court would interfere with a Penal Code which has been the law of the land for nearly a century and the provisions of which are not in conflict with the basic principles of any system of law". The Judge sarcastically remarked whether the principles that no person can be condemned without a hearing by an impartial tribunal, which is well recognized in all modern civilized systems of the law and which Halsbury puts on par with well recognized fundamental rights, cannot be regarded as part of the law of this country? Justice Fazl Ali further observed that the principle being part of the British system of the law and procedure which we have inherited has been observed in this country for a very long time
and is also deeply rooted in our ancient history, being the basis of the panchayat system from the earliest times, the whole of the Criminal Procedure Code .............. is based upon the foundation of this principle, and it is difficult to see that it has not become the part of the law of the land and does not figure in our system of law. Justice Fazl Ali therefore insisted that procedural due process had been a part of Indian law not merely by virtue of inheritance from the British legal system, but also because it was deeply rooted in the India's Ancient History. This was a thoughtful way of stressing the indigenous roots of Human Rights.

The dissenting judgment of Fazl Ali, J. in Gopalan as well as in Kesavan served as the guiding principle in the subsequent development of Indian Constitutional Law. Justice Subba Rao in Kharak Singh v. State of Uttar Pradesh accepted the dissenting view of Justice Fazl Ali, in his dissenting judgment, which gave wider meaning to the words 'personal liberty'. Even the majority judges in that case had accepted that domiciliary visits on an ex-convict at irregular times, violated his rights to privacy and since the right to privacy was part of the right to personal liberty, such visits were unconstitutional. They did not, however, accept that the words 'personal liberty' included the freedom guaranteed by Article 19(1), although they did hold that the words 'personal liberty' comprehended many aspects of liberty other than freedom from arrest and detention. The majority did not agree that the words 'procedure established by law' had a wider connotation
Subba Rao, J. in his dissenting judgment, said that Fazl Ali's dissenting view in *Gopalan* would have been preferable.

In *Gopalan*\textsuperscript{41}, Kania, J. said that Article 22(7)(b) is permissive, it being not obligatory on Parliament to prescribe the maximum period and that if this construction resulted in a Parliamentary law enabling the detention of a person for an indefinite period without trial that unfortunate consequences is the result of the words of Article 22(7) itself and the court could do nothing about that.

Ultimately, the Court (Supreme Court) changed its view in the 1978 in *Menaka Gandhi V. Union of India*\textsuperscript{42}, where it not only decided to read Article 19 and 21 cumulatively, but also read the word 'life', 'personal liberty' and 'procedure established by law' more liberally. The right to life and the right to personal liberty now mean almost all basic Human Rights\textsuperscript{43}.

**Maintenance Of Internal Security Act—1971:**

The Preventive Detention Act, 1950 which was originally enacted for one year, continued to operate for about two decades and ceased to have effect on the 31\textsuperscript{st} December, 1969 and after a short span of one and half years the Maintenance Of Internal Security Ordinance, 1971 was promulgated which came into force on 3\textsuperscript{rd} June, 1971 and which was followed by the Maintenance Of Internal Security Act, 1971 (MISA) which came into force on 2\textsuperscript{nd}
July, 1971 in less than two years time after the lapse of the Preventive Detention Act, 1950.44

The reaction of the opposition was sharp. They even boycotted the parliament. The CPI leader S. M. Banerjee said that it was a “carbon Copy" of much hated Preventive Detention legislation; only its provisions were much harsher. It was a sad commentary on the Parliamentary democracy of this country that even after the massive verdict given by the people to the ruling Congress, it wanted to impose “this black Law/ Ordinance.” Jyotirmoy Bosu (CPI-M) said that the Bill was being brought in order that the Congress Party could further its own political interests. The congress taking advantage of its power in the Center was misusing it and clamping on people obnoxious laws that curtailed civil liberties. The ruling party was becoming more and more dictatorial. In West Bengal alone, they had detained more than 3000 persons45.

The Maintenance of internal security Act was drafted on the same lines as compared to the Preventive Detention Act 1950 except that the new Act contained special provisions for foreigners. In certain classes of cases and in certain circumstances, the MISA provided for detention of foreigners for a period longer than three months but not exceeding two years from the date of their detention. For such detention of the foreigners, the reference to the Advisory Board could be made at any time prior to but in no case latter than three months before
the expiration of two years instead of thirty days\(^46\). The maximum period of detention will be one year (in case of Indian) but the Government concerned has been empowered to revoke or modify the detention order at any earlier time\(^47\).

Another change brought in the new Act was that for the communication of the grounds of detention; disclosure of grounds of the order of the detention to the detenu not latter than the five days in general and fifteen days in exceptional circumstances was fixed. But the lacunae were that the authority was empowered not to disclose the grounds if such disclosure goes against the public interest \(^48\). The law also provided the constitution of an Advisory Board consisting of three persons of the status of High Court Judges. The Government concerned will place before the Advisory Board within thirty days from the date of detention, the grounds on which the order has been made and representation, if any, made by the affected person. The words ‘status of the High Court Judge’ in this clause provided opportunity to accommodate their own party men on the Advisory Board. The Boards will submit its report to the Government within ten week from the date of the detention giving its opinion (majority will prevail) as to whether or not there is sufficient cause for the detention. The right to engage a lawyer was denied to the detenu. Moreover, the proceeding of the Advisory Boards will be confidential \(^49\).
Judicial Attitudes In Safeguarding Human Rights:

The constitutional validity of the Maintenance of Internal Security Act was challenged before the five judges bench of the Supreme Court in *Hardhan Saha v. State of West Bengal*. Wherein the contention was that the law of the preventive detention is unreasonable and therefore, it violates Article 19 and Article 21. That the right to be heard is infringed. Further, the Act does not lay down the just procedure for giving effect to the Article 22(5). It was further contended that the Act violates Article 14 because it permits discrimination. The bench after scrutinizing all Sections of the Act rejected all the pleas and was held that the Act does not suffer from any constitutional infirmity. The law could not be regarded as being unreasonable as "the principle of the natural justice in so far as they are compliable with detention laws are present. The court considered that the Maintenance of Internal Security Act did not offend against Article 19. Again, in *Khudi Ram Das v. State of West Bengal*, the Court observed that the question of the relationship of Article 19 and 22 was 'concluded' and 'a final seal had been put on the controversy. It did not examine the validity of the Maintenance of Internal Security Act on the ground of Article 19 because it thought that *Hardhan Saha* had concluded that issue.

Human Rights Position During Emergency 1975-1977

In a democratic country, the rights and liberties of an individual are as important as the power of the State to regulate
them in the interest of the society; and a balance is maintained between them with the help of the judiciary. However, the maintenance of civil liberties becomes a complex issue in times of national emergency. There can be no debate that, in a national crisis, national interest has precedence over individual liberty. Since civil liberties rest on the continuance of the state as a sovereign body, preservation of the state against the threats, internal or external, to its existence, has the top most priority and cannot be ignored even in the name of civil liberties. On the contrary, when a war or internal disorder threatens the state, the interest of the individual and of those of society become identical and the individual is expected to surrender his liberty to the extent it is necessary in the interest of the state. The basic question is, to what extent should the state limit Human Rights and the fundamental freedoms which are so basic to existence that even the consideration of security of the state cannot be permitted to suppress them?

The International Covenant of Civil and Political Rights provides that state may depart from their obligations when an emergency threatens the very life of the nation', but 'only to the extent strictly required by the exigencies of the situation'. Moreover, the measures taken must not be 'inconsistent with their obligations under the 'International Law'. Article 4(2) of the International Covenant of Civil and Political Rights, provides that the Government under its emergency power, must not arbitrarily deprive an individual of life; subject him to cruel, inhuman and
degrading treatment or punishment; hold him in slavery; imprison him for inability to fulfill a contractual obligation; subject to retroactive penal laws; and deny him the right of thought, conscience and religion.

In India, the Fundamental Rights of the people have been on the occasions, under heavy strain. From Gopalan to Makhan Singh and from Golak Nath to Keshavananda Bharti, the basic issue has been the place of Fundamental Rights in India’s Constitution. But in the epoch making case of Shiva Kant Shukla, popularly known as the Habeas Corpus case, the very life and liberties of the nation were sacrificed at the alter of the rule of law. At a time when the High Court upheld personal liberties against heavy odds, the Supreme Court displayed little enthusiasm for it. In this case, the court was called upon to consider the validity of detentions made during the emergency of 1975-1977. The question before it was whether, in view of Presidential Order issued under clause (1) of Article 359 of the Constitution, a petition under Article 226 before the High Court for a writ of Habeas Corpus to enforce the right of ‘personal liberties’ of a person detained under Maintenance of Internal Security Act, 1971, was maintainable. The court had to decide the question at a time when the entire law of Preventive Detention was immunized from judicial review. Not only the courts could not to be moved for the protection of Fundamental Rights because of a Presidential Order to this effect, but the statute under which these detention were made i.e. the Maintenance of Internal
Security Act 1971, also placed in the Ninth Schedule of the Indian Constitution which was beyond the reach of Judiciary.

Several detenus under the Maintenance of Internal Security Act 1971, had filed petitions in different High Courts for the issue of the writ of Habeas Corpus praying for their release from Preventive Detention. Nine High Courts of the country held that though the petitioners could not move the court to enforce their Fundamental Rights under Article 21, it was open to them to challenge their detention on the grounds that it was ultravires i.e. by showing that the detention order ex-facie was passed by the authority not empowered to pass it, or it was in excess of powers delegated to the authority, or the power had been exercised in breach of the condition prescribed in that behalf by the Detention Act, or the order was not in strict conformity with the provisions of the said Act despite the Presidential Order dated 27th June 1975, issued under Article 359(1). In reaction of the above findings of the High Courts, several State Governments and the Union Government filed appeals in the Supreme Court. They argued that, since the Presidential Order under Article 359, had suspended the enforcement of Fundamental Rights enumerated in Article 14, 19, 21, and 22 the detenu had no locus-standi to move any court for the writ. They pleaded that, under Section 16A of the Maintenance of Internal Security Act, they were not obliged to disclose the grounds of detention; therefore the courts could not go into the reasons for detention and must accept ex-facie the
subjective satisfaction of the detaining authority as recorded in the detention order.

The 1978 Reform:

With the dawn of a new Government headed by the Janata Party in 1977, the forty fourth Amendment Act was enacted in 1978. This Act amended Article 22 and 352. Whilst the amendment of Article 352 has been brought into force so that an emergency can no longer be declared if there were internal disturbances, but amendment relating to the safeguard against the Preventive Detention, under Article 22 have not been brought into force for twenty four years despite change of Governments at the Union. The Amendment did make the Advisory Board independent of the Executive. The new provision makes the Chief Justice of the appropriate High Court in constituting the Advisory Board mandatory. It shall consist of a chairman and not less than two other members. The chairman of an Advisory Board shall be a sitting Judge of the appropriate High Court and the other two members shall be a sitting or retired judges of any High Court. Further, it is provided that a person cannot be detained beyond two months. The Amendment also substituted a clause (4), reducing the maximum period detention without obtaining the opinion of the Advisory Board. The detention of a person for a period longer than two months can only be made after obtaining the opinion of the Advisory Board and the power conferred on the Parliament to provide for a longer period has been taken away.
The Amendment thus provide for two categories of the Preventive Detention: first, detention for a longer period of two months under a law made by a legislature, and second, detention for a period longer than two months provided the Advisory Board give its opinion in favour of it. It is a safeguard against executive encroachment on the working of an Advisory Board. The Advisory Board is bound to submit its report before the expiration of the said period of the two months. Failure to do so would render the detention illegal. In absence of Advisory Board’s clear opinion, it was held that detention for more than one year was without legal sanction and hence illegal.

In *A.K. Roy v. Union of India*, a question was raised as to whether Supreme Court could issue the writ of Mandamus to the Union Government to bring the Amendment provision in force. By a majority of three to two, though disapproved the delay on behalf of the Government in not bringing into force the forty forth amendment but held that it could do nothing. It said that the power to amend constitution is different from that of bringing the concerned amendment into force.

**The National Security Act: 1980**

The Maintenance of Internal Security Act 1971 was repealed on August 3, 1978 by the Janata Government. And in 1980, when the congress (I) came to power at the Center, National Security Ordinance was promulgated. Justifying the Bill the then Information and Broadcasting Minister, Vasant Sathe, said in the
Lok Sabha that the Bill is essential for protecting the fundamental freedoms guaranteed to the citizen in the Constitution. These freedoms, he mentioned, are "freedom from murder and violence, communal and caste riots, black marketing and hoarding and smuggling." With lot of hue and cry the Lok Sabha passed the Bill in the form of the National Security Act, which came into force on 27 December 1980.

The Act provides for the detention of a person with a view to preventing him from acting in any manner prejudicial to various states objectives including national security and public order. Apparently, the Act aims at the black marketers and smugglers, persons preaching communal hatred and fan faring caste clearages. It was assured that the said Act would not be used against the opposition. The then Prime Minister, Indira Gandhi announced on October 1, 1980 "the Government needs the National Security Act, to deal with the black marketers, Smugglers and anti social elements, and that it will affect the civil liberties of the law abiding citizens." The act, however, was not used for the purpose for which it was enacted. It is an irony that not a single smuggler or a black marketer has been hauled under the law. The total number of the detentions made all over the country till 1981, under this Act was about 732. The figure excludes the persons arrested in the State of North East and Punjab. It is surprising that the first to be detained under the Act were A.K.Roy, M.P. and K.S.Chateerjee, M.L.A. both active trade unionists from Dhanbad belonging to the Marxist Coordination Committee.
Provision Of National Security Act and International Norms of Human Rights:

To be fair it ought to be pointed out that the provisions of the Act are more liberal as compared to the other Preventive Detention laws. It provides for detention up to a maximum period of twelve months but does not bar the detenu from challenging his detention in a court of law on the grounds, amongst other, of infringement of his personal liberties and Fundamental Rights. The Act limits the powers of the court to review the detention orders after the 1984 amendment. The detenu will be conveyed the grounds of detention within five days and in exceptional circumstances ten days of his detention order. However, the arbitrary nature of the Government’s power is revealed by the fact that the authorities need not disclose the grounds of detention if it goes against public interest.

In the case of a Bombay based Sikkimese lawyer Hem Lall Bhandari, the Supreme Court reaffirmed the principle that the statutory constitutional provisions relating to Preventive Detention must be strictly complied with. Justice Khalid for himself and Chinnappa Reddy, J. observed, “in matters where the liberty of the people or citizen is involved, it is necessary for the officers to act with utmost expedition and in strict compliance with the mandatory provisions of the law. Expeditious action is insisted upon as a safeguard against the manipulation (by officers).” The Sikkim Government, which had detained Bhandari
under the National Security Act, 1980 in Bombay and later in Delhi, in September 1986, contended before the Supreme Court that since Bhandari was released on bail, the delay on the part of the police officers in serving the grounds of detention should be condoned. Rejecting this "specious plea" Justice Khalid observed that if this contention were carried to its logical conclusions it would clothe the authorities with powers to delay communication of the grounds of detention indefinitely. He held that to accept that contention would be destroy the effection of the mandate of Section 8 of the National Security Act. The Section has to be interpreted liberally and no relaxation was possible.

The Act requires the Government to refer all cases to an Advisory Board consisting of High Court judges within three weeks of the detention; in accordance with the provisions of the section 3 of the 44th Amendment Act, in spite of the fact that the aforesaid section was not brought into force. The detainee shall have the right to represent to the Advisory Board against his detention.

The only difference between the earlier preventive laws and the present one is that the present law gives the detenu the right to go to the court and challenge the validity of his detention. But the amendment Act 1984 limits the scope of judicial review of the Preventive Detention laws considerably. It thus nullifies the effect of numerous decisions of the courts in which the detention order have been struck down on the ground that one of the several
grounds of detention was found to be vague, non existent or unconnected with the grounds of detention supplied to the detenu.

**Human Rights Scenario:**

The Act contains provisions that are incompatible with the Rule of Law and the principles of democracy. The National Security Act deviates from rights guaranteed under the International Covenant of Civil and Political Rights, in particular Article 9\(^7^3\), which provides that any one who is arrested must be informed of the reasons for the arrest and charges against him. Under section 8(2) of the National Security Act, the authorities may not disclose the grounds on which the person has been detained.\(^7^4\) This is also in direct contravention of the Article 14(3)(a)\(^7^5\) of the Covenant.

**Working Of the National Security Act:**

In the implementation of this Act, the executive has not shown even scanty regard for the criterion laid down by the Supreme Court in a dozen judgments about the grounds on which a person may be detained to prevent him from committing a crime. Here are a few typical cases, which reveals not only that persons have been detained on vague and flimsy grounds but also that they were detained for legitimate political and democratic activity, and for voicing legitimate political and democratic demands in a just and peaceful manner.
Shankar Guha Nivogi, leader of the Dalli Rajahara Iron Ore Mine Workers, was arrested under the National Security Act. The grounds of Niyogi’s arrest refer to allegation like “instigation leading to misbehavior,” gheroing ‘, “improper abusing of officers and staff of Bhilai steel plant”, “leading a procession of 3000 labourers”, “detaining of trucks”, “holding public meeting”. Most of the allegations leading to his detention related to events, which supposedly occurred as far back as ‘a year and a half’, well before the National Security Ordinance and the National Security Act came into effect. Niyogi’s real crime was that he was organizing the Iron Ore Mine Workers for higher wages and better working conditions as well as trying to educate and socially transform them.76

In case of Bishnu Das, a college student is charged of being “behind the screen in creating a number of law and order situation arising out of the political controversy.” The charge sheet further says, “It is in his habit to mobilize and misguide innocent students in the negative direction—he is always trying to scandalize the Government, the administration—he gives statements to the press and hold public meeting with a view to serve his own political ends. The fact is that Bishnu Das is a popular student leader having been elected President of the Jagatsinghpur College Students Union, Orrisa, thrice in succession. He was also demanding the Birdi murder case be reopened and a judicial inquiry be constituted into the rape and murder of Mrs. Chabirani Mahapatra77.
Further, a number of the facts are revealed when we look at the chart showing the position of the detentions under the National Security Act. Nationwide, more than two thirds of the 16000 people detained under the National Security Act from 1980 to 1994, have been released by the order of the State Government or the Advisory Boards. At the end of the year 1995, 514 persons throughout India continued to be detained under the National Security Act.

Judicial Response:

The constitutional validity of National Security Ordinance was challenged before the Gauhati High Court in *Basi Singh v. State of Assam*, wherein it was held that no provision of the Ordinance is directly or indirectly violative of the provisions of the Article 19, 21 and 22 of the constitution. Again, the constitutional validity of the National Security Ordinance as well as National Security Act was challenged in *A.K.Roy v. Union of India*, popularly known as the National Security Act case. The Supreme Court by 4:1 majority upheld the Constitutional validity of both the Ordinance and the Act. The court held that the Act was neither vague nor arbitrary in its provisions providing for detention of persons on certain grounds, for acting in a manner prejudicial to the 'defense of India', 'security of India', 'security of the state', and 'to the relations with the foreign powers'. While upholding the validity of the National Security Act and the Ordinance preceding it, the Court issued a number of directions...
with a view to safeguarding the interest of the detenues detained under the National Security Act. The court directed:

(1) That immediately after detention the kith and kin of the detainee must be informed in writing about his detention and his place of detention.

(2) The detenu must be detained in a place where he habitually resides unless exceptional circumstances require detention at some other place.

(3) That detenu is entitled to his book and writing materials, his own food, visits by friends and relatives.

(4) He must be kept separate from other convicts.

(5) No treatment of punitive character should be meted out to him and should be treated according to civilized norms of human dignity.

Justice Gupta and Justice Tulzapurkar dissented from the majority view and issued the writ of Mandamus to the Union Government to bring the Amendment into force. It is submitted that the majority view on this point is correct. The Government must bring the amendment into force within a reasonable time. It would appear to be anomalous that the Parliament can pass an amendment, which cannot be brought into operation at all. The dissenting judgement observed that by not bringing into force the provisions of the 44th Amendment Act, the Union Government had
not performed 'its' constitutional duty and the majority has abdicated its power to issue mandatory direction to the Government to bring the Amendment into force. Thus, the petitioner was denied a very important right, that is, the right to have his representation considered by the Board as set up in accordance with the provisions of the forty-fourth Amendment Act. Tulzapurkar, J. in a brief judgement agreed with the majority judgement that an ordinance was "law" and agreed with the dissent of Gupta, J. on the question of bringing into force section 3 with section 1(2) of the forty-fourth Amendment Act. In the dissenting judgement, Justice Gupta observed that: "there is another aspect of the matter. Article 21 not only speaks of a person's liberty but also of his life. It is difficult to think of a situation in normal times, which left no time for the President to summon Parliament and required him to promulgate Ordinances to take away the life or liberty of persons unless one considered life and liberty as matters of no great importance. However, in view of the opinion of the majority upholding the validity of the Ordinance, it is unnecessary to dilate on this aspect.”

Yet another draconian piece of legislation, the Terrorist and Disruptive Activities Act (TADA) was passed in 1985. It was meant to expire after two years; however, it was regularly extended every two years, despite strong opposition to it. It was only in May 1995 that it was repealed, more of which in the next chapter.
REFERENCE:


2. This is provided in the UDHR & ICCPR.

3. The Constitution of India, Article 22(1) provides, No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult and defended by, a legal practitioner of his choice. Article 22(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of Magistrate and so such person shall be detained in custody beyond the said period without the authority of a Magistrate.


5. Total numbers of detention were 6851, The Hindustan Times, New Delhi, 24 Nov. 1977

6. The Constitution of India, Article 22(4) provides, No law providing for preventive detention shall authorize the detention of a person for a longer period than three months. Article 22 (5) provides, When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order. Article 22 (6) provides, nothing in clause (5) shall require the authority making any such order as is referred to
in that clause to disclose facts, which such authority considers to be against the public interest to disclose. Article 22 (7) provides, Parliament may by prescribe the law of preventive detention.

7. The Constitution of India, Article 22(4)(a) provides, An Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention. Provided that nothing in this sub-clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by the Parliament under sub-clause (b) of clause (7)


9. Setalvad, M. Atul, “Preventive Detention in India”, (edited), Iyer, Venket, Democracy, Human Right and Rule of Law, Butterworths India, New Delhi, 2000, p. 41

10. A K Roy v. Union of India, AIR 1982 SC 710


13. A.D.M. Jabalpur V. Shiva Kant Shukla, AIR 1975, S.C. 1207

15. The Maintenance of Internal Security Act, 1974, Section 11(4)

16. *AIR* 1966, SC. 1928

17. *AIR* 1968, SC. 1509,1513


21. Lok Sabha debate, 26 February 1951


27. *AIR* 1953,SC.318

28. *AIR* 1962, SC. 911

29. *AIR* 1951, PAT.47

31. AIR 1971 J&K. 12

32. AIR 1966 SC 1925&1928

33. AIR 1950 SC27

34. The Constitution of India, Article 22(3)(b) provides, nothing in clause (1) and (2) shall apply to any person who is arrested or detained under any law providing for preventive detention.

35. Supra note, 5

36. The Preventive Detention Act 1950

37. AIR 1950 SC, 27 at 51

38. AIR 1950 SC 27, 60

39. AIR 1951 SC, 128

40. AIR 1963 SC 1295

41. AIR 1950 SC, 27

42. AIR 1978 SC, 597


45. The Statesman, Delhi, 4 June 1971.


47. The Statesman, Delhi, 4 June 1971.


51. AIR 1975 SC 550


53. The International Covenant of Civil and Political Rights, Article 4 (1) provides, In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin.


58. i.e. High Courts of Allahabad, Andhra Pradesh, Bombay, Delhi, Karnataka, Madras, Madhya Pradesh, Punjab & Haryana, and Rajasthan.
59. The Constitution of India, Article 21 provides, that no person shall be deprived of his life or personal liberty except according to procedure established by law.

60. The Maintenance of Internal Security Act, Section 16A provides, No suit or other legal proceeding shall lie against the Central Government or a State Government, and no suit, prosecution or other legal proceedings shall lie against any person, for anything in good faith done or intended to be done in pursuance of this Act.

61. Prior to 1977, this could be done if there was war or external aggression and internal disturbance ---Article 352; after the 1977 amendment, an emergency can only be declared in the event of the war, external aggression or armed rebellion.


64. *AIR 1982 SC 710*


69. *AIR 1987 SC 765*
70. The National Security Act, Section 8 provides that, Grounds of order of detention to be disclosed to persons affected by the order---- (1) When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but ordinarily not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than ten days from the date of detention, communicate to him the grounds on which the order has been and shall afford him the earliest opportunity of making a representation against the order to the appropriate Government. (2) Nothing in sub-section (1) shall require the authority to disclose facts, which it considers to be against the public interest to disclose.


72. HRDC, Emerging State of Insecurity: India’s War Against Itself, 30 January 2002.

73. The International Covenant of Civil and Political Rights, Article 9 provides that, (1) everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. (2) Anyone who is arrested shall be informed, as the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. (3) Anyone arrested or detained on a criminal charges shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trail within a reasonable time or to release. It shall not be the general rule that persons awaiting trail shall be detained in custody, but release may be subject to guarantees to appear for trail, at any other stage of the judicial proceedings and, should occasion arise, for execution of the judgement. (4) Anyone who is deprive of his liberty by arrest or detention shall be entitled to take
proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. (5) Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation.

74. *Supra note*, 69

75. The International Covenant of Civil and Political Rights, Article 14(3)(a) provides, to be informed promptly and in detail in a language, which he understands of the nature and cause of the charge against him.

76. PUCL, NSA—a weapon of repression, 1981.


82. *AIR* 1982 SC 710.
Chapter 3
THE TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT: AN ANALYSIS OF THE LOK SABHA DEBATES

The Terrorist And Disruptive Activities (Prevention) Act 1985 was first introduced as a temporary measure for a period of two years to deal with the violence perpetrated by the armed secessionist groups in Punjab. According to the statement of object and reasons, of the bill, the then Law Minister observed that the terrorists have been indulging in wanton killing, arson, loot and other heinous crimes mostly in Punjab and Chandigarh. Since May, 10 1985 the terrorists have extended their tentacles to other parts of the country as were, Delhi, Haryana, U.P and Rajasthan, as a result of which several innocent lives were lost and many suffered serious injuries. The Prime Minister, Rajiv Gandhi rushed to his Cabinet to get approval for the Terrorist and Disruptive Activities (Prevention) Bill. A few top officers warned him against the misuse of such a measure but he brushed them aside. He specially ordered the then Home secretary Sommaia not to say anything on the Bill at the cabinet meeting. Sommaia kept quit even some pertinent questions were raised. Parliament, which made under the shadow of Indira Gandhi's murder and the Delhi blasts, was too dazed, too frightened and too overwhelmed. It was not in the frame of mind where it could appreciate the dangers that Terrorist and Disruptive Activities (Prevention) Bill could bring to society, which was already suffering from the rough and ready methods of police. Some member of parliaments suspected
foul play. But never did they expect its misuse on such a large scale.

A.K.Sen, the Minister of law and justice while introducing the bill in the Lok Sabha, said, "the Bill is introduced at a time when terrorism from all sides, from the eastern frontier right up to western frontier is threatening the very existence of the state. We are facing a grave danger and threat; and the last spate of bombing in Delhi and in other towns and areas have shown that behind these acts of terrorism are organized gangs operating not merely with their own resources but we have strong reason to believe with great encouragement and help from outside agencies, that foreign hand is clearly visible." The planting of explosives in trains, buses and public places, to create fear, terror and panic among people has completely disrupted peace, security and tranquility. It was this scenario that warranted a strong law to deal with terrorism. The alarming increase in disruptive activities was also a matter of serious concern. A.K.Sen also observed that the Government has been every lenient to these people; and it was thought that the ordinary law is suffice to deal with these elements. But that was not to be, hence the need for a more stringent law. The new legislation seeks inter alia to provide for deterrent punishment for terrorist acts and disruptive activities, confer on the Union Government adequate powers to make such rules as may be necessary or expedient for the prevention of, and for coping with, terrorist acts and disruptive activities; provide for the constitution of designated courts for the speedy trial of
offences under the TADA. the Act also provides that whoever commit a terrorist act shall, if such act has resulted in the death of any person, be punishable with death or any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extended to term of life and shall also be liable to fine. Further, whoever conspire and attempts to commit, or advocates, abets, advices or incites or knowingly facilities the communication of, a terrorist act or any act prepatory to a terrorist act shall be punishable with imprisonment for a term which shall not be less than three years but which may extended to term of life and shall also be liable to fine.

Supporting the Bill, A.K. Sen argued,“ we want this kind of Bill for the simple reason that we want to root out terrorism. Let there be no faltering voices in this House on this issue, and if there is one, I shall be reluctantly compelled to say that it might give indirect encouragement to those who are indulging in acts of terrorism. He further said that the present Bill was by no means directed against the Sikhs. It had been brought against terrorist whether in NEFA, Nagaland and Mizoram in the northeastern region or in Punjab and elsewhere in the northwest area. That is the rationale behind the purposed legislation. He also assured the House that it would not be misused either by the Central or by the State Governments. “We have only the terrorist in view.” No other objective was even remotely contemplated, declared the Minister. C.V Chavan, (Minister of Home Affairs), also joined the debate and supported the Bill by adding that hundreds of
people have lost their lives, a large number of people have been injured or maimed and a kind of situation was created to foster permanent cleavage between different communities. The Minister congratulated the people for not reacting violently to the recent bomb blast incident in Delhi. “We anticipated some kind of reaction. Fortunately this has not happened.” Chavan also conceded that harsh punishment has been provided in the Bill so that it can act as a deterrent. The Home Minister agreed with Zainul Basheer (cong.) that the anti terrorist law is necessary under the prevailing circumstances. He concluded by saying that the proposed Act has bestowed sufficient powers on the law enforcing agencies to flush out terrorism and that there is no excuse for them to say they have no power. Both A.K.Sen and S.B.Chavan, assured the Rajya Sabha on 21st May 1985, that “the new law would be used only to curb genuine terrorist acts and would not be directed against any particular community. They also allayed the misgivings that the provisions of the Bill would not be used to curb political activities and trade union movement.

GENERAL OPINION ABOUT THE BILL WAS:

The death of innocent men, women and children in Delhi caused by the transistor bombs brought terrorism to Delhi’s doorstep creating a sense of insecurity among people. And when the Terrorist and Disruptive Activities (prevention) Bill, 1985 was passed by both the Houses, it met with a volley of criticism.
from different sections of society—social scientists, Human Rights forums etc. the general feeling was that there was no need of this kind of Bill as there are ample provisions to deal with the terrorists. There is the Punjab Disturbed Areas Act 1983, the National Security (Amendment) Act 1984, the Armed Forces (Punjab and Chandigarh) Special Power Act 1983, the Code of Criminal Procedure (Punjab Amendment) Act, 1983 and the Terrorist Affected Areas (special court) act 1984. In addition, there is the Arms Act, which has recently been amended, providing for more stringent punishment. There are also provisions in the Indian Penal Code, under sections 121 to 130 and 503 to 508, to take care of such activities.

Mukhoty Gobinda, senior advocate of the Supreme Court and the President of the People’s Union For Democratic Rights criticised the Bill on two grounds. First, the government is vested with enough extraordinary power “provided there is a political will”. Secondly, had legislation curbed terrorism, it would have been wiped out by now given the plethora of laws we have. Instead it is on the increase.” I fear these type of legislation are only alienating a large number of people, for whenever specific draconian powers have been given to the executive, it has always been misused.” He also voiced his apprehensions that the Act may jeopardize the freedom of the press, for section 5 of the Act empowers the Government to frame rules necessary to curb disruptive activities. And under this provision, a district magistrate can prohibit the “use of photographic apparatus” or
any means of recording of information and also ensure "the accuracy of any report or declaration legally required of a person." This would amount to Para censorship."¹⁷ Fears were also raised that the Government is assuming more and more arbitrary powers under the garb of combating terrorism. N.D.Pancholi, General Secretary of The Citizen For Democracy observed that the law Minister’s assurance that the new law against terrorism was not aimed at the Sikh Community was “only an eyewash.”¹⁸ Madhu Dandvate, Janta Party, M.P., also voiced his suspicions that with all the safety valves that can be built into any Act of the Government of India which deals with law and order, disruption and terrorism, “the main source of mischief” remains. As far as the Government’s assurances are concerned both the late Prime Minister, Indira Gandhi and the then Home Minister, Uma Shankar Dixit, had assured the fifth Lok Sabha that Maintenance of Internal Security Act would not be used against political workers. These assurances were swept under the carpet by arresting Jaya Prakash (JP) and dissident congressmen Chandra Shekhar and Ram Dhan under MISA. The trade unionists were also not spared. The biggest beneficiary of such laws was the Government which acquired more and more powers to silence the opposition.¹⁹

General J.S Arora, hero of Bangladesh war, also shared M.Dandavate’s apprehension and said that, “though terrorism is ‘most reprehensible’ and is to be condemned, the Bill is likely to be misused by the administration and police, which is far from
honest and efficient. It will give the police additional powers and freedom to harass people.” The weakness lay not in law but in poor intelligence and it is exactly this that needs to be rectified so that the guilty can be brought to book. Khushwant Singh writer and member of Rajya Sabha points out “The failure of the intelligence agencies is monumental. The only way to combat terrorism is for the intelligence agents to infiltrate the ranks of the terrorist as was done with the Boader Meinhoff group in Germany. 20 He further stated, “that terrorism and civilization could not go together. But he was afraid that the legislation would not help the Government to curb terrorism. If any thing, the steps would only widen the gulf between the Sikhs and the rest of the society.” 21 He alleged, in the Rajya Sabha, that the fake encounters, police brutality on innocent people in Amritsar and Delhi last year and their failure to get justice had swelled the ranks of extremists. 22 Dipin Ghosh (CPI-M) regretted that the opposition was not consulted about the Bill. He said that mere legislation would not help and called for a political solution of the problem. 23 Indradeet Singh (CPI) expressed the fear that the measures might be misused against trade union activities and the working class movement. 24 Geeta Mukherjee (CPI) observed that the Bill gave sweeping powers to the executive, which is bound to, be misused despite the Government’s assurances to the contrary. C.Janga Reddy (BJP) wondered whether any amount of law would check terrorism so long as the Government did not have the will to root it out. 25 Amal Datta (CPI-M) expressed his
fears that the provisions of the Bill might be used suppress the genuine political activities of the opposition. Opposition ruled states, he said, had particularly to fear as their party workers might be hauled up by the Center on the pretext of “disrupting” the functions of the Central Government. He confirmed that there were enough laws already to deal with the criminals. There was no necessity of bringing the present anti-terrorist Bill. The purpose of the Bill was to suppress the rising political dissent in the country. And that the definition of ‘disruptionist’ is too vague to be interpreted to the convenience of the Government.  

Charan Singh, the Lok Dal President described as “shocking” the way the Government has thought of implementing the Terrorist And Disruptive Activities (prevention) Bill 1985. In a statement, published in The Statesman, Mr. Charan Singh observed “the wide powers assumed by Government under this legislation are liable of being misused to curb legitimate political activity. Authority given to the police to keep a suspected under remand for 90 days (in case of murder) and 60 days (in other cases) without furnishing charge sheets for full one year is wholly uncalled for. This provision is meant to cover up the inefficiency of the police to trace the culprit and will enable it to keep under arrest any person on mere suspicion there by encroaching upon the civil liberties of the people.” The general feeling in the country was that the proposed Bill was unwarranted and uncalled and the present laws are sufficient to tackle the problem of terrorism. Prakash Singh Badal, Akali leader and former Chief
Minister of Punjab went to the extent of making an appeal to the President not to accord his assent to the Bill as the Bill aimed at sealing the fate of Sikhs as free citizen of India and that the challenge before us demands statesmanship of a very high order and not gradual handing over of the state to authoritarianism and dictatorship. He further lamented that the declaration of Punjab and Chandigarh as terrorist affected areas has not been applied to the anti Sikhs forces “indulging in all sorts of violent activities against Sikhs which only confirms the fears and apprehensions of the people specially the Sikhs.”

The West Bengal ruling Left Front also did not lag behind in opposing the measures.

The Act unfortunately bestows unlimited power on the executive in the name of security of the state. W. Shakespeare would have said: “security, what crimes are committed in thy name!” In the name of security, people were put placed behind bars, weaker sections and members of minority community have been detained. Infact, the detainees include old women and young children. From 1987 onwards, we have various examples, the first is the case of Gujarat where thousands of people detained at one stroke. Roughly about 2,000 peoples were put behind the bars at one go, including women and children. The case of Rajasthan was no different where more than 250 persons were languishing behind the bars for the last two years and more; and the Home Minister of the State is on record as having admitted on the floor of the Assembly that at least 178 of them have no charges against them. Such examples are not difficult to find in the State of
Punjab and Jammu & Kashmir. In Jammu & Kashmir, even the designated court is not functioning. People were arrested in the valley and they were required to go to Jammu if they wanted to move the court for review. It was only later that a designated court was proposed, in Srinagar which is yet to be established.

The fire goes on raging and the purpose for which the legislation was framed were hardly met on the contrary, it proved counter productive. It helped in adding fuel to the fire. It is true that terrorism has to be condemned; it has no place in democratic society. But the state which is committed to rule of law cannot venture to enact a lawless law. State terrorism is no answer to terrorist violence. The state should examine the causes that has led to the growth of terrorism and try to remove those irritants which has caused havoc to the country. Man cannot be made moral by an act of legislature. A multi-dimensional approach, politico-social and economic is an imperative. State generates hate, it can only be eradicated by creating conditions conducive to peace. A healing touch will go a long way in ventilating the grievances of the people, real or imaginary, rather than resorting to, legislations contrary to the ethos of the Constitution.

Speaking in the Lok Sabha, S.B.Chavan pleaded that the Terrorist and Disruptive Activities (amendment) Bill was introduced on 24th May 1987 when terrorist and violent activities were at their peak and it was not possible to contain them through prevailing laws. When the situation became abnormal, the Bill
was introduced with the hope that normalcy would be brought within two years. But it could not be possible. Then, on May 23rd, 1989, the Act was amended extending its validity for a period of two years. Now when the country is once again witnessing intense terrorist activities and violence it seems difficult to contain it through prevailing laws. Therefore, there is a need to extend it for a further period of two years and that is why this Bill has been brought forward.

The Government justified its extension in the view of the threat posed to the very security, law and order and economy by the terrorists. This bring an extra ordinary situation, having both national and international ramifications, calls for extra ordinary legislation. This is more true of the border studies of the country, especially Punjab and Jammu & Kashmir, where reports of frequent infiltration from outside of the border are not the common. The present laws are too humane to deal with these inhuman activities. Inflicted upon the people by the militants. The whole needs to be seen in the national perspective. But unfortunately, as the subsequent events have proved, the law was not very successful in eradicating terrorism. On the contrary, it brought disrepute to democracy and democratic institution, led to indiscriminate arrests and detentions, posing a threat to human rights and fundamental freedoms.
The 1993 AMNEDMENT: -

In May 1993 when TADA was extended for two more years, with certain amendments relating to property. Previously forfeiture of property of the accused or convicted alone was permissible, Now it has been made to wide, whoever holds property 'derived or obtained from commission of any terrorist act or has been acquired through the terrorist funds' is also made liable and such property can also be sized [Section 2(1)(gg); Section 3(6); and Section 7 A]. Some members in Lok Sabha strongly protested pointing out the enormous scope it gives to police to lay their hands on anybody's property. The Home Minister justified it on the ground that the new provision is required to tackle the havala transactions. Another amendment relates to persons who may not themselves be involved in any terrorist acts but are members of 'a terrorist gang or a terrorist organization'. They shall be punishable for a term which 'shall not be less than five years and may extend to imprisonment for life' [Section 3 (5)]. Another amendment permits confessions made to police even by co-accused or co-conspirators admissible as evidence[Section 15 (1)]. Along with these amendments some changes in the right direction have also been initiated. The burden of proof is on the accused in some cases even if the accusation is made in the confessions of a co-accused before a police officer or before any other person. These sections relating to confessions by co-accused are now deleted [the deleted sections are Section 21(1)(c) and (d)]. Previously, in camera trials were mandatory
unless otherwise desired by the public prosecutor. Now they can be held only if the ‘Designated Court so desires’ [Section 16(1)]. Previously the maximum remand period during the course of investigation was one year. Now it is reduced to 180 days [Section 20(4)(b)]. Thereafter remand can be extended only when prosecution gives specific reasons for the delay in investigation. Reducing the period to six months will be of some relief to thousands detained in false cases. They can at least hope to get bail after six months. The power of local policemen to book TADA cases is also taken away. Now it is mandatory to have the prior approval of the District Superintendent of Police [Section 20 A(1)]. And the prosecution in all such cases can be launched only after the ‘previous sanction of the Inspector General of Police, or the Commissioner of Police’ [Section 20 A(2)]. These changes, marginal in nature, have all been introduced on earlier occasions in the Parliament by the opposition member, but were rejected by Government. The Government extends the Act without analyzing the causes of these activities which are growing. Unless the Government takes the whole thing in totality, it will not be able to check terrorism. Scholars suggest that the Socio-economic deprivation is the cause of terrorism. Apart from the Socio-economic causes, there are few other reasons of growing terrorism. First, terrorism has become an international factor because of certain developments in the international arena. Now there is no question of war. The war merchants boost terrorism, so that they will be able to save their industry and make profit.
Second, our police force never use this power for the purpose for which it is being given to them. The police use this power not against the terrorists but more against the innocent people and the people who fight for the just causes. The growing terrorism has kept the Administration under control. Third, the ideological question is the main question and unless people are ideologically educated, they will not be able to face terrorism and enacting this kind of legislation will not serve the purpose. To deal with the terrorists, secessionists and the persons with whose activities the country’s unity and integrity are affected, Government can enact the stringent law or the existing law should be utilized for that purpose and if necessary, suitable amendments should be made in the Acts (Criminal Procedure Code and Indian Penal Code). But before enacting or amending any law, the Government must try to educate the people and make them conscious ideologically so that they oppose terrorism in every sphere. An effort is made ideologically to remove the discontentment of the people.

Many of its provisions contravene important international Human Rights standards, especially, the right to freedom of expression; and the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment. These rights are provided in the International Covenant of Civil and Political Rights as well as other standards provided in the United Nations Declaration on Torture. India being party to the Covenant is bound to respect and guarantee these rights. Thousands of people were arbitrarily held without the basic legal safeguards to which
they entitled under both International Human Rights Standards as well as the Constitution of India. The Act’s application in many Indian states meets the standard of ‘strict necessity’ required for emergency measures under International Human Rights Standards. Not only this, in some cases arguably, it failed to meet the National Human Rights standards and, fall short of fundamental rights guaranteed in India’s own constitution.

**The Right to Freedom of Expression:**

The Act prohibit not only the “terrorist acts” (Section 3) but also the “disruptive activities” (Section 4). Disruptive activities are too vague and can be interpreted in more than one way. It all depends on the way one looks at it. It can include freedom of speech, press, Public meetings, trade union and a whole lot of other activities. Even ordinary political debate can be brought under its ambit. Such a provision can make people to toe to the official line. Section 4 of the Act not only undermines Article 19\(^{34}\) of the Constitution of India but also Article 19\(^{35}\) of ICCPR. It makes easier the possibility of its abuse and misuse.

**The Right to Liberty and Security of the person:**

Article 9 of ICCPR provides that no one shall be subjected to arbitrary arrest or detention,\(^{36}\) that all arrested persons shall be promptly informed of the charges against them,\(^{37}\) and that any one arrested or detained on a criminal charges shall be brought promptly before a judge or other officer legally authorized to
exercise judicial power, and shall be entitled either to trial within a reasonable time or release.\textsuperscript{38} Article 22 of the Constitution of India also provides for procedural safeguards in matters of arrests and detentions. The TADA is a negation of these provisions.

The power to arrest and detain under section 4 of the Act are so broadly defined that they permit people to be detained for peacefully expressing their political views: Such powers are arbitrary. The United Nation working group on Arbitrary Detention has in its reports, expressed concern about offences which are described in vague terms. According to the working group; “Criminal law requires precision, so that the conduct which is wrongful can be clearly understood by the person held to be liable. Vague description are sources of abuse and encourage arbitrariness.”\textsuperscript{39} It also pointed out, such vaguely defined offences violated articles 15 ICCPR (which prohibits retroactive punishment for an act that did not constitute a criminal offence at the time it was committed) and “ seriously affects some thing that is essential to the right to justice.”\textsuperscript{40}

The right to be brought before a judge 'promptly': -

The Terrorist and Disruptive Activities (Prevention) Act permits Executive Magistrates to authorize detention, instead of Judicial Magistrates, who are independent judicial officers, as per the guidelines laid down in Section 167\textsuperscript{41} of the Criminal Procedure Code to authorized demand. The authorization of detention under Terrorist and Disruptive Activities (Prevention)
Act by such Executive officials may lack impartiality and independence and the compulsions of natural Justice. It is exactly for this reason that Article 9(1) of ICCPR speak of judicial supervision of detentions. International human rights standards and mechanisms require supervision of detention by an independent, preferably judicial body and every form of detention or imprisonment shall be ordered by or be subject to effective control of, judicial authorities. In 1988, United Nation Special Rapporteur on Torture observed each arrested person should be handed over without delay to the competent judge, who should decide on the legality of his arrest immediately and allow him to see lawyers. No such provisions exist under the Terrorist and Disruptive Activities (Prevention) Act. None of the former detainees released from detention under the Act, had been brought before a magistrate nor they were informed of grounds for their arrest despite the fact that they had spent several days in custody under the Act.

Right to be released if not tried within a reasonable time:

All arrested persons are entitled to "trial within time or release." The Act on the contrary makes release on bail considerably more difficult. Under the Act bail can be refused simply if opposed by the public prosecutor unless the detenu provides evidence that he is not guilty or the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any
offence while on bail.\textsuperscript{45} Prisoners held under the Act are rarely tried (according to the Home minister in November 1993 as reported in the Indian press, that over 50,000 humans were tormented by TADA detention, while the conviction rate under the Act is 0.81\%).\textsuperscript{46} Consequently many people held under Terrorist and Disruptive Activities (prevention)act spend long period awaiting trial. The misused of the Act by the police to keep any person whom the police wished to detain in custody was also highlighted by the chairman of the National Human Rights Commission. Describing the police attitude in September 1984 in an interview with the Pioneer the Chairman of the Commission observe, if an accused is released on bail, keep him in under Terrorist and Disruptive Activities (Prevention) Act.\textsuperscript{47}

**The Right To Fair Trial:**

The ICCPR lays down important safe guards for fair trial. Which include the right to fair trial and public hearing by an impartial tribunal, the accuser’s right to examine witnesses and to defense, witnesses against them (the principles of “equality of arms”), the presumption that all are innocent unless proved otherwise, and the right to appeal.\textsuperscript{48} Further more, the Declaration On The Protection Of All Persons from being Subjected to Torture And Other Cruel, Inhuman And Degrading Treatment Or Punishment requires that evidence obtained from torture or other cruel, in human or degrading treatment may not be invoked as evidence against the person on trial.\textsuperscript{49}
The provisions of the Terrorist and Disruptive Activities Act contravene these essential legal safeguards for a fair trial. Firstly, the doctrine of Presumption Of Innocence is wholly ignored. On the contrary the Act obliges Designated Courts trying these cases to presume that such an offence has been committed.\(^50\) The provision strikes at the root of Article 14 (2)\(^51\) of ICCPR, moreover, the exceptions to the Law of Evidence are so broadly defined that the innocent person can easily be convicted under these provisions. Secondly, the Act is based on the Presumption Of A 'Terrorist' Motive. A person found in unauthorized possession of arms in a 'notified area'\(^52\) amounts to him being associated with 'terrorist' or 'disruptive' activities.\(^53\) Consequently the offence, which is normally punishable under the Arms Act, becomes triable under Terrorist and Disruptive Activities (Prevention) Act. Section 5 of the Act is often used by the police as it contain very few legal safeguards for the detenu. A report of the Home Ministry made public in October 1993, reveals that most of convictions are for offences under Section 5.\(^54\) It would not be one of context to quote Justice Suresh, who observed that "Adivasis (member of India’s tribal population) be they in Andhra Pradesh, Maharashtra, Madhya Pradesh or the northeast, by their very nature carry weapons. But that has been enough reason for Terrorist and Disruptive Activities (Prevention) Act to be applied to them. True, carrying the arms (unlicensed) is illegal. But the way of dealing with that is through the Arms Act, not Terrorist and Disruptive Activities (Prevention)
Act." The general comment of Human Rights Committee, on Article 1455 of ICCPR, says, "The presumption of innocence is fundamental to the protection of human rights. By reason of the presumption of innocence, the burden of proof of the charges is on the prosecution and the accused has the benefit of doubt. No guilty can be presumed until the charges has been proved beyond reasonable doubt."56

The right to be informed promptly of charges and to be tried without undue delay: -

Thirdly, there were no provision under the Act, requiring the detainee to be promptly informed the reasons for their arrest or the charges against them. To add fuel to the fire, the Act allows up to 180 days detention in police custody for purpose of investigation, a period which can be extended to one year on an application by the public prosecutor. And it is only at the end of investigation that the police is obliged to identify, in its report to Magistrate, the offences that appear to have been committed. In July 1994, the Supreme Court ruled that, if this did not happen, the accused had an ‘indefeasible and absolute right’, to be released on bail. Formal charges have to be subsequently framed by the court. The Act is silent on the period within which this has to be done.57 The periods of 180 days and one year were considerably longer than envisaged by the international human rights standards. The ICCPR requires that charges should be communicated to an accused "promptly". Such an arbitrary can
lead to its misuse as it is evident from the Report of the Ministry of Home Affairs that 30,000 out of 53,000 cases under the Act were pending before the Courts for more than five years.  

Fourthly, the Act provides that the identity and address of any witnesses can be kept secret, which is bound to affect cross-examination of witnesses by the defense jeopardizing fair trial and constitutes a grave violation of Article 14(3)(e) of ICCPR. The Chairman of National Human Right Commission has pleaded for the deletion of Section 16(2) from the Act.

The right to have evidence extracted by force or compulsion excluded from the trial:

Fifthly, the Act provides that the "confession made to a police officer of the rank of the superintendent of police and above is admissible evidence in court proceeding." This is contrary to the Law of Evidence which excludes all confessions made to police officers from being used as evidence. It is common knowledge that Police often resort to third degree methods and compels the accused to confess the crime. Resort to torture and inhuman treatment is prohibited under the ICCPR even during emergencies.

Sixthly, the Act provides for trial in camera. It is very well recognized that open and public trial is the sine qua non of fair play and natural justice for justice should not only be done but should also seems to have been done. It is only in exceptional cases, where there is threat of security to the accused or the
witnesses that trial is conducted in close doors as has happened in
the trial of the accused in the case of Indira Gandhi's
assassination. The ICCPR also provides for public trial under
Article 14(1) to guarantee justice. The supreme court has
however, declared this provision as ultravires of the Constitution
in the case of Kartar Singh and accordingly the provision was
deleted.

Another astonishing feature of the Act is that it excludes
appeals to the High Court, allowing appeals only to the Supreme
Court, and that also not latter than thirty days of sentence being
passed. The provision clearly violates the International Human
Rights standards, which guarantees every convicted person the
right to appeal to a higher tribunal.

The Human Rights Committee has also held that the right
to appeal in Article 14 of ICCPR implies that, "if domestic law
provides for more than one instance to appeal, the convicted
person must have access to each of them." The limitation of
appeals under Terrorist And Disruptive Activities (Prevention)
Act to one stage only could also violate the right to equality
before the courts provided in Article 14 of ICCPR.
### SUMMARY TABLE OF TADA: DEVIATIONS AND VIOLATIONS

<table>
<thead>
<tr>
<th>ISSUE</th>
<th>TADA</th>
<th>Cr.P.C.</th>
<th>COI</th>
<th>UDHR</th>
<th>ICCPR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Freedom of Expression</td>
<td>4(1)(3)</td>
<td>-</td>
<td>19</td>
<td>19</td>
<td>1(1), 19</td>
</tr>
<tr>
<td>In camera trial</td>
<td>16 (1)</td>
<td>327</td>
<td>14, 19, 21</td>
<td>10</td>
<td>14 (1)</td>
</tr>
<tr>
<td>Identity of witness</td>
<td>16 (2)</td>
<td>-</td>
<td>21</td>
<td>-</td>
<td>14 (3)</td>
</tr>
<tr>
<td>Role of executive Magistrates</td>
<td>20(3)(4)</td>
<td>164, 167</td>
<td>50</td>
<td>9, 10</td>
<td>9 (4)</td>
</tr>
<tr>
<td>Admissibility of confession made before police</td>
<td>15, 20(3)</td>
<td>164 and 26 of IEA</td>
<td>20 (3), 50</td>
<td>9, 11</td>
<td>14(3)(g)</td>
</tr>
<tr>
<td>Role and Power of High Courts</td>
<td>9 (2)(3), 19, 20(6)</td>
<td>374, 482, 483</td>
<td>214, 226, 227, 235, 236, Part V</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

Note: In case of TADA, Cr.P.C. and IEA the numbers refer to sections of the Acts. In case of others refer to Articles.
UDHR : Universal Declaration of Human Rights.
ICCPR : International Covenant on Civil and Political Rights.
IEA : Indian Evidence Act.
REFERENCE:

1. TADA was preceded by the Terrorist Area (special courts) Act 1984, which provided for the speedy trial of certain offences in areas declared to be “terrorist affected” and applied to Punjab.

2. The Sunday Statesman, Delhi, 19 May 1985.


10. The Times Of India, New Delhi, 21 May 1985.

12. The Times Of India, New Delhi, 22 May 1985.


14. These Sections of the Indian Penal Code are related to the offences Against the State specially the waging of war against the Government and prescribed stringent punishment for such activities, making offences as Cognizable and Non-bailable.

15. These Sections of the Indian Penal Code are related to the Criminal Intimidation, Insult and Annoyance.

16. Section 5 of the Act provides that, Where any person is in possession of any arms and ammunition specified in columns 2 and 3 of Category I or Category III(a)of Schedule I to the Arms Rules, 1962, or bombs, dynamite or other explosive substances unauthorisedly in a notified area, he shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.


23. *Ibid*. 21


30. Power to detain any person without giving the reasons of his arrest under various sections of the Act. (Sections 3, 4 and 5)


34. Right to freedom.

35. Article 19 provides that (1) Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. (3) The exercise of the right provided in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary: (a) For respect of the rights or reputation of others; (b) For protection of national security or of public order, or of public health or morals.

36. Paragraph (1) of Article 9 of ICCPR.

37. Paragraph (2) of Article 9 of ICCPR.

38. Ibid. Paragraph (3).


40. Ibid. 40

41. Section 167 provides that (1) whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in
charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate. (2) the Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorize the detention of the accused in such custody as such Magistrate thinks fit, a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such Jurisdiction.

42. Article 9 (1) provides that Everyone has the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.


44. Article 9 (3) of ICCPR says that anyone arrested or detained on a criminal charges shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings and, should occasion arise, for execution of the judgement.

45. TADA, Section 17 (5).


49. Article 12 Of Declaration On Torture Or Other Cruel, In Human Or Degrading Treatment Or Punishment.


51. Article 14 (2) provides that, Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

52. An area so specified by the state Government by the official notification.

53. Section 5 of Terrorist and Disruptive Activities (Prevention) Act.


55. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a
trial for reasons of morals, public order (order public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; To be tried without undue delay; To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; To be tried without undue delay; To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; To be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; To have the free assistance of an interpreter if he cannot understand or speak the language used in court; Not to be compelled to testify against himself or to confess guilt. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. When a person has by a final decision been convicted of a criminal offence and when subsequently his
conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.


59. Article 16(2) of Terrorist and Disruptive Activities (Prevention) Act.

60. The International Covenant of Civil and Political Rights, Article 3(e) provides, to examine, or to have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

61. The TADA, Section 16(2) provides, A Designated Court may, on an application made by a witness in any proceedings before it or by the Public Prosecutor in relation to such witness or on its own motion, take such measures as it deems fit for keeping the identity and address of any witness secret.
62. The Times Of India, New Delhi, 22 August 1994.

63. Section 15 (1) of Terrorist And Disruptive Activities (Prevention) Act

64. Section 25 of the Indian Evidence Act provides that, no confession made to a police officer shall be proved as against a person accused of any offence. Section 26 of the Indian Evidence Act provides that, no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

65. The International Covenant of Civil and Political Rights, Article 14(1) provides, All persons shall be equal before the courts and tribunals. In the determination of any criminal charges against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or where the interest of the private lives of the Parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice, but any judgement rendered in a criminal case or in a suit a law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes of the guardianship of children.

66. Article 14 (5), ICCPR.

67. The committee of ICCPR to review of the working of Human Rights.

68. Views expressed by Human Right Committee in Raphael Henry v. Jamaica, Communication, Paragraph 8.4
Chapter 4
THE TERRORIST AND DISRUPTIVE ACTIVITIES ACT AND JUDICIAL RESPONSE

Introduction:

In a democracy, Judiciary has an independent role to play. It ensures that the Basic Law—the Constitution—is followed by both the legislation and executive. Law is not justice. Law, which is abstract, is interpreted by the judges in a humane manner to provide justice to the people. An upright, conscientious and creative judiciary enables the citizens to enjoy the Human Rights guaranteed by the Constitution. Judges interpret law, keeping in mind the social needs and requirements. The judiciary has to be ever alert to the protection of Human Rights of citizens as the all powerful executive may like to whittle them down. Judiciary stands as the Defender of Human Rights and as a bulwark against State’s authoritarianisms and arbitrariness.

In India, Supreme Court, which is strong, independent and creative. Through judicial interpretation, the Supreme Court has inverted *suo motu*, whenever violations of Human Rights have taken place and had come to rescue of the right of the citizen. An important focus of the Supreme Court of India has been on human rights jurisprudence centered around Article 21. Personal liberty under Article 21 has been constructed as covering a wide array of rights that go to constitute a life lived in freedom and with dignity. In *Francis Coralie Mullin v. Administrator, Union
Territory of Delhi, \(^1\) the Court observed that the life and personal liberty were held to cover not just bare existence but a life with dignity. In Asian worker case, \(^2\) it was observed by the Court, the poor too have civil and political rights and the Rule of Law is meant for them also, though today it exists only on paper and not in reality. It has been rightly observed that there are quite a few human rights which touch the people at grass root level but which have unfortunately not received sufficient attention from human rights activists in developing countries. In Bandhua Mukti Morcha v. Union of India, \(^3\) the Court ordered the release of bonded labour. The expanding the concept of the life and liberty have embraced by the Supreme Court through some unusual rights including: the right to receive instant medical aid in case of injury\(^4\); the right to receive free education up to the age of 14 years\(^5\); or the right of workers in the asbestos industry to receive health care\(^6\); free legal service to poor was held to be an essential element of a reasonable, just and fair procedure\(^7\); the right to a speedy trail was spelt out from Article 21\(^8\); the handcuffing and parading of undertrial prisoners was held to violative of Article 21\(^9\). Article 21 was held as prohibiting any form of physical mutilation or deliberate inflicting of pain or suffering.\(^10\)

Supreme Court also develop a method of enforcing Human Right through the "Public Interest Litigation". It has been fashioned by the Indian courts in the context of the violation of the human rights of those people who are unable, for various
reasons, to move the courts for a redressal of their wrongs. The requirement of ‘procedure established by law’ under Article 21, has also been transformed by judicial interpretation. In *A.K. Gopalan v. state of Madras*, the Court upheld the detention without trial holding that ‘procedure established by law’ meant law as enacted by Parliament or the State Legislature. The court declined to examine the righteousness of the procedure and whether it accorded with principles of natural justice. But three decade later, in *Maneka Gandhi v. Union of India*, the Court rejected this interpretation and held that the procedure which can deprive a person of his life or liberty under Article 21 must be a right, just and a fair procedure, and not an arbitrary or oppressive procedure. This is a welcome step since judiciary is only a hope to correct the present day system which is decaying due to political or other reasons.

**The Role of Judiciary in TADA cases:**

The supreme court in a controversial judgment of March 1994 upheld the constitutional validity of the Terrorist And Disruptive Activities Act inspite of wide range of public protest and criticism about the Act from different section of the society but at the same it confirmed police abuse of the Act in order to circumvent ordinary legal provisions. In *Kartar Singh v. State of Punjab*, a galaxy of senior lawyers, namely, M/s. V.M.Tarkunde, Ram Jethmalani, M.S.Gurjal, Rajinder Sachhar, Hardev Singh, M.R.Sharma, A.K.Sen, Balwant Singh—all appearing for the
petitioners pleaded strongly against the Constitutional validity of the Act in general and the various provisions of those Acts in particular mainly on the grounds that;

(1) That the Central Legislature has no legislative competence to enact the legislations and

(2) The provisions of the Act is in contravention of or ostensibly in violation of any of the fundamental rights specified in Part III of the Indian Constitution.

According to them, the Act and the provisions thereto, which are in utter disregard and breach of humanitarian law and universal human rights, not only lack impartiality but also fail the basic test of justice and fairness which are well established and recognized principles of law.

After critically analyzing a number of penal and procedural provisions relating to issue of arrest, investigation, bail, mode and methodology of trial, right of the accused etc., the learned counsels have argued that the Act with which we are confronted, are draconian, ugly, vicious and highly reprehensive, the brutality of which cannot and should not be minimized or ignored though this Court is not called upon to condone the penalized conduct of the real terrorist and destructionists. Then they made a scathing attack on the police for abusing and misusing their power under
the impugned Act is doing a 'witch-hunt' against the innocent people and suspects stigmatizing them as potential criminals and hunt them all the time and over react and thereby unleash a reign of terror as an institutionalized terror perpetrated by Nazis to Jews. But unfortunately the majority judgement of the Supreme Court held that; "it is true that on many occasions, we have come across cases wherein the prosecution unjustifiably invokes the provisions of the Terrorist And Disruptive Activities Act with an oblique motive of depriving the accused persons from getting bail and in some occasions when the Courts are inclined to grant bail in cases registered under ordinary criminal law, the investigating officers in order to circumvent the authority of the courts invoke the provisions of Terrorist And Disruptive Activities Act. This kind of invocation of the provisions of the Terrorist And Disruptive Activities Act in cases, the facts of which do not warrant (it), is nothing but sheer misuse and abuse of the Act by the police." Further more, the definition of 'abetting' 'terrorist acts' or 'disruptive activities' in Section 2 of the Act was so broad and vague that invites innocent people to be arbitrarily arrested under its provisions. The Supreme Court, in its majority judgment of Kartar Singh case reviewing the constitutionality of Terrorist And Disruptive Activities Act, found; "it is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values... vague laws may trap the innocent by not providing fair warning. Such a law impermissibly
delegates basic policy matters to police men and also judges for resolution on an ad-hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application...let us examine Clause (i) of Section 2(1)(a) [which define the terms 'abet' as to be read in the Act]. This Section is shown to be blissfully and impermissibly vague and imprecise...even an innocent person who ingenuously and undefiled communicates or associates without any knowledge or having no reason to believe or suspect that the person or class of persons with whom he has communicated or associated is engaged in assisting in any manner terrorist or disruptionists, can be arrested and prosecuted by abusing or misusing or misapplying this definition.” Despite these strong reservations, the Supreme Court upheld the validity of the Section 2 of the Terrorist And Disruptive Activities Act. However, in order to prevent abuse as described above, the court ruled that ‘abet’ in Section 2(1)(a)(i) should be read as including a “guilty mind”, i.e. actual knowledge or reason to believe that the person with whom one communicated was involved in those activities as prohibited by Terrorist And Disruptive Activities Act.

Dissenting from the minority Judgment, one of the Judge observed that the definition of ‘abet’ in Terrorist And Disruptive Activities Act should be amended “to avoid the ambiguity and make it immune from arbitrariness.”
The defense counsel has also argued that the word "communication" in Section 2 is so loosely phrased that giving professional legal advice to a detainee held under the Terrorist And Disruptive Activities Act can be enough to invite prosecution. Similarly, the wide definition of "terrorist acts" in Section 3 of the Terrorist And Disruptive Activities Act includes similar loose wording, which provide sub-section (3): "Whoever conspires or attempts to commit, or advocates, abets, advises...the commission of a terrorist act..."16

Under Section 15 of Terrorist And Disruptive Activities Act, the Court will have to admit unreliable evidence in the form of 'confessions', which, in many cases, were allegedly extracted, by the police officers through illegal methods. Recognizing these danger the Supreme Court observed "whatever may be said for or against the submission with regard to admissibility of a confession before a police officer, we cannot avoid but saying that we...have frequently dealt with cases of atrocities and brutalities practiced by some over zealous police officers restoring to inhumane, barbaric, archaic and drastic methods of treating the suspect in their anxiety to collect evidence by hook or crook and wrenching a decision in their favor. We remorsefully like to state on few occasions even custodial deaths caused during interrogation are brought to our notice...."
Nevertheless, the Supreme Court upheld the constitutionality of Section 15 considering "the gravity of terrorism unleashed by the terrorists and disruptionists" and the fact that the legislature was competent to make a law prescribing different rules of proof, even "though we at first impression thought of sharing the view of the learned counsel that it would be dangerous to make a statement given to a police officers admissible...." Reacting the provisions of the Section 15 of TADA, two out of five Judges castigated this provision as unfair. Justice K. Ramaswamy observed that such a provision offends the principles of fair justice, shocks the conscience and violates fundamental fairness. He warned that if people lose their respect for the courts, their respect for law and order will vanish to the greater detriment of society. He therefore, held that Section 15 was unfair, unjust and unconstitutional. Similar was the view expressed by the other Judge R.M. Sahai, who said the basic philosophy of a Sub-Inspector and a Superintendent of Police remains the same as both are interested in securing a confession from the accused. One Supreme Court Judge, however, dissented. He found that Section 15(1) is "unfair' unjust and unconscionable," offending Article 14 and 21 of the Indian constitution (guaranteeing, respectively, the right to equality before the law and the right to life and personal liberty). He found that from the Human Rights perspective, the history of the working of the provisions in the Evidence Act and the wisdom behind the Code of Criminal Procedure, the Section demonstrate
“inherent invalidity”. He stressed that built fin procedural safeguards had to be scrupulously adhered to in recording confessions. “It is, therefore, concludes the Judge obnoxious to confer power on [a] police officer to record confessions under Section 15(1).”

Justice K. Ramaswamy in his dissenting voice stressed that under Article 20(3) of the Indian constitution, “no person, accused of any offence, shall be compelled to be a witness against him self.” Article 21 assures of right to life and personal liberty. It would be deprived only according to procedure validity established by law. Article 20 is not confined to individual or common law offences. It extends to statutory offences as well offences under the Act are statutory offences. As soon as a formal accusation constituting an offence under the Act has been made before S.H.O. or in a private complaint the person is entitled to the protection under Article 20(3) and 21. Their violation, except in accordance with valid procedure established by law, are in violation of right to life assured by Article 21 of the Constitution of India. The standards of fairness in recording confessions under Section 15 (1) of the Act must be within constitutionally sustainable parameters. It is, therefore, obnoxious to confer power on police officer to record confession under Section 15(1). If he were entrusted with the solemn power to record a confession, the appearance of objectivity in the discharge of the statutory duty would be seemingly suspect and inspire no public
confidence. If the exercise of the power is allowed to be done once, may be conferred with judicial powers in a lesser crisis and to normalized in grave crisis, such an erosion is an anathema to rule of law, spirit of judicial review and a clear negation of Article 50 of the Constitution and the Constitutional creases. It is, therefore, unfair, unjust and unconscionable. ¹⁹

Justice R.M. Sahai, in a dissenting judgment, said that “A law entitles a police officer to record confession and makes it admissible is violative of both Article 20(3) and 21 of the Indian Constitution. Section 15 cannot be valid merely because it is the result of law made by a body which has been found entitled to make law. The law must still be fair and just.” ²⁰ He further said that a confession made to a police officer for an offence committed irrespective of its nature in non-notified area is admissible. But the same police officer is beyond reproach when it comes to notified area. An offence under Terrorist And Disruptive Activities Act is considered to be more serious as compared to the ones under Indian Penal Code or any other Act. Normally, graver the offence more strict the procedural interpretation. But here it is just otherwise. What is inadmissible for a murder under Section 302 is admissible even against the person who abet or is in possession of arms under Section 5 of the Act. The method applied by police in extracting confession has been deprecated by the supreme court in series of decisions. But
all that changes overnight when Terrorist And Disruptive Activities Act was enacted.21

On the appointment of judges of Designated courts Section 9(7) the Supreme Court in majority view held that the continuance of appointment of judges of Designated Court even after attainment of age of superannuating is not valid. However, supreme court suggested that the Government should appoint those judge in the Designated Court who have a sufficient tenure of service.22

Justice K.Ramaswami in a dissenting opinion on Section 9(7) observed that a conjoint reading of Sections 9, 11 and 12 of the Act does not indicate to preserve the control or supervisions of the High Court over the Designated Courts or Judges holding the posts, though they were appointed initially with concurrence of chief justice of the concerned High Court. Section 19 of the Act provides an appeal to the Supreme Court from any judgment, sentence or order of a Designated Court both on facts and under law. Control of the High Court over the judicial work of the judge or additional judge of the Designated Court was taken out. Thus it would be clear that appointment of Sessions or Additional Sessions Judge as Judge of the Designated Court under Section 9(1) are outside of the scheme of the constitution and the Code but a creature of the Act. Sub-section 7 of Section 9 of the Act postulates its fulcrum without mincing any words that despite the
judge of a Designated Court attained the age of superannuation under rules applicable to him in the State judicial service, he shall be entitled to continue. In other words, the legislative intention is clear that though Designated Judge attained superannuation under the relevant rules applicable to him in his normal judicial service, he shall remain in service during the pleasure of Central or the appropriate State Government. It would foster the “pleasure doctrine” laying the seeds to bear fruits of poisoned tree to destroy independence and impartiality of justice which the Constitution of India consciously avoided. It is, therefore, unconstitutional.

The operation of the judgment was postponed for a year to carry out the amendments relating to Sections 15(1) and 9(7) of the Act. The Court further ordered that if no amendments are effected within the stipulated period, Section 15(1) and Section 9(7) would thereafter become void. The appointments made earlier were saved.23

In other words, the legislative intention is clear that though Designated Judge attained superannuation under the relevant rules applicable to him in his normal judicial service as a Sessions or Additional Sessions Judge, he shall remain in service during the pleasure of the Central or the appropriate State Government. It would foster the “pleasure doctrine” laying the seeds to bear fruits of poisoned tree to destroy independence and impartiality
of justice which the Constitution of India consciously avoided. It is, therefore, unconstitutional.

On the question of the validity of the Section 16(2), (3) of the Act, the Court held it as valid. It observed "generally speaking, when the accused persons are of bad character, the witnesses are unwilling to come forward to depose against such persons fearing harassment at the hands of those accused. The persons who are put for trial under the Act are terrorists and disruptionists. Therefore, the witnesses will be all the more reluctant and unwilling to depose at the risk of life. The Parliament having regard to such extraordinary circumstances has thought it fit that the identity and addresses of the witnesses shall not be disclosed." The court further added that, in order to ensure the purpose and object of cross-examination, the identity, names and address of the witnesses may be disclosed before the trial commences; but it should be subject to an exception that the Court, for weighty reasons in its wisdom, may decide not to disclose the identity and addresses of the witnesses especially of the potential witnesses whose lives may be in danger.

This would imply that the right of the accused to prove his innocence through cross examination of the witnesses was denied by the supreme court in the name of security of the life of the witness, which in effect amounts to denial of fair trial. All International covenants on Human Rights recognize the right of
fair trial of the accused. One of the serious objections against anonymous witness is that if the defense is unaware of the identity of the person it seeks to question, it may be deprived of the particulars to demonstrate that the witness is prejudiced, hostile and unreliable. Furthermore, a trial court cannot observe a witness demeanour under questioning and it thus becomes more difficult to form its own opinion of the reliability of the witness. The European court of Human Rights has affirmed that the use of the evidence of anonymous witness denies an accused person the right to a fair trial. The Australian Government was found to have violated the convention. The European Court held that a domestic Court may not rely on the evidence obtained from anonymous sources whom the defendant has not had the opportunity to challenge.

On the issue of recording of confession under Section 20(3) Supreme Court held that “merely because the Executive Magistrate and Special Executive Magistrates are included along with the other Judicial Magistrates in Section 164(1) of the Criminal Procedure Code and empowered them with the authority of recording confessions in relation to the case under TADA, it cannot be said that it is contrary to the accepted principles of criminal jurisprudence and that the Executive Magistrates and Special Magistrates are persons outside the ambit of the machinery for adjudication of criminal cases.” The court further said “the Executive Magistrates while exercising their judicial or
quasi-judicial functions though in a limited way within the frame of the Code of Criminal Procedure, which judicial functions are normally performed by Judicial Magistrates can be held to be holding the judicial office. Therefore, the plea that the conferment of judicial functions on the Executive Magistrates and Special Executive Magistrates is opposed to the fundamental principles of governance contained in Article 50 of the Indian Constitution cannot be countenanced. Resultantly, that subsection (3) of Section 20 of the TADA does not offend either Article 14 or 21 and hence this subsection does not suffer from any constitutional invalidity.” The Court further observed that it was desirable that the Government follow certain guidelines in its application;

1. The confession should be recorded in a free atmosphere and in the same language in which the person is examined, and as narrated by him;
2. The person making the confession should be produced before the Magistrate to whom the confession is required to be sent, along with the confessional statement without unreasonable delay;
3. The said Magistrate should record any statement that such person may wish to make, get him to sign it, and where he complains of torture, direct him to be produced before a medical officer;
4. No police officer below the rank of Assistant Commissioner of Police in the metropolitan areas or
Deputy Superintendent of Police elsewhere should be allowed to investigate any offence under the TADA;

5. Where a person being interrogated asserts his right to remain silent, he should not be compelled to make a statement.

The court further said "the sub section (8) of section 20 of TADA Act imposing the ban on temporary release of a person accused of any offence punishable under the Act or any rule made there under, but diluting the ban only on the fulfillment of the two conditions mentioned in clauses (a) and (b) of that sub section cannot be said to be infringing the principle adumbrated in Article 21 of the Constitution."\(^{30}\)

Undoubtedly, liberty of a person must be zealously safeguarded by the Courts, nonetheless the Courts while dispensing justice in cases like the one under the TADA, should keep in mind not only the liberty of the accused but also the interests of the victims and their near and dear ones and the collective interests of the community and the safety of the nation so that the public may not lose faith in the system of judicial administration and indulge in private retribution.\(^{31}\)

Furthermore, Section 5 of TADA raises an irrefutable presumption that if a person is found in unauthorized possession of arms in a “notified area” .....automatically connected with “terrorist” and “disruptive” activities. One supreme Court Judge,
R.M. Sahai, in his dissenting opinion on the above Section in the *Kartar Singh case*, described the arbitrary effect that inherently results from the departure from the ordinary rules of evidence which is made under Section 5, "mere possession of [unauthorized] arms and ammunitions specified in the Section has been made substantive offence it is much serious in nature and graver in impact as it results in prosecution of a man irrespective of his association or connection with terrorist activity..... The harshness of the provisions is apparent as all those provisions of the Act for prosecuting a person including forfeiture of property, denial of bail, etc. , are applicable to a person accused of possessing arms and ammunition as the one who is charged for an offence under Sections 3 and 4 of the Act [describing the Act’s main objective: “terrorist” and “disruptive” activities]. There can be no justification for possessing illegal arms but mere possession does not make a person a terrorist or disruptionist. It is necessary, that this Section, if it has to be immune from attack of arbitrariness, may be invoked only if there is some material to show that the person who was in possession of the arms and ammunition is really intended to use them for terrorist or disruptionist activities or that it was really used.”

On the provision of the right to appeal, the Supreme Court in the *Kartar Singh* indeed recognized that “the indisputable reality is that the Supreme Court is beyond the reach of an average man/person considering the fact of distance, expenses
In spite of the absence of an effective appeals machinery, the Supreme Court upheld the validity of the Section 19 of the TADA, which facilitates police abuses. The majority view was that, “the practical difficulties faced by the aggrieved persons under the appeal provisions can be removed by the Parliament by devising a suitable mode of redress by making the necessary amendments in the appeal provisions. This does not, however, mean that the existing appeal provisions are constitutionally invalid.” One supreme court judge, in his dissenting opinion, held the right to appeal as restricted under TADA very often to be “illusory”. This, he felt, could amount to a breach of constitutional guarantees. He further held that “today the 1987 Act has been extended even to far off states. The effect of such extension is that for every sentence, one has to approach this court. In many cases, the remedy of appeal may be illusory. He [the convict] may not be able to approach this court because of enormous expenditure and exorbitant legal expenses involved in approaching this court. It should not be forgotten that our is a vast country with majority on the poor side. The knowledge of economic inability of sizable section of the society to approach this court by way of appeal may result in arbitrary exercise of power and excesses by the police, Inability to file appeal suits for financial reasons may amount to breach of guarantee under Article 14 an Article 21 of the Indian constitution. It may in many cases be denial of justice.”
In *Hitendra Vishnu Thakur and others v. State of Maharashtra and others*, three meaningful questions, were raised before the Court. First, When can the provisions of the section 3(1) of the Terrorist and Disruptive Activities Act, 1987, (hereinafter referred to as the TADA) be attracted? Second, Is the 1993 Amendment, amending section 167(2) of the code of Criminal Procedure by modifying section 20(4)(b) and adding a new provision as 20(4)(bb), applicable to the pending cases i.e. is it retrospective in operation? And thirdly, What is the true ambit and scope of section 20(4) and section 20(8) of TADA in the matter of grant of bail to an accused brought before the Designated Court and the factors which the Designated Court has to keep in view while dealing with an application for grant of extension of time to the prosecution for further investigation under clause (bb) of section 20(4) and incidentally whether the conditions contained in section 20(8) of TADA control the grant of bail under section 20(4) of the Act also?

The Constitution Bench noticed that the offences arising out of a terrorist or disruptive activity might overlap the offences covered by the ordinary penal law and dealing with the situation under which the provisions of TADA would be attracted observed, “as the Act tends to be very harsh and drastic containing the stringent provisions and provides minimum punishment" and to some other offences enhanced penalties also. The provisions prescribing special procedures aiming at speedy disposal of cases,
departing from the procedures prescribed under the ordinary procedural law are evidently for the reasons that the prevalent ordinary procedural law was found to be inadequate and not sufficiently effective to deal with the offenders indulging in terrorist and disruptive activities, secondly that the incensed offences are arising out of the activities of the terrorist and disruptionists which disrupt or are intended to disrupt even the sovereignty and territorial integrity of India or which may bring about or support any claim for the cession of any part of India from the union, and which create terror and a sense of insecurity in the minds of the people. Further, the Legislature being aware of the aggravated nature of the offences have brought this drastic change in the procedure under this law so that the object of the legislation may not be defeated and nullified.”

The court further observed that, this case involved, *inter alia*, the interpretation of the expression “terrorist act” as defined in section 2(1)(h) of the Terrorist and Disruptive Activities (prevention) Act 1987 and the circumstances under which a person can be charged with such an offence. The court expressed the view that, although it was not possible to give a precise definition of “terrorism”, there were certain characteristics of terrorism, which were clearly identifiable. “There may be death, injury or destruction of property of even deprivation of individual liberties in the process but the extent and reach of the intended terrorist activities travels beyond the effect of an ordinary crime
capable of being punished under the ordinary penal law of the land, and its main objective is to overawe the Government or disturb harmony of the society or "terrorize" people and the society and only those directly assaulted, with a view to disturb [the] even tempo, peace and tranquility of the society and create a sense of fear and insecurity. A 'terrorist' activity dose not merely arises by causing disturbance of law and order or of public order. The fallout of intended activity must be such that it travels beyond the capacity of the ordinary law enforcement agency to tackle it under the ordinary penal law." The court went on to hold that, "even though the crime committed by the 'terrorist' and an ordinary criminal would be overlapping to an extent, it is not the intention of the legislature that every criminal should be tried under TADA, where the fallout of its activity dose not extend beyond the normal frontiers of the ordinary criminal activity. Every 'terrorist' may be a criminal but every criminal cannot be given the label of a 'terrorist' only to set in motion the more stringent provisions of the TADA. The criminal activity in order to invoke TADA must be committed with the requisite intention as contemplated by section 3(1) and which cause[s] or [is] likely to result in the offences as [sic] mention in the said section." The court stressed that the investigation agency had a duty to satisfy the Designated court that the entire requirement in the section 3(1) had been satisfied in a given case for it to be pursued under TADA. "The true ambit and scope of section 3(1)," said the court, "is that no conviction ....can be recorded unless the evidence led
by the prosecution establishes that the offence was committed with the intention...envisaged by section 3(1), by means of weapons etc...enumerated in the section and was committed with the motive...postulated by the said section."

The Designated Court finds, after taking cognizance of the offence, that the offence does not fall under TADA, it was obliged to transfer the case for trail to an ordinary court having jurisdiction over it. The court also examined the scope of the 1993 amendment to the section 20(4)(b) of TADA which allowed the release of accused persons on bail if the investigations in their case had not been completed within 180 days. Noting that “the law enjoins upon the investigating agency to carry out the investigation... with utmost urgency and completed the investigation with great promptitude [within] the prescribed period,” the court ruled that if this requirement was not compiled with, then the amended section 20(4)(b) created and indefeasible right in an accused person to seek an order for his release on bail, irrespective of the nature of the offence he is charged with. The section cast an obligation on the court to decline any request from the prosecution for a further remand of the accused in custody. The court was also obliged to inform the accused, on the expiry of the 180 days period, of his right to seek such release, but there was no obligation on the part of the court to order his release on its own. The only circumstances under which the court could continue an accused detention was where the prosecution was able
too show unequivocally that the investigation agency could not complete its investigations for the reason stated in section 20(4)(bb). The court also read into Section 20(4) and held that, if an accused person applied to be released on bail at the end of the 180 days period, the court would give notice to the public prosecutor of such application who may then show cause why it should not be granted. Similarly, if the public prosecutor applied for an extension of the detention of the accused under section 20(4)(bb), the court would give notice of such application to the accused to enable him to make representation against it. Any application for grant of bail under section 20(4), said the court, had to be judged on its own merits uninfluenced by the merits or the gravity of the case.” The court has no power to remand an accused to custody beyond the period prescribed by [section 20(4)(b)]...only the ground that the accusation against the accused is of a serious nature of the offence is very grave.” 40

In *Hitendra Vishnu Thakur and others*41 the Supreme Court concluded the issue with the conclusion, that an accused person seeking bail under section 20(4) has to make an application to the court for grant of bail on grounds of the ‘default’ of the prosecution and the court shall release the accused on bail after notice to the public prosecutor uninfluenced by the gravity of the offence or the merits of the prosecution case since section 20(8) dose not control the grant of bail under section 20(4) of TADA and both the provisions operate in separate and independent
fields. It is, however, permissible for the public prosecutor to resist the grant of bail by seeking an extension under clause (bb) by filling a report for the purpose before the court. However, no extension shall be granted by the court without notice to an accused to have his say regarding the prayer for grant of extension under clause (bb). In view of this, it is immaterial whether the application for bail on the ground of 'default' under section 20(4) is filed first or the report as envisaged by clause (bb) is filed by the public prosecutor first so long as both are considered while granting or refusing bail. If the period prescribed by clause (b) of section 20(4) has expired and the court does not grant an extension on the report of the public prosecutor made under clause (bb), the court shall release the accused on bail as it would be an indefeasible right of the accused to be so released. Even where the court grants an extension under the clause (bb) but the charge sheet is not filed within the extended period, the court shall have no option but to release the accused on bail, if he seeks it and is prepared to furnish the bail as directed by the court. Moreover, no extension can be granted by the Designated Court under the clause (bb), except on a report of the public prosecutor nor can extension be granted for reasons other than those specifically contained in clause (bb), which must be in construed." The Court further said that the Designated Court would have "no jurisdiction to deny to an accused his indefeasible right to be released on bail on account of the default of the prosecution to file the challan within the prescribed time if
an accused seeks and is prepared to furnish the bail bond as directed by the court”; and that a ‘notice’ to the accused is required to be given by the Designated Court before it grants any extension under the further proviso beyond the prescribed period of 180 days for completing the investigation.

In Sanjay Dutt, the charges against the petitioner were many including those under the TADA Act, of which section 5 thereof is one. The prosecution on the testimony of certain witnesses, incriminating circumstances and an un-retracted confession places reliance on the petitioner himself. In the said confession, which has remained un-retracted, the petitioner admitted receiving three AK-56 rifles along with ammunition from the persons adding that two days later he returned two of them but retained only one for the purpose of self-defense. The petitioner further stated that in view of the tense communal situation as a result of the incident at Ayodhya and the serious threats given to petitioner’s father, for his active role in steps taken to restore communal harmony and serious threat to the petitioner’s family. The petitioner agreed to obtain and keep one AK-56 rifle with ammunition for protection of his family. In short, the petitioner’s statement is that his possession of the rifle with ammunition was necessitated by self-defense and nothing to do with terrorist activity and, therefore, mere unauthorized possession of weapons and ammunition by him in these circumstances cannot constitute an offence under section 5 of the
TADA Act, and has to be dealt with only under the Arms Act, 1959. The petitioner prayed for release on bail. The Designated Court, however, refused to grant bail to the petitioner. The special leave petitions are against the order of the Designated Court, in substance, for the grant of bail to the petitioner.

The supreme court observed that; the ingredient of the offence punishable under section 5 of the TADA Act are; Possession of any of the specified arms and ammunition etc., unauthorizedly, and in a “notified area”.

If these ingredients of the offence are proved, then the accused shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine. If these ingredients of the offence are proved, then the accused shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.44

In the context the word ‘possession’ must mean possession with the requisite mental element, that is, conscious possession and not mere custody without the awareness of the nature of such possession. There is a mental element in the concept of possession. Accordingly, the ingredient of possession in section 5 of the TADA Act means conscious possession. This is how the ingredient of possession in similar context of a statutory offence importing strict liability on account of mere possession of an
unauthorized substance has been understood. The unauthorized possession in the context means without the authority of law.\textsuperscript{45}

The court relied on the unauthorized possession in a notified area of “any arms and ammunition” specified in columns 2 and 3 of Category I or Category III (a) of the Scheduled “or bombs or dynamite or other explosive substances” is forbidden, the word ‘and’ instead of ‘or’ is used in the expression “any arms and ammunition specified...” because reference to both is made as specified in the schedule. For this reason, the words “arms and ammunition” are not to be read conjunctively. This is further evident from the fact that the disjunctive ‘or’ is used while describing other forbidden substances like bombs etc. it means the forbidden substances, the unauthorized possession of any of which in a notified area is an offence under section 5, are any of the specified arms or its ammunition or bombs or dynamite or other explosive substances. Unless these words are read disjunctive instead of conjunctively in this manner, the object of prohibiting unauthorized possession of the forbidden arms and ammunition would be easily frustrated by the simple device of one person carrying the forbidden arms and his accomplice carrying its ammunition so that neither is covered by section 5 when any one of them carrying both would be so liable.\textsuperscript{46}

The court also said that the section 2(1)(f) defines “notified area” to mean such area as the state Government may, by
notification in the official gazette, specify. The state Government's power to notify an area under section 2(1)(f) must have relation to curbing terrorist and disruptive activities in the notified area, otherwise the state Government's power would be unfettered and unguided which would render section 5 vulnerable. A specified area is declared to be a notified area by the state Government under section 2(1)(f) of the TADA Act with reference to the fact that a notified area is treated to be more prone to the commission and escalation of terrorist and disruptive activities. This is the basis for classification of 'a notified area' differently from the non-notified areas and it has a reasonable nexus with the object of classification. Such activities must, therefore have a bearing on the constitution of any special offence confined to the area. Declaration of a specified area as a notified area by the state government is based on its satisfaction, subjective in nature that the area is prone to terrorist and disruptive activities and its escalation. This opinion of the state government has to be formed necessarily with reference to facts relating to incidents of terrorist and disruptive activities, for the prevention of which check on the influx of the specified arms and ammunition etc. in that area, is the object of enacting section 5 for otherwise it would be put to proof in every case. This is the true significance of the third ingredient of the offence under section 5.47
However, the supreme court did not wish to go quite that far, judgment of 9th September 1994, it was not necessary for the prosecution to produce such evidence of intended use, once conscious possession of unauthorized arms in a notified area had been established. The supreme court held that the accused, despite the wording of Section 5 of the Act which raises an irrebuttable presumption, has a right to prove his innocence by providing evidence that, although he possessed unauthorized arms, these were in fact not used or meant to be used for "terrorist" or "disruptive" activities. The court reportedly rejected the State's argument that mere conscious possession of unauthorized arms in a notified area was sufficient for conviction under Terrorist and Disruptive Activities (Prevention) Act and that no further defence by the accused was required. However, the Supreme Court did not question that it was the accused who had the burden of proving his innocence of intended use under Section 5, contrary to what ordinary legal procedures require. Once "conscious possession unauthorisedly in a notified area" of any arms and ammunition had been established by the prosecution, in view of the statutory presumption, "No further nexus of his [the accused's] unauthorized possession of the same with any specific terrorist or disruptive activities is required to be proved by the prosecution for providing the offence under Section 5 of the Terrorist and Disruptive Activities (Prevention) Act."48
Section 20 (4)(bb) of the Terrorist and Disruptive Activities (Prevention) Act only requires production of the accused before the court in accordance with section 167 (1) of the code of criminal procedure and this is how the requirement of notice to the accused before granting extension beyond the prescribed period of 180 days in accordance with the further provision of clause (bb) of sub-section (4) of section 20 of the Terrorist and Disruptive Activities (Prevention) Act has to be understood in the light of the judgment of the Division Bench of the Supreme Court in *Hitendra Vishnu Thakur*. The requirement of such notice to the accused before granting the extension for completing the investigation is not a written notice to the accused giving reasons therein. Production of the accused at that time in the court informing him that the question of extension of the period for completing the investigation is being considered, is alone sufficient for the purpose.

**Conclusion:**

In the prosecution for an offence punishable under section 5 of the Terrorist and Disruptive Activities (Prevention) Act, the prosecution is required to prove that the accused was in conscious ‘possession’, ‘unauthorisedly’, in a ‘notified area’ of any arms and ammunition specified in columns 2 and 3 of the category I or Category III (a) of Schedule I of the Arms Rules, 1962 or bombs, dynamite or other explosive substances. No further nexus with any terrorist or disruptive activity is required to be proved by the
prosecution in view of the statutory presumption indicated earlier. The accused in his defense is entitled to prove the non-existence of a fact constituting any of these ingredients. As a part of his defense, he can prove by adducing evidence, the non-existence of the fact constituting the third ingredient as indicated earlier to rebut the statutory presumption. The accused is entitled to prove by adducing evidence that the purpose of his unauthorized possession of any such arms and ammunition etc. was wholly unrelated to any terrorist or disruptive activity. If the accused succeeds in proving the absence of the said third ingredient, then his mere unauthorized possession of any such arms and ammunition etc. is punishable only under the general law by virtue of the Section 12 of the Terrorist and Disruptive Activities (Prevention) Act and not under Section 5.

The “indefeasible right” of the accused to be released on the bail in accordance with Section 20(4)(bb) of the Terrorist and Disruptive Activities (Prevention) Act read with Section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur is a right which ensure to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be
released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. The right of the accused to be released on bail after filling of the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at that stage.
REFERENCE:

1. 1981 (1) SCC 608
2. AIR 1982 SC 1473
3. 1984 (3) SCC 161
11. AIR 1950 SC 27
12. AIR 1978 SC 597
13. 1994 *Criminal Law journal*, 3139
15. Ibid. Para 143 and 144

16. Frontline, New Delhi, 23\textsuperscript{rd} September 1994

17. Supra note 14, Para 273 (Majority Judgment)

18. Ibid. Para 435 (Minority Judgment)


21. Ibid., Para 457

22. Ibid., Para 177 and 375

23. Ibid., Para 428.

24. Ibid., Para 375, 294 and 295.

25. Ibid., Para 297 and 375.

26. The Criminal Procedure Code, Section 164 (1) provides, Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial: Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

27. Supra note 25, Para 16, 375, 379 and 463


34. The TADA, Section 18 provides, Power to transfer cases to regular Courts. – Where, after taking cognizance of any offence, a Designated Court is of opinion that the offence is not triable by it, it shall notwithstanding that it has no jurisdiction to try such offence, transfer the case for trial of such offence to any Court having jurisdiction under the Code and the Court to which the case is transferred may proceed with the trial of the offence as if it had taken cognizance of the offence.

35. *Supra note* 32, Para 303, 375 and 379.

36. *Supra note* 33, Para 484 (dissenting opinion)

37. *AIR 1994 SC 2623*

38. The TADA, Section 20(4)(bb), provides, the maximum periods of detention during the course of investigation is 180 days.

39. The TADA, Section 3(2), provides, Whoever commits a terrorist act, shall, -(i) if such act has resulted in the death
of any person, be punishable with death or imprisonment for life and shall also be liable to fine; (ii) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine; (3) Whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitate the commission of, a terrorist act or any act preparatory to a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine. (4) Whoever harbours or conceals, or attempts to harbour or conceal, any terrorist shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also liable to fine. The TADA, Section 4, provides, Punishment for disruptive activities. – (1) Whoever commits or conspires or attempts to commit or abets, advocates, advises, or knowingly facilitates the commission of, any disruptive activity or any act preparatory to a disruptive activity shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.


44. *Ibid.*, Para 12


47. *Ibid.*, Para 21 and 24


50. *Supra note* 43, Para 53(2)(a), 45, 47 and 48.

Chapter 5
The Terrorist And Disruptive Activities (Prevention Act) 1985 enacted to deal with the terrorists and disruptive activities, has done more harm than good. It not only contravenes the international human rights standards (as we have already discussed in the previous Chapter) but also much more draconian than the pre-independence preventive detention Act and the Rowlett Act. Apparently, the situation in Punjab, Assam and Kashmir promoted the Government of India to enact this Act, in the interest of the nation, but instead of improving the situation, it got further deteriorated in States like Uttar Pradesh, Gujarat, West Bengal, Rajasthan and Maharashtra. The disease aggravated with each dose of medicine. The infamous Rowlett Act was no liberal document, but it seems so today compared to the laws enacted, ostensibly to deal with terrorism. The Rowlett Report frowned on preventive detention and said, “If in the supreme interests of the community, the liberty of individuals is taken away, an asylum must be provided of a different order from a jail.”¹ The hated Rowlett Act 1919 was more liberal than TADA.

The Rowlett Act can be divided in three parts, first, trial by special Courts for specified offences; second, power to direct execution of bond for good behaviour, internment within the city, reporting at police station, and abstention from specified acts; and lastly, power of arrest without warrants, preventive detention
and search of places. An analysis of the Rowlett Act would bring to surface that it has more concern for the human rights even during the Colonial rule than the present legislation in a democratic set up.

(1) The provincial Government, which desire to setup special courts to try an accused, had first ‘to prefer a written communication to the Chief Justice (of the High Court) against such person’. It had to set out ‘all particulars within the knowledge of prosecution of what is intended to be proved against the accused.’ The Chief Justice could ask for “further particulars” and direct a copy of the information to be served on the accused. This initial judicial check (Section 4) is altogether absent in the Act of 1985.

(2) The Rowlett Act enjoined the Chief Justice to nominate three High Court judges for trial. The Act of 1985 is content with a Sessions Judge appointed by the Government with the concurrence of the Chief Justice of the High Court (Section 7).

(3) The Act of 1919 and 1985 did away with the committal proceedings before a magistrate as preliminary to the trial. But the Rowlett Act of 1919 requires the prosecutor to open the case setting out the evidence, which he expected to adduce. The procedure had to be as in a warrant case (Section 8). The Act of 1985 permit trial by summary procedure (Section 12) where an
offence is punishable for a term not exceeding three years or with fine or both.

(4) The 1985 Act enjoins secret trials except if the public prosecutor deigns to opt otherwise. The court has no discretion (section 13). The Act of 1919 left the normal discretion of the court untouched and empowered it only to prohibit or restrict publication of reports of the proceedings (Section 11).

(5) Under the Rowlett Act, a sentence of death could be imposed only if all the three judges of High Court so ordered (Section 16) but the 1985 Act enables a Session Judge to impose death sentence.

(6) The present Act permits an appeal directly to the Supreme Court on the facts and the law (Section 16), by-passing the High Courts. The Act of 1919 however, barred appeals; hence the popular discontent against the Act expressed in the slogan “No vakil, no dalil (argument), no appeal.”

(7) The Rowlett Act empowered the Chief justice to make rules regarding bail etc. (Section 20), but the 1985 Act forbid bail as a rule [Section 17(5)] unless ‘the Court is satisfied that there are reasonable grounds for believing that the accused is not guilty’ and is not ‘likely to commit any offence while on bail.’
(8) The Rowlett Act empowered the local Government to order a person to execute a bond for good behaviour; notify his residence; confine him to a particular area; report himself to a police station at intervals; and to 'abstain himself from any act so specified (in the order) which, in the opinion of the local Government, is calculated to disturb the public peace' etc. but these orders could be made only after 'a judicial officer who is qualified for appointment to a High Court' had given his opinion. No such safeguards exist in the Act of 1985 (Section 5).

(9) It is extremely important to note that even in regard to preventive detention, the Rowlett Act provided an initial judicial curb, which was never provided in any of the detention law of free India. The Act directed the Government first to 'place all the materials in its possession relating to the detenu's case before a judicial officer who is qualified for appointment to a High Court and to take his opinion -thereon' (Section 34).

(10) After detention, it provided the same remedies as those available to persons against whom the directives had been issued; namely, a concise statement of the grounds together with 'all material facts and circumstances' be given to the person, plus a right to appear before a three member body (two of them had to be former district or sessions judges, and the third, a private individual) and offer his defense. The Act of 1985 had no such safeguards.
INDISCRIMINATE USE OF TADA:

A dispassionate review of the working of TADA reveals that far from checking terrorism, it has led to police excesses and also targeted political opponents. Judicial review is deliberately kept aside. The People Union for Democratic Rights and other Human rights organizations have, time and again, attempted to chronicle the immense human suffering that the TADA inflicted on hundreds of ordinary men and women. This suffering was not an outcome of 'stray cases of abuse', but built into the very structure of the law. The very fact that there were wide spread protests, all over India, which no other law has attracted, is a pointer to its arbitrariness, ultimately leading to its termination in 1995. Like Banquo's ghost, it is still haunting those, who are languishing in jails under this 'dead' Act. It has failed on all fronts, be it the investigation process, police excesses, terrorism or easy convictions. It has the most abysmal record of convictions. Over the years, the indiscriminate use of TADA Act has only succeeded in making the suspicion of the people stronger about the bonafides of the justice system so much so that the Home Minister, S. B. Chavan admitted in the Rajya Sabha that his ministry had written to all Chief Ministers to review all TADA cases. "This law was meant only to curb terrorist activities. Unfortunately, number of Chief Ministers misused it in-spite of the direction issued by his ministry. Ultimately, action is to be
taken by the State Governments. We can only request them. After all, we have a federal structure. An official admission of gross abuse is also evident from the 27th July 1994 letter, in which S. B. Chavan reportedly stressed that the Act should not be invoked against political dissenters, trade union leaders, journalists, former judges and civil servants, as it had been in the past. Speaking in the Rajya Sabha, Meen Afzal of Janta Dal criticize the Act as “TADA had become a form of ‘TA/DA’ (Traveling Allowance/Dearness Allowance) for the police. It was alleged that the Bombay police resorted to pressurizing people to name accomplices in the Bombay blast case. The minorities were the worst sufferer.” The, then Minister of State for Internal Security, Rajesh Pilot, admitted in Bombay that States were misusing TADA, that the Centre had declared them to monitor the cases because it had been brought to its notice that the Act was misused mainly to harass the minorities. Its purpose was to curb anti-national activities, but unfortunately it had been misused extensively against Muslims. In September 1994, the Home Minister said that the Act ‘meant for terrorists’ had been used on wide scale to detain thousands of people, including common criminals. He reportedly conceded that despite his earlier letters and instructions to the Chief Ministers, the law continued to be misused. The Act was misused even in the States affected by insurgency. Some indirect evidence of this can be had from the fact that, at the end of 1991, in Punjab, where only a small fraction of the population indulged in militancy, there were 6,206
detenus, while in Assam, where the involvement of people is even much smaller, there were 7,130 detenus. In Delhi alone 838 persons were arrested under this Act ironically, in Kashmir there were only 688 TADA detenus.\(^6\)

The Act extended gradually to 22 out of the 25 states besides two (Chandigarh and Delhi) Union territories out of seven. It covers 93 per cent of the country’s population. It was Central Legislation but implemented by the States. It was frequently invoked to curb political activists,\(^7\) leaders of farmer’s movements,\(^8\) students,\(^9\) lawyers,\(^10\) journalists,\(^11\) and creative writers\(^12\) and even a former judge\(^13\) involved in human rights issues. It has been invoked where normal laws sufficed.

The number of arrests under this law itself has become a subject matter of controversy, while various civil liberty organizations put the figure at 53000 ever since the TADA was enforced but the Minister of State for Home Affairs, Rajesh Pilot, claimed the figure was only 10,504 up to June 1994.\(^14\) Whatever be the truth as regards the number of arrests, nearly 30 to 60 per cent charged under TADA belonged to ‘non-problem’ States and had hardly anything to do with terrorism or disruptive activities.
Table: - 1

<table>
<thead>
<tr>
<th>State/Union Territory</th>
<th>No of detentions under TADA as on</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>10-9-89</td>
</tr>
<tr>
<td>Andhra Pradesh</td>
<td>2143</td>
</tr>
<tr>
<td>Arunachal Pradesh</td>
<td>24</td>
</tr>
<tr>
<td>Assam</td>
<td>1270</td>
</tr>
<tr>
<td>Bihar</td>
<td>NF</td>
</tr>
<tr>
<td>Chandigarh</td>
<td>400</td>
</tr>
<tr>
<td>Delhi</td>
<td>160</td>
</tr>
<tr>
<td>Goa</td>
<td>NF</td>
</tr>
<tr>
<td>Gujarat</td>
<td>4491</td>
</tr>
<tr>
<td>Haryana</td>
<td>275</td>
</tr>
<tr>
<td>Himachal Pradesh</td>
<td>19</td>
</tr>
<tr>
<td>Jammu and Kashmir</td>
<td>669</td>
</tr>
<tr>
<td>Karnataka</td>
<td>10</td>
</tr>
<tr>
<td>Madhya Pradesh</td>
<td>110</td>
</tr>
<tr>
<td>Maharashtra</td>
<td>379</td>
</tr>
<tr>
<td>Manipur</td>
<td>654</td>
</tr>
<tr>
<td>Meghalaya</td>
<td>NG</td>
</tr>
<tr>
<td>Mizoram</td>
<td>NG</td>
</tr>
<tr>
<td>Nagaland</td>
<td>NG</td>
</tr>
<tr>
<td>Punjab</td>
<td>7969</td>
</tr>
<tr>
<td>Rajasthan</td>
<td>59</td>
</tr>
<tr>
<td>Tamil Nadu</td>
<td>NF</td>
</tr>
<tr>
<td>Tripura</td>
<td>NF</td>
</tr>
<tr>
<td>Uttar Pradesh</td>
<td>130</td>
</tr>
<tr>
<td>West Bengal</td>
<td>524</td>
</tr>
<tr>
<td><strong>Grand Total</strong></td>
<td><strong>19286</strong></td>
</tr>
</tbody>
</table>

Source: Parliament Replies; relevant volumes

Note: NG: --- The Act is in force but the figures were not given.
NF:--The Act was not in force till date (mentioned)
Note on The Unreliability of This Table

The table given here is based on the data provide by the Union Home Ministry in various Parliamentary Debates. At best they indicate the minimum number of the detentions under the Act. The following factors have to be kept in mind while making use of the data.

1. Data sent by the State Governments to the Centre is not always complete. Nor does it refer to the same time period always. Some Governments simply did not send the data.

2. Data does not make it clear whether the figures include people, who were released on bail, or against whom cases are withdrawn, or against whom cases are not being pursued. It is also not clear whether those acquitted subsequently are being counted as those arrested under the Act initially. More complicated is the case of those who are convicted on other charges but are acquitted of TADA charges. In other words we do not know whether these figures are gross or net.

3. A more reliable source, to gather the data is that of the National Crime Records Bureau, but it began monitoring TADA cases only since 1990, therefore, it does not give the complete picture.

4. To have a clear and complete picture of the implementation of the Act, one should have the total number of arrests actually made at one time or other, whatever be the aftermath of arrest. These figures would certainly be more than what this table gives here. The lack of reliable information is perhaps part of the scheme of misinformation campaign on TADA.

Significantly, States that do not figure in the Government specified list of "problem States" have widely used the Act. The most notable example is Gujarat, which ranks first in detaining people under TADA inspite of Union Home Minister Butta Singh's assurance that TADA will not be misused. The Center's assurances about the judicious use of TADA have been honored only in the breach. The next Union Minister for Home, P. Chidambaram also observed in categorical terms "this law is very unusual and must be invoked rarely and only in the very special circumstances to avoid abuse." But contrary to all assurances, the State has used it to crush farmer's movements, labour
problems and protests over price hike. The anti-terrorist act was
first used widely against BJP workers in Baroda after Communal
violence. Then it was the turn of agitating Bharatiya Kisan Sangh
activists, 240 of whom were booked under TADA during their
‘rasta roko’ agitation. Of them, 204 were from Junagadh district
alone. The reason of their arrest was that the Superintendent of
Police was injured in stone throwing.\textsuperscript{16} Till October 1987, as
many as 2,230 people, including 50 children and women, have
been arrested under this Act as the State Government has
ruthlessly used it to crush dissent. M. M. Singh (Director General
of Police), a no nonsense IPS officer reputed for his integrity, has
been held responsible for the Act’s misuse. In May 1987, he has
been directing his officers to use it. “But,” says an officer, “even
instances of communal violence, other laws, if implemented
seriously, are adequate to deal with the situation.” It is an
exhibition of police arrogance that TADA was also used to arrest
a blind man, a mentally retarded man, and two others above 75
years old, during farmer’s agitation.\textsuperscript{17} But for the judiciary, the
situation could have gone worse, of the 2,230 persons charged
under the Act till the third week of October, the Court released
1800 on bail; which only indicates the extent of the Act’s misuse.
While releasing people charged under the TADA protesting
against the transfer of the local municipal Commissioner, S.
Jagdishan, Special Judge of Rajkot, Justice B. K. Shah observed
that “if such indiscriminate use of TADA continues, the
impression created among the masses that the State is heading
towards a police raj cannot be said to be totally baseless.” If this is carried on, “democracy will be in great danger.” He directed that ‘a procedure be adopted by which the police obtain the opinion of the Chief Public Prosecutor before resorting to TADA.’

According to Raoof Valiullah, Chairman, Gujarat State Minorities Board, the State Government is using TADA in “flagrant violation of the existing Constitutional safeguards given to minorities” under the pretext of maintaining law and order. Twenty-three Muslims were arrested under TADA only ten days before the Ghodhara by-election for their alleged involvement in the Veerpur Balasinur riots, which broke out a year ago. The local police sub-inspector had instruction from the Government to oppose their bail application in the Court. In the Bharuch constituency of the PCC (I) president, Ahmed Patel, nineteen people belonging to the minorities were arrested under the TADA on the eve of the elections. It is reliably learnt that the Sessions judge, Surat, while throwing out the TADA application moved against them by the police severely indicted the Government as, there was “no evidence of subversive or disruptive activities against them.” During the communal violence several innocent persons fell victims to this very Act. One such case was, the arrest of Siayad, who lived in the Khanpur area of the city, when he went out to bring his brother home following a stone throwing incident between Hindu and Muslims. The police charged him
under TADA. He was, however, not alone, seventy others, (vast majority of Muslims), were booked under the law. The ordeal of the men picked up in Khanpur has been particularly traumatic. They were brutally beaten up by the police after being incarcerated. Even age was no bar to the police. Fifteen years old, Anwarkhan Pathan, says the scars will remain forever: “we will never forget the time in jail. It still gives us night-mares.”

There was another instance, in which 47 people were charged under the TADA in Ansarnagar, a predominantly Muslim locality. The charges against them includes the use of “bombs and the spreading of terror.” But investigation revealed that what the police described as bombs were, in fact, simple crackers. People of this locality fixed these crackers inside a small tin box, which exploded creating noise. Muslims residents in Ansarnagar say they resorted to using these “mechanism” to scare away their attackers during communal riots. In other instance, TADA was allegedly applied against a 12-year-old boy in Baroda, who was actually trapped in a mosque during the communal riots. Even prostitutes were detained under this Act. Harpal Singh Jhala, a criminal lawyer, says, “What the police are doing in Gujarat is unconstitutional. Even worse, is that TADA is being invoked mostly against Muslims, who are already the victims of the communal violence.” But the State Director General of Police, B.S.Nirula, is adamant; “TADA is the prime factor behind the peace currently prevailing in the State after
some horrific riots.” There could have been two possibilities of the use of TADA in Gujarat, either the police are pursuing their own communal agenda by booking the particular section of the society under the pretext of combating communalism or they genuinely believed that TADA is the best way to contain communal violence, which was not true. The Chief Minister admitted, “We are compelled to apply this Act in case of persons arrested in Gujarat.”

In 1993, Ashok Tondon (DGP), ‘attributes the high usage of TADA to the communal riots. It was pointed out that more than 1600 people were booked under TADA in the two months during which communal disturbances rocked the city following the demolition of the Babri Mosque on 6 December 1992. The law was used more to deal with situations arising out of ‘communal conflicts’, rather than terrorism, which could have been dealt with under the ordinary laws. It only helped the police to use of the wide range of discriminatory powers under the Act. Statistics reveal that since the introduction of TADA in 1985, as many as 2,990 cases were registered under the Act and 13,152 people booked. [The number of those booked is 14,094 as per the records of the Union Home Ministry]. Out of these, 12,816 had been either released on bail or have been acquitted by the Special Courts or let off by the Home department after a review of the cases till February 1993. According to the DGP office of Gujarat,
till 1993, 410 prisoners booked under TADA are languishing in various jails in the State awaiting trial. Most of them are those arrested during the last bout of communal riots.

The situation of the other States was not different. TADA, which was initially meant to curb terrorist activities in some parts of Punjab, was utilized in almost all States. It was used in Maharashtra "to curb gang feuds and terrorism." The Chief Minister, Sharad Power, in the Legislative Assembly, justified its use on account of increased criminal activities in Bombay and Thane due to free availability of illegal weapons and prompt legal respite available to criminals. Datta Samant, trade union leader and ex-member of Parliament said "when the Act was introduced in the Parliament, it aimed at the Punjab situation as the Government was finding it difficult to prosecute terrorists, no one would give evidence against the terrorists. The Government assured that it would never be used elsewhere as TADA is not needed in other States (except, may be, Kashmir)." Thangappan, Bombay trade unionist and working president of the Kamani Employees Union, reiterates Samant’s stand, stating that the Act is being used against workers. He cites the examples of Paithan, where in April 1990, forty-five workers of Universal Luggage Company were detained under TADA. One of them, Vishwas Bhagwan Lotange was tortured for 15 days and when he was taken to a private hospital, he was declared dead. According to the doctor’s report, his body was full of wells and marks of
cigarette burns. The police and the administration agree that till now they were fighting criminals with their hands tied behind their backs, but the new legislation will arm them to deal directly with the criminals and to curb the criminal activities. Police says some time ago the Act was used in Ahmedabad against the workers of Reliance Industries when they went on strike demanding the implementation of the Industrial Tribunal Award. The police justify the law by blaming the Courts for bailing out people under other preventive detention laws, like the NSA.

All Governments, irrespective of political complexion, at one time or the other, inspite of the availability of various preventive detention laws in the State, had used the Act. The fact is, that if the administration wants to use them against the criminals the already available preventive detention laws were sufficient. Even without such laws people are beaten up in custody, as was the case of Raju Mohitya. And with TADA the situation turned worse. The more severe the law, the more likely it is to be misused and the police are armed with powers without proper checks, they will take the shortest route possible to show their effectiveness, by hook or crook. This was exactly the case with TADA.

The press had reported that after the Bombay bombing in March 1993 over 150 people were detained under TADA, who could have been tried under the ordinary law. There is a report
that prior to 15 July 1993, 121 people described as "gangsters" had been booked under TADA.$^{30}$ The Indian Express reported that, there were 189 accused for their alleged involvement in the Bombay bombings, but that 45 of them absconding, including the alleged ringleaders and planners, 121 were in custody and 23 were out on bail.$^{31}$ The accused had often made complaints in the Court and many of the detainees had subsequently retracted confessions allegedly extracted by police. It was also alleged that a number of the accused had been threatened by the police not to contact lawyers. One was said to have been told; "if you contact a lawyer or complaint about your treatment, we will take your relatives in custody, or we will arrange a confrontation with one of your relatives and they will be killed." Consequently, the Court admits unreliable evidence, which in many cases, allegedly consists of confessions extracted under torture or ill treatment.

On 7 May 1993, Justice J.N.Patil, of the Designated Court sitting under TADA, ordered the medical examination of Shaikh Aziz, son of Mohammed, after he had told the judge "that he was hit by a belt in the night and has been warned not to disclose it to the Court otherwise he will be shot and that he should also say that he does not want to engage any advocate."$^{32}$ In an other report, charges against 198 in the blast case were dismissed (as published in the Times of India, April 11, 1995) by the Designated Court (Justice J.N.Patil) on the ground that "sufficient material was not there to proceed against those involved in the transportation, loading, and unloading of arms and explosives consignment that
landed at Dighi and Shikhadi (Bombay in January and February 1993), justice Patil stated that dropping of proposed charges by the prosecution under Sections 121 and 121-A of the Indian Penal Code is justified. However, it is expressed that, better late than never the innocent persons are discharged. As on June 30, 1994, the total number of persons arrested under TADA had crossed 76,000. Of these, the police dropped 25 per cent without framing any charges. Trials were completed in about 35 per cent of cases that were actually brought to trial. Ninety five per cent of these trials ended in acquittals, and only about 1 per cent of the arrested ended up being convicted.

The situation in Kashmir was no different. The Government itself has admitted in a reply on 1 January 1991 that the total number of persons arrested was 4593 of which 2044 under TADA. It means nearly 55 per cent were detained under other laws. But in reply to another question, to how many terrorists had been arrested in Kashmir, the answer was 124. It means that out of 2044 arrested under TADA, only 124 were terrorists. The record of Jammu & Kashmir was pathetic. A written reply by the ministry of Home Affairs to the Parliament on 21 February shows that although 20,000 TADA cases were filed no one has been convicted. A newspaper write-up concerning those detained under TADA in Jammu & Kashmir record how, "the Deputy Commissioner and Superintendent of Police had... deposed before the Court that they were made to sign on the dotted line by the
landed at Dighi and Shikhadi (Bombay in January and February 1993), justice Patil stated that dropping of proposed charges by the prosecution under Sections 121 and 121-A of the Indian Penal Code is justified. However, it is expressed that, better late than never the innocent persons are discharged.\textsuperscript{33} As on June 30, 1994, the total number of persons arrested under TADA had crossed 76,000. Of these, the police dropped 25 per cent without framing any charges. Trials were completed in about 35 per cent of cases that were actually brought to trial. Ninety five per cent of these trials ended in acquittals, and only about 1 per cent of the arrested ended up being convicted.

The situation in Kashmir was no different. The Government itself has admitted in a reply on 1 January 1991 that the total number of persons arrested was 4593 of which 2044 under TADA. It means nearly 55 per cent were detained under other laws. But in reply to another question, to how many terrorists had been arrested in Kashmir, the answer was 124. It means that out of 2044 arrested under TADA, only 124 were terrorists. The record of Jammu & Kashmir was pathetic. A written reply by the ministry of Home Affairs to the Parliament on 21 February shows that although 20,000 TADA cases were filed no one has been convicted. A newspaper write-up concerning those detained under TADA in Jammu & Kashmir record how, "the Deputy Commissioner and Superintendent of Police had... deposed before the Court that they were made to sign on the dotted line by the
agencies detaining militants.” Out of 20,000 cases 11,000 cases were dropped after preliminary investigation; 2,000 cases were dropped under Section 169 of Criminal Procedure Code due to lack of evidence, 1,400 persons were freed on parole and 1,500 were granted bail, 778 cases involving 1,504 alleged militants are pending. The rate of conviction is too low under the TADA inspite of large-scale arrests. The low conviction rate testifies to its misuse and abuse. The actual rate of conviction under this Act (according to available figure) is given below.

**TADA: DETENTIONS AND CONVICTIONS**

Table-2

<table>
<thead>
<tr>
<th>Period</th>
<th>Area</th>
<th>Arrested</th>
<th>Convicted</th>
<th>%Age</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>India</td>
<td>5685</td>
<td></td>
<td>0.75</td>
</tr>
<tr>
<td>1985-March 1991</td>
<td>India</td>
<td>35538</td>
<td>318</td>
<td>0.89</td>
</tr>
<tr>
<td>1985- March 1993</td>
<td>India</td>
<td>52998</td>
<td>434</td>
<td>0.81</td>
</tr>
<tr>
<td>1985- Dec. 1990</td>
<td>Gujarat</td>
<td>11957</td>
<td>99</td>
<td>0.82</td>
</tr>
<tr>
<td>1985-March 1992</td>
<td>Punjab</td>
<td>14007</td>
<td>52</td>
<td>0.37</td>
</tr>
<tr>
<td>1985- June 1994</td>
<td>India</td>
<td>76000</td>
<td>760</td>
<td>1</td>
</tr>
</tbody>
</table>

Source:
1. Rajya Sabha Debate; 6 Aug 1991
2. Lok Sabha Debate; 9 Aug 1991
3. Lok Sabha Debate; 12 Aug 1991
4. Lok Sabha Debate; 14 Aug 1993
6. Home Department; Gujarat and Punjab.
TADA And the Police: -

The image of the police in the public eye, by and large, is depressing. Independence brought very little change in the mindset of the police, especially the rank and file. The colonial legacy still haunts the police. The political leaders are equally responsible for sustaining this colonial attitude. The political interference in the administration, more so in the police functioning, have made the police thoroughly inefficient and partisan. This becomes evidence during several human rights groups and civil liberties organizations have focused the blatant misuse of TADA, by the police at the behest of the powers that be.

The case of Shahid Siddiqui, an Urdu Journalists is one such instance. Siddiqui was arrested for publishing an interview with Jagjit Singh Chauhan, the self-styled president of ‘Khalistan’. After his arrest, he was taken to the local police station where the Station House Officer interrogated him and later shifted to the Red Fort for further interrogation and then to the Tihar Jail. According to Rakesh Luthra, one of the Siddiqui’s lawyers, “what is dangerous about the Act is that it seeks to break down the basic tenets of criminal procedure and the rule of evidence that exist to protect the accused. Also the definition of terrorism and disruptive activities is so vague that anyone can be trapped.”
In other instances, two members of the Shrimoni Gurdwara Prabandhak Committee were arrested under the Act of 1985 in Delhi. They belonged to the Prakash Singh Badal faction of the Akali Dal and were arrested on the eve of the election of the Shrimoni Gurdwara Prabandhak Committee President. After the midnight arrests, the police tried to persuade them to talk to Barnala, and when they refused they were locked up for three months. Both men over the age of sixty have not ever been associated in any way with the terrorist groups and yet the police booked them as hard-core members of Jinda’s Group. If this can happen in Delhi under the nose of the country’s most vocal civil rights groups, then one can imagine the fate of the people in the remote parts of the country. This is not an isolated case. There are several such cases of police excesses. Another glaring case was that of sixty-five years old Banubibi Shermhammed Sirahi, cattle grain seller on the street of Ahmedabad, hit by a police bullet accidentally when police opened fire to disperse a mob in Jamalpur area during a communal flare-up. The police booked her under TADA to hide its indiscriminate firing and to prevent the person from launching prosecution proceedings. But due to outcry in the city about her arrest, the administration had to drop the charges. It is common knowledge that Victims of police’s arbitrary use of TADA refused to talk to investigation agency for fear of police reprisals.
Similar veins, four men accused of gang rape, in Chembur, were detained under TADA. The Bombay Police Commissioner was honest enough to admit that, he had, indeed, authorized the detention under the TADA of the suspects in gang rape case, to check the increasing violence against women, and that the ordinary law of the land is often gets defeated by the meticulous application of the law of evidence, and that evidence in such cases, is difficult to procure with the result, the accused go scout free. However convincing the argument might sound, recourse cannot be taken to TADA cases, which are amply covered by the Indian Penal Code. The problem with the ordinary law should be overcome by suitably amending the law of Evidence and simplifying the procedures. TADA is no remedy, in fact, it is worse than the malady. The damage that TADA has caused is unimaginable. For example, in a marriage dispute where, bride’s father lodged a case against the groom’s family, TADA was invoked against groom’s brother. Similarly, even persons carrying cartridges were detained under TADA. The police and the administration are looking for newer ways of inflicting punishment on people under the pretext of combating terrorism. One that has come more and more frequently into use is trial by the public through the press: in short a lynching. “Whether it is a Sanjay Singh, a V.N.Kirloskar, a Rajinder Sethia, and a Kirti Ambani to V. Krishnamurty, the police destroy them by releasing juicy allegations to the press while they are under interrogation, long before they frame a charge, and therefore when, technically
the case is not sub-judice. After this is done it no longer matters whether a sufficiently plausible case is made that can even be admitted for trial. Those whom the police or their political masters deem guilty have been punished.”  

Under the TADA, the confession made before the police is admissible in the Court of Law. This was the most hated and very crucial Section of the Act and very often it was misused. For example, in New Delhi the police picked up Karam Singh, Harnik Singh, Baldev Singh, Ujjaggar Singh and others in 1987 and charged them under the Sections 3 and 4 of the TADA. The Deputy Commissioner of Police apparently recorded confessions of three of them, Baldev Singh, Ujaggar Singh, and Karam Singh in September 1987. More than twelve years later, the additional Sessions Judge, R.C.Yaduvanshi observed that these confessional statements were ‘untrust worthy’ and ‘unreliable’. He observed, “The DCP is not aware about the place where the statements were recorded, by whom they were recorded, and the fact that there is nothing on record to show that sufficient time was given to the accused.” In short, nothing to dispel doubts that the accused had made the statement voluntarily. The DCP concerned claimed that somebody else at his instance recorded the statement. But somehow he could not name the scribe even on seeing the confessional statements. And so after languishing in jail for 12 years the ten alleged ‘terrorist’ were finally acquitted.
It is rather curious that persons were, first, detained under TADA but when the charges could not be proved in the Designated Courts, they were tried under the ordinary law. The case of Sukhdev Singh alias Sukha and Harijinder Singh alias Jinda the assassins of General Vaidya, fall in this category. Similarly, in the Rajiv Gandhi assassination case, the CBI arrested 27 persons under different Sections of TADA. They were kept in alleged illegal custody between six to sixteen days before being produced before a court, which granted police remand for 60 days. The outcome of custody were 17 confessions. One accused died in custody. All confessions were later withdrawn. Complaints of torture were made. However these confessions become the basis of conviction. All the 27 accused were sentenced to death. But on an appeal to the Supreme Court, the Court acquitted all 27 of charges under TADA. Nineteen were acquitted of murder charges. Four of the convicted face death sentence, the basis of the conviction is the same 17 confessions extracted by the police.

A scrutiny of various judgements in TADA cases brings to surface the police highhandedness of misleading or false statement. A typical case of Virar Police Station in which the Virar police changed the order after judgement was partly delivered by Justice Sujata Manohar and Justice B.N. Srikirshna. When it had become clear that the Section 5 (possession of arms) of the TADA Act was not applicable to the cases, the police
issued an order to apply Section 3 (committing a terrorist act) and field an affidavit to justify it, even though lawyer conceded that the facts did not justify applying Section 3. In Uttam Ramaji Hulavale justice M.L. Pendse and A.D. Mane, found that a man detained under the act as a ‘known’ criminal involved in seven cases (according to the Lonavale Police Inspector who arrested him), had only one case pending against him. The Judges found that the detenu had been acquitted in four cases. He had been convicted in one case in which he had gone in appeal and which was still pending, while the sixth case was awaiting trial. The seventh case was the one for which he had come before the judges. The judges concluded that there was no ‘merit’ in the police claim that he was a ‘known criminal’. The judges also accepted the petitioner’s contention that the offence, with which he was charged, threatening and chasing a driver with knife, was not of so serious a nature as to merit the application of the TADA. They agreed that the police had applied the Act because they felt aggrieved when he was granted bail.

There are several such instances in which police failed to provide evidence against the detainees, and complete investigations within the stipulated time. Few examples are available to show the inefficiency of the police. Maulana Massod Azhar, a leader of Harkat-ul Ansar, was first arrested in February 1994 under TADA and the challan was not produced in the courts even after six years. The designated court, for want of evidence,
finally dismissed the case under TADA. The case for which he is actually facing trial is one of attempted jailbreak. Mushtaq Ahmad Zargar, Known to be a leader of Al Omar-Mujahadeen, has been facing trial in a TADA case since 1992 and challan is yet to be produced. Ahmad Umar Syed Sheikh, was arrested under different Sections of TADA in 1994 and the charge sheet was not filed even after five years. Despite Section 17 of TADA, which gives precedence to TADA cases over other cases, these cases are not being disposed off for many years.

According to the estimates provided by the Peoples Union for Democratic Rights (PUDR), which conducted, a survey of TADA detenus, over 50,000 persons had been detained under this provision so far. As against this, hardly 500 were convicted. There were as many as 15,000 bail applications still pending in various Courts. Yet another sensitive point on which the Government is on the dock is the allegation made by the Minorities Commission that the TADA provisions were mostly being used as a weapon against members of the minority community and has argued upon the Government to consider its immediate repeal. The Chairman, National Human Rights Commission, Justice Ranganath Mishra, said that it would be sensible not to renew the TADA in view of its gross misuse in various parts of the country. He pointed out that though about 78000 arrests were made under TADA during the last ten years, the rate of conviction was just 1%. Mishra has been of the view
that the Act, under which most of the cases have so far been registered, should be repealed in toto because it is invoked even in States not touched by terrorism at all. He said time and again that if the repeal of the Act is not possible at least its “obnoxious provisions” should be removed. At the Madras convention, Mishra threatened to sue the Government in Court on TADA, if the Government will not take appropriate action immediately to save the rights of the people.\(^{55}\) The threat caused lot of embarrassment to the Ministry, which services the NHRC in terms of looking after its various administrative requirements. Due to strong protest against the Act and demand of its removal from the statute book, the Supreme Court said that TADA detenu had “absolute right” for bail if no charge sheet was filed within 180 days of the arrest. The judgement pressurized the Government to set up a review panel. But unfortunately there is no central Government review panel so far but some States did set up such panels.

The Delhi Government had set up a review panel for TADA detenus. The panel found that three in every four cases of arrest under this measure was unnecessary. The Delhi Government has, consequently, ordered its director of prosecution to withdraw all TADA charges in 145 of the 200 cases reviewed by the panel.\(^{56}\) This is the first batch of TADA cases pending trial in various courts to be reviewed. The other 750 old TADA cases pending trial are also similarly reviewed. The Government of Andhra Pradesh has withdrawn operation of the TADA provisions against
145 of 153 TADA cases registered in the city.\textsuperscript{57} The 145 cases of the city pertain to communal violence during 1990, 1991 and 1992. The Government has also dropped TADA provisions in respect to the cases against Progressive Organization of Women leader K. Sandhya and 56 others during the electioneering of Prime Minister at Nandyal in November 1991.\textsuperscript{58} In Rajasthan, the Government withdrew all cases registered under the now-defunct TADA act against 41 people in Jaipur, Kota and Bikaner districts.\textsuperscript{59} The majority of these cases pertained to communal violence in the State in 1989 and early nineties. Official sources said while the cases against some of the accused would be withdrawn completely, the case booked against those found in possession of incriminating material are likely to be tried under other laws as suggested by the review panel.\textsuperscript{60} A review committee in the State (Uttar Pradesh) ordered the release of 240 out of 1,146 people detained under the Act in the State.\textsuperscript{61} The Government declared that TADA would be revoked in all cases in which the accused were held for giving “shelter to terrorists” as; experience has shown that most often people are forced to shelter terrorists.\textsuperscript{62}

**TADA after its dropout:**

Two years after the lapse of TADA in 1997, the number of persons under arrest was 4,528. Charges were dropped in 6 percent of these cases. At the end of the year, challans had been filed only in 5 per cent of these cases and 90 per cent are still
under investigation. There were, 6,709 TADA under trials in the same year. Trials were completed only in about 6 per cent of these cases, 65 per cent of these resulted in acquittals. That amounts to conviction of barely 2.5 per cent.

**DISPOSAL OF TADA CASES BY THE COURTS**

Table –3

<table>
<thead>
<tr>
<th>YEAR</th>
<th>TOTAL NUMBER OF CASES FOR TRIAL (including pending cases)</th>
<th>NUMBER OF CASES Compounded/Withdrawn</th>
<th>In which trial were completed Convicted</th>
<th>Acquitted/Discharged</th>
<th>PENDING TRIAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>1994</td>
<td>6688</td>
<td>241</td>
<td>359</td>
<td>422</td>
<td>5666</td>
</tr>
<tr>
<td>1995</td>
<td>2459</td>
<td>10</td>
<td>40</td>
<td>92</td>
<td>2317</td>
</tr>
<tr>
<td>1996</td>
<td>6979</td>
<td>27</td>
<td>48</td>
<td>465</td>
<td>6439</td>
</tr>
<tr>
<td>1997</td>
<td>6709</td>
<td>NA</td>
<td>14</td>
<td>261</td>
<td>NA</td>
</tr>
<tr>
<td>1998</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>1999</td>
<td>2661</td>
<td>6</td>
<td>36</td>
<td>157</td>
<td>2462</td>
</tr>
</tbody>
</table>

## DISPOSAL OF TADA CASES BY THE POLICE

### Table 4

<table>
<thead>
<tr>
<th>YEAR</th>
<th>TOTAL NUMBER OF CASES FOR INVESTIGATION (including pending cases)</th>
<th>NUMBER OF CASES IN WHICH Investigation was refused</th>
<th>Investigation was completed</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Charge Found</td>
<td>False</td>
</tr>
<tr>
<td>1994</td>
<td>8408</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>1995</td>
<td>6120</td>
<td>06</td>
<td>63</td>
</tr>
<tr>
<td>1996</td>
<td>5805</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>1997</td>
<td>4528</td>
<td>272</td>
<td>NA</td>
</tr>
<tr>
<td>1998</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>1999</td>
<td>1130</td>
<td>NA</td>
<td>08</td>
</tr>
</tbody>
</table>

**Source:** National Crime Bureau Records

The poor conviction rate is largely due to the failure on the part of the police to file the charge sheets. More than five years
after the repeal of the TADA, trials have yet to be completed in 4,958 TADA cases. Of these cases, 1,384 are still being investigated. There are about 13,345 cases to 14,446 cases are still awaiting trial.

A survey of 10-years experience of TADA presents the most sordid picture as far as human rights and fundamental freedoms are concerned. The Act was enacted to meet the challenges posed by militancy in Punjab but it failed miserably in controlling the menace referred to as terrorism. The damage done by the misuse of TADA is irreparable. Every extension of TADA has emboldened the authorities to rope in more people. The National Human Rights Commission, Human Rights activists and minority groups came down heavily on the Act for the gross violation of lives and liberties under the pretext of national interest and security perceptions. It was often invoked to settle political scores. Even cases, which could have been tried under the ordinary law, were booked under TADA to keep people on tenterhooks. In Pune some college going boys accused of eve teasing found themselves charged under TADA. In Haryana, a jobless youth of impeccable character languishing in the jail for some years until Supreme Court relieved him of TADA and ordered his trial under the bailable arms Act.

Under the Anglo-Saxon Jurisprudence, which India follows, everyone is innocent unless, proved guilty. The Act reversed the
dictum---- that everyone is a terrorist unless proved contrary to it. The Act has been largely counterproductive. Not more than that mere 1% of the cases under TADA has ended up in conviction. There is some element of truth in the assertion of the eminent lawyer, Soli Sorabji, that for every terrorist arrested under TADA then are 100 innocent citizens arrested under the same Act and languishing in jails. The most obnoxious part of the Act was that a confession before police officer is admissible as evidence. Section 15, which is violative of the Indian Evidence Act. The Act had also made bail extremely difficult. Mere possession of unauthorized weapon in a notified area becomes punishable with jail term of not less than five years.
REFERENCE:


2. The Indian Express, New Delhi, 20 August 1994.

3. The Times of India, New Delhi, 20 August 1994.

4. The Indian Express, New Delhi, 22 August 1994; The Times of India, New Delhi, 23 August 1994.


7. Madhukar (MLA) of Bombay Legislative Assembly.


9. Shahabuddin Gory, Jawaharlal Nehru University, Delhi; Wisdom Kamodang, Delhi University, Delhi.

10. D. Veerasekaran, High Court, Madras.

11. Khalid Ansairi, Midday, Bombay; Dilwant Singh Dhillon, Blast, Punjab.


13. Justice Ajit Singh Bains, PHRO


17. *Ibid*.


22. *Ibid*.


27. *Ibid*.


32. Letter No. 17222 of 1993 from the Registrar, City Sessions Court, Gr. Bombay, to the Sr. Inspector of Police, Worli Police Station, Bombay, informing the latter of the order passed on 7 May 1993 by the Judge, Designated Court, Gr. Bombay.


34. “20,000 TADA cases filed in Jammu & Kashmir, but none convicted,” *The Times of India*, New Delhi, 22 February 2000.


37. *Ibid*.

38. *Ibid*.


43. Punishment for terrorist acts. – (1) whoever with intent to overawe the Government as by law established to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substance or fire-arms or other lethal weapons or poisons or noxious gases or other chemical or by another substances (whether biological or otherwise) of a hazardous nature in
such a manner as to cause, or as is likely to cause, death of, injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community., or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist Act. (2) Whoever commits a terrorist act, shall, - (i) if such act has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to fine; (ii) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine; (3) Whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitate the commission of, a terrorist act or any act preparatory to a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine. (4) Whoever harbours of conceals, or attempts to harbour or conceal, any terrorist shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also liable to fine.

44. punishment for disruptive activities. - (1) Whoever commits or conspires or attempts to commit or abets, advocates, advises, or knowingly facilitates the commission of, any disruptive activity or any act preparatory to a disruptive activity shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine. (2) For the purpose of sub-section (1), “disruptive activity” means any action taken, whether by act or by speech or through any other media in any other manner whatsoever,- (i) which questions, disrupt or is intended to disrupt, whether directly or indirectly, the sovereignty and territorial integrity of India; or (ii) which is intended to bring about or support any claim, whether directly or indirectly, for the cession of any part of India or the secession of any part of India from the Union. (3) Without prejudice to the generality of the provisions of sub-section (2), it is hereby declared that any action taken whether by act or by speech or through any other media or in any other manner whatsoever, which - advocates, advises, suggests or incites; or predicts, prophesies
or pronounces or otherwise expresses, in such manner as to incite, advise, suggest or prompt, the killing or the destruction of any person bound by oath under the Constitution to uphold the sovereignty and integrity of India or any public servant shall be deemed to be disruptive activity within the meaning of this section. (4) Whoever harbours or conceals, or attempts to harbour or conceal, any disruptionist shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.


46. The Designated Court had power to transfer cases to regular Courts under Section 19 of the Act which provides, Where, after taking cognizance of any offence, a Designated Court is of opinion that the offence is not triable by it, it shall notwithstanding that it has no jurisdiction to try such offence, transfer the case for trial of such offence to any Court having jurisdiction under the Code and the Court to which the case is transferred may proceed with the trial of the offence as if it had taken cognizance of the offence.


49. *Ibid*.

50. 180 days fixed by the Supreme Court.


53. *Ibid*.

55. *The Indian Express*, New Delhi, 26 August 1994.


64. *The Indian Express*, New Delhi, 30 December 1999.


68. Certain confessions made to police officer to be taken into consideration under the Act which provides, (1) notwithstanding anything in the Code or in the Indian Evidence Act, 1872, but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such
person for an offence under this act or rules made thereunder. (2) The police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily.
Conclusion
CONCLUSION

"Restrictive legislation is almost always a signal of repressive institutional change, but is, of course, not the cause of it ... the major focus of the defense of the citizen as a person can only be on procedure, or, as we call it in our society, due process."

Stanley Diamond.

The concept of Rule of Law and Constitutionalism was evolved with a view to establish supremacy of law and to strengthen democracy, which in the course of time, have defied both. Their implications were grossly misinterpreted and misused. During the freedom struggle, the Rowlett Act was enacted to suppress the activities of the revolutionaries, which was rightly condemned as anti-people and anti-freedom. But curiously in a different form, the law finds a convenient place in the Constitution in the name of Preventive Detention. Its incorporation was justified in the Constituent Assembly by the post-partition scenario in the country. So far so good. But its continuation even after decades of partition is difficult to comprehend. What was thought to be a temporary provision became a permanent part of the Constitution. Its unsuccessful challenge in *A. K. Gopalan* gave the much-needed judicial fillip to its continuation. There can, however, be no two opinions on the need of such a law in exceptional circumstances, where the very existence of the State is in danger and resort to such extraordinary measures become indispensable, but even in those
conditions the compulsions of democracy demand effective safeguards against its possible misuse. But that was not to be. What was the more surprising was that after lapse of the Preventive detention Act on December 31, 1969, even more harsh laws were enacted like National Security Act and the Terrorist And Disruptive Activities Act under the grab of curbing anti-national activities, black marketing, smuggling and terrorism. All democratic norms in the process, were swept under the carpet.

The nation, benumbed by the shock over Indira Gandhi’s assassination and its aftermath and the unending terrorism in Punjab, necessitated positive and concrete steps and laws to cope with violence and disruption. In May 1985, a series of bomb blasts were witnessed by the nation in Delhi and other places. A large number of innocent people in buses and public places were killed, generating widespread revulsion. These incidents obviously demanded immediate action to nip the mischief in the bud and the result was the enactment of the TADA. The sharp rise in the terrorist activities in the country also motivated the Government to frame an extra-ordinary law. The Act received more or less unanimous approval of the Parliament in 1985 as it was convinced about the lofty objectives with which the Act was proposed. In 1987, it was reintroduced along with a Bill relating to President’s Rule in Punjab. In 1989, it was introduced along with the Chandigarh Disturbed Areas (Amendment) Bill. And lastly in 1993, it was introduced along with the Bill amending the
Indian Penal Code (IPC) to enhance the punishment for kidnapping. In all these extensions, the reasons cited were different. Specific events or problems (transistor bombs, Naxalites, LTTE, bomb blast in Bombay and Calcutta) and specific problem States like Punjab, later Kashmir and Assam were stated as reasons for the continuation of the Act. On all occasions, the Bill for extending TADA was introduced along with some other Bill, which helped in diluting the debate in Parliament. But the context chosen by the Government and the timing seem to have had some effect on the quality of the discussions in the House. On all occasions, the Act was introduced along with a statement of objects and reasons and was accompanied by a detailed defence of the Act by the Ministers (A. K. Sen in 1985, Butta Singh and P. Chidambaram in 1987 and 1989 respectively, S. B. Chavan in 1991 and 1993). Surprisingly, States, which did not figure in the Government’s specified list of ‘problem states’, have extensively used the Act. The most notable example was Gujarat, which tops in detaining persons under the Act. The Punjab DGP, K. P. S. Gill’s, claim that it has brought tranquility to the State and that it was no longer needed went unheeded. Moreover, the number of States that have used the Act has increased. In 1985, the Government cited 2 Union Territories and 2 States. Two years later 2 more States were added. In 1991 it was 17. And at the time of its repeal, the Act was in force in 22 out of 25 States and 2 out of 7 Union Territories. The exceptions were Kerala, Orrisa, Sikim, Andaman & Nicobar Islands, Dadra
and Nagar Haveli, Daman & Diu, Lakshadweep and Pondicherry. A close scrutiny of the figures reveals that 30-60% of the people booked under the Act belonged to those States that did not figure in the Government's list of 'problem States' at the specified time. These States took recourse to TADA under the pretext of protecting the unity and integrity of the country.

The Act has brought drastic changes in the bail provisions and trail procedures. Some of those changes were unheard of in the annals of Indian jurisprudence as well as in the International standards set by the United Nations. The well-established criminal justice standards were thrown in the dustbin. The Act had to be given more longevity and wider operation on account of the increasing terrorist and disruptive activities, very soon, the Act degenerated into worst form of tyranny by the police, who utilized its provisions to keep persons in custody for longer periods, even those who were not even remotely connected with terrorist and disruptive activities. The TADA mantra paid rich dividends to police. The long and cumbersome trial, poor rate of convictions, have made a mockery of human rights. The attitude of judiciary was not very encouraging. The Judges in Kartar singh (1994) put their seal of approval on the law, that the exigencies of the situation demanded an extra-ordinary law. The Court's attitude reminds one of Lord Atkin who held that "some of his brothers on the Bench were more executive-minded than the executive." A number of human rights organizations
including the National Human Right Commission have highlighted, time and again, the misuse of the TADA by organizing meetings and campaigns and by volunteering to help people who are falsely implicated under the Act.

So indiscriminate have been the arrests that 92 per cent of the 80,000 detainees has been let off in the last ten years. Doubtlessly, terrorism is neither legally justified nor ethically acceptable. It is a crime against humanity and a challenge to the credentials of the State. The killing of thousands of people by the terrorists can never be justified. It is true that the state has to equip with stringent laws to deal with such acts, but it is all the more necessary to guard against hauling up of innocents on mere suspicion or settling political scores or searing the opposition. To cite one example, the State of Gujarat, which has no history of terrorism, has detained some seventeen hundred people under Terrorist and Disruptive Activities (Prevention) Act. It is this misuse that has made the bonafides of the Government suspect inviting criticism from every section of society. At the meeting of Chief Ministers in New Delhi on May 5, 1995, majority of State demanded its immediate repeal.

Infact, the entire exercise that the Home Ministry has been conducting for renewing Terrorist and Disruptive Activities (Prevention) Act is futile because the law itself is counter productive. It smacks of Bonapartism that has become the
distinguishing feature of the Congress since its authoritarian rule during the emergency approximately 27 years ago. In a note to the Prime Minister, the Home Ministry has rationalized the opposition to Terrorist and Disruptive Activities (Prevention) Act as a natural resistance to any ‘special act’. But during the course of the operation of TADA in the country, the Court did succeed in extending some control over the administrative action. In Sunjay Dutt case (1994), the Supreme Court held that mere possession of an unauthorized weapon in a notified area does not link one to Section 5 of the TADA. The investigation agency or the State must prove that there was ‘conscious’ possession of unauthorized arms and ammunition with the intention to disturb the public order. The Court recognized the value of personal liberty and freedom in a free and democratic society and thus sought to mitigate the rigours of the law to the extent they could within the limits of its limited jurisdiction.

It is a fairly settled principle that an order of preventive detention is liable to be struck down if it has been made for the purpose other than those indicated in the law. In TADA, the objective was to curb the terrorists and disruptive activities but it was used for other purposes, often with political overtones, with greater impunity. Thus, the Court has been required to consider whether the use of preventive detention in particular cases is for the purpose indicated in the Statute and the most frequent question is, whether the grounds indicated show that the order of
detention has been made for the same offence as mentioned in the objectives of the Act. The wall of separation created by the Supreme Court between Article 19 and 22 of the Constitution had made it difficult to discern the limit, which the civil right imposes on the exercise of the power of detention. It is submitted that in the absence of such realization it has not been possible to evolved adequate criterion to control the exercise of the power of detention.

In preventive detention cases, the inquiry is limited to letter of the order or the grounds supplied or the returns filed in the Habeas Corpus petitions. The scope of judicial scrutiny is thus, limited. It is seen that there is no uniform pattern in detention orders. The only uniformity is that the detaining authority (in general) has been meticulous in preparing the grounds of detention in strict conformity with the phraseology of the Statute thereby reducing the courts to a helpless position. The total absence of substantive restraint in the implementation procedure of preventive detention laws often creates problems. The judiciary must not shirk from its responsibilities to strike a balance between a citizen's right to personal liberty and the national interests. The Court should evolve effective restraints through which it can control and monitor the action of the executive from unwarranted transgression. The apprehension of violation of rights and victimization always haunts people under special laws, be it the Preventive Detention Act, the Defence of
India Act, the Maintenance of Internal Security Act, the National Security Act, the Terrorist and Disruptive Act or the latest Prevention of Terrorism Act. The wide powers that these Acts confer on the executive are the main concern. The searches and seizures, undertaken under these laws, have caused avoidable harassment to citizens, very often, to innocent citizens. These detention laws negate the ideals enshrined in the Human Rights Documents, the Universal Declaration of Human Rights, International covenant of Civil and Political Rights and International Covenant of Economic, Social and Cultural Rights, to which India is a signatory. As far as possible the penal laws of the country, which provide remedy for every malady, should be used to deal with disruptive forces; it is only when the situation becomes extremely grave, resort can be taken to such extraordinary laws, for in such a situation the need to protect national sovereignty becomes paramount.

The following improvements may, perhaps, help in putting some premium on the misuse of powers by the detaining authority under such special laws. First, a provision may be incorporated to empower the Designated Courts and the Supreme Court to award damages or compensation in case of victimization of persons under preventive detention laws. The present safeguards are awfully inadequate to protect the rights of citizens. Second, terrorism is a complex problem. It has socio-economic and political dimensions. Lack of definition of terrorism and terrorists
have further added to the complications. In such a situation, men cannot be made moral and law abiding by legislation alone. The root of terrorism has to be addressed in all sincerity with a view to uproot the causes and the circumstances leading to such activities. Detention laws have failed to act as deterrents to check the menace of terrorism such laws at best can possible cosmetic remedies. Therefore, what is needed is collective and concerted action on the part of the Government, non-governmental organizations, bar and bench, human rights organizations, to tackle the problem from a human point of view rather than resorting to such laws. Third, frequent review by a high-powered committee, of the laws of detention in the fast changing circumstances is a desideratum. Fourth, the Government should set up special benches for preventive detention cases in the Supreme Court and High Courts instead of referring these cases to the specially constituted Designated Courts. The idea of special courts tends to create a wrong impression on the detainees that they may not get justice at these specially constituted courts. The impression may be quite unfounded yet the State has a responsibility to clear such misgivings. Fifth, the scientific developments and inventions like wallet cameras, microphones, lie detectors, computers, should be used with a view to expedite the investigation process. Prolong detentions, on one pretext or the other, strikes at Rule of Law and democratic principles. It is for this reason that the apex court recognized right to speedy trial as implicit in Article 21 in Hussain Ara Khatoon v. State of
Conclusion

Bihar. The inordinate delays on the part of prosecution in putting up the challans adding to the miseries of the detainees also care for serious consideration. Sixth, the Confessions made by an accused to the police should not be admissible as evidence under any law—ordinary or emergency. The police methods for extracting evidence are, too well known for any comment. One remedy to check the police menace is to be incorporate a provision in the detention laws making the police liable to action if they act *malafide* or influenced by frivolous grounds. There is a need to limit the doctrine of sovereign immunity even in such special laws. Seventh, under normal circumstances detention laws should be confined to only the disturbed areas and should be revoked as soon as normalcy is restored. It is not necessary to extend these laws to the entire country keeping the entire population on tenterhooks. Finally, to bring in greater transparency and to clear the clouds surrounding the detention laws, a list of detainees be published providing information about them. That may, perhaps, act as a deterrent to the possible offenders in future.
REFERENCE:


Appendix
APPENDIX

[THE] MAINTENANCE OF INTERNAL SECURITY ACT, 1971
(Act No. 26 of 1971)*

[2nd July, 1971.]

An Act to provide for detention in certain cases for the purpose of maintenance of internal security and matters connected therewith.

Be it enacted by Parliament in the Twenty-second Year of Republic of India as follows:-

[*] For statement of Objects and Reasons, see Gaz. of India, 3-6-1971, pt II, sec. 2, Extra., p. 276.

1. Short title and extent. – (1) This Act may be called the Maintenance of Internal Security Act, 1971.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

2. Definitions. – In this Act, unless the context otherwise requires,

(a) “Appropriate Government” means, as respect a detention order made by the Central Government or a person detained under such order, the Central Government, and as respect a detention order made by a State Government or by an officer subordinate to a State Government or as respect a person detained under such order, the State Government;

(b) “detention order” means an order made under section 3;

(c) “foreigner” has the same meaning as in the Foreigner Act, 1946;

(d) “State Government”, in relation to a Union territory, means the administrator thereof.

3. Power to make order detaining under certain persons. – (1) The Central Government or the State Government may, -

(a) if satisfied with respect to any person (including a foreigner) that with a view to preventing him from acting in any manner prejudicial to-

(i) the defence of India, the relations of India with foreign powers, or the security of India, or

(ii) the security of the State or the maintenance of public order, or

(i) the maintenance of supplies and services essential to the community, or

(b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India, it is necessary so to do, make an order directing that such person be detained.

(2) Any of the following officers, namely: -

(a) District Magistrates,
(b) Additional District Magistrates specially empowered in this behalf by the State Government,

(c) Commission of Police, wherever they have been appointed, may, if satisfied as provided in sub-clause (ii) and (iii) of clause (a) of sub-section (1), exercise the power conferred by the said sub-section.

(3) When any order is made under this section by an officer mentioned in sub-section (2), he shall forthwith report the fact to the State Government to which he is subordinate together with the grounds on which the order has been made and such other particulars as in his opinion have a bearing on the matter, and no such order shall remain in force for more than twelve days after the making thereof unless in the meantime it has been approved by the State Government:

Provided that where under section 8 the grounds of detention are communicated by the authority making the order after five days but not later than fifteen days from the date of detention, this sub-section shall apply subject to the modification that, for the words "twelve days", the words "twenty two days" shall be substituted.

(4) When any order is made or approved by the State Government under this section, the State Government shall, within seven days, report the fact to the central Government together with the grounds on which the order has been made and such other particulars as in the opinion of the State Government have a bearing on the necessity for the order.

4. Execution of detention orders. — A detention order may be executed at any place in India in the manner provided for the execution of warrants of arrest under the Code of Criminal Procedure, 1898.

5. Power to regulate place and conditions of detention. — Every person in respect of whom a detention order has been made shall be liable—

(a) to be detained in such place and under such conditions, including conditions as to maintenance, discipline and punishment for breaches of discipline, as the appropriate Government may, by general or special order, specify; and

(b) to be removed from one place of detention to another place of detention, whether within the same State or in another State, by order of the appropriate Government:

Provided that no order shall be made by a State Government under clause (b) for the removal of a person from one State to another State except with the consent of the Government of that State.

6. Detention orders not to be invalid or inoperative on certain grounds. — No detention order shall be invalid or inoperative merely by reason—

(a) that the person to be detained thereunder is outside the limits of the territorial jurisdiction of the Government or Officer making the order, or

(b) that the place of detention of such person is outside the said limits.

7. Powers in relation to absconding persons. — (1) If the Central Government or the State Government or an officer specified in sub-section (2) of section 3, as the case may
be, has reason to believe that a person in respect of whom a detention order has been made has absconded or is concealing himself so that the order cannot be executed, that Government or officer may

(a) make a report in writing of the fact to a Presidency Magistrate or a Magistrate of the first class having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of sections 87, 88 and 89 of the Code of Criminal Procedure, 1898, shall apply in respect of the said person and his property as if the order directing that he be detained were a warrant issued by the Magistrate;

(b) by order notified in the Official Gazette direct the said person to appear before such officer, at such place and within such period as may be specified in the order; and if the said person fails to comply with such direction he shall, unless he proves that it was not possible for him to comply therewith and that he had, within the period specified in the order, informed the officer mentioned in the order of the reason which rendered compliance therewith impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to one year or with fine or with both.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, every offence under clause (b) of sub-section (1) shall be cognizable.

8. **Grounds of order of detention to be disclosed to persons affected by the order.**

- (1) when a person is detained in pursuance of detention order, the authority making the order shall, as soon as may be, but ordinarily not later than five days and in exceptional circumstances and for reason to be recorded in writing, not later than fifteen days from the date of detention, communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the appropriate Government.

- (2) Nothing in sub-section (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose.

9. **Constitution of Advisory Board.**

- (1) The Central Government and each State Government shall, whenever necessary, constitute one or more Advisory Boards for the purpose of this Act.

- (2) Every such board shall consist of three person who are or have been or are qualified to be appointed as, Judges of High Court, and such person shall be appointed by the Central Government or the State Government, as the case may be.

- (3) the appropriate Government shall appoint one of the members of the Advisory Board who is, or has been, a Judge of a High Court to be its chairman, and in the case of a Union territory the appointment of Advisory Board, of any person who is Judge of the High Court of a State shall be with the previous approval of the State Government concerned.

10. **Reference to Advisory Board.**

- Save as otherwise expressly provided in this Act, in every case where a detention order has been made under this Act, the appropriate Government shall, within thirty days from the date of detention under the order, place before the Advisory Board constituted by it under section 9 the grounds in which the order has been made and the representation, if any, made by the person affected by the order,
11. Procedure of Advisory Boards. — (1) The Advisory Board shall, after considering the material placed before it and, after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if, any particular case, it considers it essential so to do or if the person concerned desires to be heard, after hearing him in person, submit its report to the appropriate Government within ten weeks from the date of detention.

(2) The report of the Advisory Board shall specify in a separate part thereof the opinion of the Advisory board as to whether or not there is sufficient cause for the detention of the person concerned.

(3) Where there is a difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board.

(4) Nothing in this section shall entitle any person against whom a detention order has been made to appear by any legal practitioner in any matter connected with the reference to the Advisory Board, and the proceeding of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential.

12. Action upon the report of Advisory Board. — (1) In any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit.

(2) In any case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith.

13. Maximum period of detention. — The maximum period for which any person may be detained in pursuance of any detention order which has been confirmed under section 12 shall be twelve months from the date of detention.

Provide that nothing contained in this section shall affect the power of the appropriate Government to revoke or modify the detention order at any earlier time.

14. Revocation of detention orders. — (1) without prejudice to the provisions of section 21 of the General Clause Act, 1897, a detention order may, at anytime, be revoked or modified.

(a) Notwithstanding that the order has been made by an officer mentioned in sub-section (2) of section 3, by the State Government to which that officer is subordinate or by the Central Government.

(b) Notwithstanding that the order has been made by a State Government, by the Central Government.
(2) The revocation or expiry of a detention order shall not bar the making of a fresh detention order under section 3 against the same person in any case where fresh facts have arisen after the date of revocation or expiry on which the Central Government or a State Government or an officer, as the case may be, is satisfied that such an order should be made.

15. Temporary release of person detained. — (1) The appropriate Government may, at any time, direct that any person detained in pursuance of a detention order may be released for any specified period either without conditions or upon such conditions specified in the direction as that person accepts, and may, at any time, cancel his release.

(2) In directing the release of any person under sub-section (1), the appropriate Government may require him to enter into a bond with or without sureties for the due observance of the conditions specified in the direction.

(3) Any person released under sub-section (1) shall surrender himself at the time and place, and to the authority, specified in the order directing his release on canceling his release, as the case may be.

(4) If any person fails without sufficient cause to surrender himself in the manner specified in sub-section (3), he shall be punishable with imprisonment for a term which may extend to two years, or with fine or with both.

(5) If any person released under sub-section (1) fails to fulfill any of the conditions imposed upon him under the said sub-section or in the bond enter into by him, the bond shall be declared to be forfeited and any person bound thereby shall be liable to pay the penalty thereof.

16. Protection of action taken in good faith. — No suit or other legal proceeding shall lie against the Central Government or a State Government, and no suit, prosecution or other legal proceedings shall lie against any person, for anything in good faith done or intended to be done in pursuance of this Act.

17. Duration of detention in certain cases of foreigners. — (1) Notwithstanding anything contained in this Act, any foreigner in respect of whom an order of detention has been made, this Act may be detained without obtaining the opinion of the Advisory Board for a longer than three months, but not exceeding two years from the date of detention, in any of the following classes of cases or under any of the following circumstances, namely:

(a) where such foreigners enter or attempts to enter the territory of India or is found therein with arms, ammunition or explosives, or

(b) where such foreigners enter or attempts to enter a notified area or is found therein in contravention of section 3 of the Criminal Law Amendment Act, 1961, or

(c) where such foreigners enters or attempts to enter the local limits or is found within the local limits of such area adjoining the border of India as may be specified in an order made under section 139 of the Border Security Force Act, 1968, without a valid travel documents, or
(d) where the Central Government has reason to believe that such foreigner commits
or is likely to commit any offence under the Official Secrets Act, 1923.

(2) In the case of any foreigner to whom sub-section (1) applies section 10 to 13 shall have
effect subject to the following modifications, namely: -

(a) In section 10, for the words “ shall with thirty days” the words “ may, at any time
prior to but in no case later than three months before the expiration of two years” shall
be substituted;

(b) In section 11, -

(i) in sub-section (1), for the words “ from the date of detention”, the words “ from the
date on which reference is made to it” shall be substituted;

(ii) in sub-section (2), for the words “ the detention of the person concerned”, the
words “ the continued detention of the person concerned” shall be substituted;

(c) in section 12, for the words “ for the detention” in both the places where they
occur, the words “for the continued detention” shall be substituted;

(d) in section 13, for the words “ twelve months”, the words “three years” shall be
substituted.

18. Repeal and savings. – (1) The Maintenance of Internal Security Ordinance, 1971,
is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said
Ordinance shall be deemed to have been done or taken under the corresponding
provisions of this Act as if this Act had come into force on the 7th day of May 1971.
THE TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT, 1987
(Act No. 28 of 1987)*

[3rd September, 1987.]

An Act to make special provisions for the prevention of, and for coping with, terrorist and disruptive activities and for matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Thirty-eighth Year of the Republic of India as follows:

PART I (PRELIMINARY)

1. Short title, extent, application, commencement, duration and savings. –

(1) This Act may be called the Terrorist and Disruptive Activities (Prevention) Act, 1987.

(2) It extends to the whole of India, and it applies also-
   (a) to citizen of India outside India;
   (b) to person in the service of the Government, wherever they may be; and
   (c) to person on ships and aircraft registered in India, wherever they may be.

(1) Section 5, 15, 21 and 22 shall come into force at once and the remaining provisions of this Act shall be deemed to have come into force on the 24th day of May 1987.

(2) It shall remain in force for a period of two years from the 24th day of May 1987, but its expiry under the operation of this sub-section shall not affect-
   (a) the previous operation of, or anything duly done or suffered under, this Act or any rule made thereunder or any order made under any such rule, or
   (b) any right, privilege, obligation or liability acquired, accrued or incurred under this Act or any rule made thereunder or any order made under any such rule, or
   (c) any penalty, forfeiture or punishment incurred in present of any offence under this Act or any contravention of any rule made under this Act or of any order made under any such rule, or
   (d) any investigation, or legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Act had not expired.

2. **Definition.** – (1) In this Act, unless the context otherwise requires, -

(a) “abet” with its grammatical variations and cognate expressions, includes-

(i) the communication or association with any person or class of person who is engaged in assisting in any manner terrorists or disruptionist;

(ii) the passing on, or publication of, without any lawful authority, any information likely to assist the terrorists or disruptionist, and the passing on, or publication of, or distribution of, any document or matter obtained from terrorist or disruptionist;

(iii) the rendering of any assistance, whether financial or otherwise, to terrorist or disruptionist;

(b) “Code” means the Code of Criminal Procedure, 1973;

(c) “Designated Court” means a Designated Court constituted under section 9;

(d) “disruptive activity” has the meaning assigned to it in section 4, and the expression “disruptionist” shall be construed accordingly;

(e) “High Court” means the High Court of the State in which a judge or additional judge of a Designated Court was working immediately before his appointment as such judge or additional judge;

(f) “notified area” means such area as the State Government may, by notification in the Official Gazette, specify;

(g) “Public Prosecutor” means a Public Prosecutor or an Additional Public Prosecutor or a Special Public Prosecutor appointed under section 13, and includes any person acting under the direction of the Public Prosecutor;

(h) “terrorist” has the meaning assigned to it in sub-section (1) of section 3, and the expression “terrorist” shall be construed accordingly;

(i) words and expressions used but not defined in this Act and defined in the Code shall have the meanings respectively assigned to them in the Code.

(2) Any reference in this Act to any enactment or any provisions thereof shall, in relation to an area in which enactment or such provision is not in force, be construed as a reference to the corresponding law or the relevant provision of the corresponding law, if any, in force in that area.

**PART II**

**PUNISHMENT FOR, AND MEASURES FOR COPING WITH, TERRORIST AND DISRUPTIVE ACTIVITIES**

3. **Punishment for terrorist acts.** – (1) whoever with intent to overawe the Government as by law established to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substance or fire-arms or other lethal weapons or poisons or noxious gases or other chemical or by another substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause,
death of, injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist Act.

(2) Whoever commits a terrorist act, shall,-

(i) if such act has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to fine;

(ii) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine;

(3) Whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitate the commission of, a terrorist act or any act preparatory to a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

(4) Whoever harbours or conceals, or attempts to harbour or conceal, any terrorist shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also liable to fine.

4. Punishment for disruptive activities. — (1) Whoever commits or conspires or attempts to commit or abets, advocates, advises, or knowingly facilitates the commission of, any disruptive activity or any act preparatory to a disruptive activity shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

(2) For the purpose of sub-section (1), “disruptive activity” means any action taken, whether by act or by speech or through any other media in any other manner whatsoever,-

(i) which questions, disrupt or is intended to disrupt, whether directly or indirectly, the sovereignty and territorial integrity of India; or

(ii) which is intended to bring about or support any claim, whether directly or indirectly, for the cession of any part of India or the secession of any part of India from the Union.

Explanation. — For the purpose of this sub-section, -

(a) “cession” includes the admission of any claim of any foreign country to any part of India, and

(b) “secession” includes the assertion of any claim to determine whether a part of India will remain within the Union.

(3) without prejudice to the generality of the provisions of sub-section (2), it is hereby declared that any action taken whether by act or by speech or through any other media or in any other manner whatsoever, which -

(a) advocates, advises, suggests or incites; or
(b) predicts, prophesies or pronounces or otherwise expresses, in such manner as to incite, advise, suggest or prompt,

the killing or the destruction of any person bound by oath under the Constitution to uphold the sovereignty and integrity of India or any public servant shall be deemed to be disruptive activity within the meaning of this section.

(4) Whoever harbours or conceals, or attempts to harbour or conceal, any disruptionist shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

5. Possession of certain unauthorized arms, etc., in specified areas. – Where any person is in possession of any arms and ammunition specified in columns 2 and 3 of category I or category III (a) of schedule I to the Arms Rules, 1962, or bombs, dynamite or other explosive substances unauthorisedly in a notified area, he shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

6. Enhanced penalties. – (1) If any person with intent to aid any terrorist or disruptionist, contravenes any provision of, or any rule made under, the Arms Act, 1959, the Explosive Act, 1884, The Explosive Substances Act, 1908 or The Inflammable Substances Act, 1952, he shall, notwithstanding anything contained in any of the aforesaid Acts or the rules made thereunder, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

(2) For the purpose of this section, any person who attempts to contravene or abet, or does any act preparatory to the contravention of any provision of any law, rule or order, shall be deemed to have contravened the provision, and the provisions of sub-section (1) shall, in relation to such person, have effect subject to the modification that the reference to “imprisonment for life” shall be construed as a reference to “imprisonment for ten years.”

7. Conferment of powers. – (1) Notwithstanding any thing contained in the Code or in any other provision of this Act, the Central Government may, if it considers it necessary or expedient so to do, -

(a) for the prevention of, and for coping with, any offence under section 3 or the Section 4; or

(b) for any case or class or group of cases under Section 3 or 4,

in any, State or part thereof, confer, by notification in the Official Gazette, on any officer of the Central Government, powers exercisable by a police officer under the Code in such State or part thereof or, as the case or group of cases in particular, the powers of arrest, investigation and prosecution of persons before any Court.

(2) All officers of police and all officers of Government are hereby required and empowered to assist the officer of the Central Government, referred to in sub-section (1), in the execution of the provisions of this Act or any rule or order made hereafter.
(3) The provisions of the Code shall, so far as may be and subject to such modifications made in this Act, apply to the exercise of the powers by an officer under sub-section (1).

8. Forfeiture of property of certain persons. — (1) Where a person has been convicted of an offence punishable under this Act or any rule made thereunder, the Designated Court may, in addition to awarding any punishment, by order in writing, declare that any property, moveable or immovable or both, belong to the accused and specified in the order, shall stand forfeited to the Government free from all encumbrances.

(2) Where any person is accused of any offence under this Act or any rule made thereunder, it shall open to the Designated Court trying him to pass an order that all or any properties, movable and immovable or both belonging to him, during the period of such trial, be attached, and where such trial ends in conviction, the properties so attached shall stand forfeited to the Government free from all encumbrances.

(3)(a) If upon a report in writing made by a police officer or an officer referred to in sub-section (1) of Section 7, any Designate Court has reason to believe that any person, who has committed an offence punishable under this Act or any rule made thereunder, has absconded or is concealing himself so that he may not be apprehended, such Court may, notwithstanding any thing contained in Section 82 of the Code, punish a written proclamation requiring him to appear at a specific place or at a specific time not less than fifteen days but not more than thirty days from the date of publication of such proclamation.

(b) The Designate Court issuing a proclamation under clause (a) may, at any time, order the attachment of any property, movable or immovable or both, belonging too the proclaimed person, and thereupon the provisions of Section 83 to 85 of the Code shall apply to such attachment as of such attachment were mad under that Code.

(c) If, within six months from the date of the attachment, any person, whose property is, or has been, at the disposal of the Government under sub-section (2) of Section 85 of the Code, appears voluntarily or is apprehended and brought before the Designate Court by whose order the property was attached, or the Court to which such Court is subordinate, and the powers to the satisfaction of such Court that he did not abscond or conceal himself for the purpose of avoiding apprehension and that he had not received such notice of the proclamation as to enable him to attend within the time specified therein, such property or , if the same has been sold, the net proceeds of the sale and the residue of the property, shall, after satisfying there from all costs incurred in consequence of the attachment, be delivered to him.

(4) Where any shares in a company stand forfeited to the Government under this section, then, the company shall, notwithstanding anything contained in the Companies Act, 1956, or the articles of association the company, forthwith register the Government as the transferee of such shares.

PART III (DESIGNATED COURTS)

9. Designated Courts. — (1) The Central Government or a State Government may, by notification in the Official Gazette, constitute one or more Designated Courts for such area or areas, or for such case or class or group of cases as may be specified in the notification.
(2) Where a notification constituting a Designate Court for any area or areas or for any case or class or group of cases is issued by the Central Government under sub section (1), and a notification constituting a Designated Court for the same area or areas or for the same case or class or group of cases has also been issued by a State Government under that sub section, the Designated Court constituted by the Central Government whether the notification constituting such courts is issued before or after the issue of the notification constituting the Designated Court by the State Government, shall have, and the Designated Court constituted by the State Government shall not have, jurisdiction to try any offence committed in that area or areas or, as the case may be, the case or classes or group of cases, and all cases pending before any Designated Court constituted by the State Government shall stand transferred to the Designated Court constituted by the Central Government.

(3) Where any question arises as to the jurisdiction of any Designated Court, it shall be referred to the Central Government whose decision thereon shall be final.

(4) A Designated Court shall be presided over by a judge to be appointed by the Central Government or, as the case may be, the State Government, with the concurrence of the Chief Justice of the High Court.

(5) The Central Government or, as the case may be, the State Government may also appoint, with the concurrence of the Chief Justice of the High Court, additional judges to exercise jurisdiction in a Designated Court.

(6) A person shall not be qualified for appointment as a judge or an additional judge of a Designated Court unless he is, immediately before such appointment, a sessions judge or an additional sessions judge in any State.

(7) For the removal of doubts, it is hereby provided that the attainment by a person appointed as a judge or an additional judge of a Designated Court of the age of superannuation under the rules applicable to him in the service to which he belongs, shall not affect his continuance as such judge or additional judge.

(8) Where any additional judge or additional judges is or are appointed in a Designated Court, the judge of the Designated Court may, from time to time, by general or specific order, in writing, provide for the distribution of business of the Designated Court among himself and the additional judge or additional judges and also for the disposal of urgent business in the event of his absence or the absence of any additional judge.

10. Place of Sitting. – A Designated Court may, on its own motion or on an application made by the Public Prosecutor, and if it considers it expedient or desirable so to do. Sit for any of its proceedings at any place other than its ordinary place of sitting.

Provide that nothing in this section shall be constructed to change the place of sitting of a Designated Court constituted by the State Government to any place out side that State.

11. Jurisdiction of Designated Courts. – (1) notwithstanding anything contained in the Code, every offence punishable under any provision of his Act or any rule made thereunder shall be triable only by the Designated Court within whose local jurisdiction it
was committed or, as the case may be, by the Designated Court constituted for trying such offence under sub section (1) of Section

(2) If, having regard to the exigencies of the situation prevailing in a State, the Central, Government is of the opinion that—

(a) the situation prevailing in such State is not conducive to a fair, impartial or speedy trial, or

(b) it is not likely to be feasible without occasioning the breach of peace or grave risk to the safety of the accused, the witnesses, the Public Prosecutor and the judge of the Designated Court or any of them, or

(c) it is not otherwise in the interests of justice,

it may, with the concurrence of the Chief Justice of India (such concurrence to be obtained on a motion moved IN that behalf by the Attorney General), transfer any case pending before a Designated Court IN that State to any other Designated Court within the State or in any other State.

(3) Where the whole or any part of the area within the local limits of the jurisdiction of a Designated Court has been declared to be, or forms part of, any area which has been declared to be a disturbed area under any enactment for the time being in force making provision for the suppression of disorder and restoration and maintenance of public order, and the Central Government is of opinion that the situation prevailing in the State is not conducive to fair, impartial or speedy trial within the State, of offence under this Act or the rules made thereunder which such Designated Court is competent to try, the Central Government may, with the concurrence of the Chief Justice of India, specify, by notification in the Official Gazette, in relation to such Court (hereafter in this sub-section referred to as the local Court) a Designated Court outside the State (hereafter in this sub-section referred to as the special court) and thereupon—

(a) it shall not be competent, at any time during the period of operation of such notification, for such local court to exercise any jurisdiction in respect of, or try, any offence under this Act or the rules made thereunder:

(b) the jurisdiction which would have been, but for the issue of such notification, exercisable by such local court in respect of such offences committed during the period of operation of such notification shall be exercisable by the specified Court.

(c) All cases relating to such offences pending immediately before the date of issue of such notification before such local court shall stand transferred on that date to the specified court.

(d) All cases taken cognizance of by, or transferred to, the specified Court under clause (b) or clause (c) shall be dealt with and tried in accordance with the Act (whether during the period of operation of such notification of thereafter) as if such offence had been committed within the local limits of the jurisdiction of the specified Court or, as the case may be, transferred for the trial to it under sub-section (2).

Explanation I. — a notification issued under this sub-section in relation to any local Court shall cease to operate on the date on which the whole or, as the case may be, the
aforementioned part of the area within the local limits of its jurisdiction, ceases to be a disturbed area.

Explanation 2. — For the purposes of this section, "Attorney-General" means the Attorney General of India or, in his absence, the Solicitor-General of India or, in the absence of both, one of the Additional Solicitors-General of India.

12. Power of Designated Courts with respect to other offences. — (1) when trying any offence, a Designated Court may also try any other offence with which the accused may, under the Code, be charged at same trial if the offence is connected with such other offence.

(2) If, in the course of any trial under this Act of any offence, it is found that the accused person has committed any other this Act or any rule made thereunder or under any other law, the Designated Court may convict such person of such other offence and pass any sentence authorized by this Act or such rule or, as the case may be, such other law, for the punishment thereof.

13. Public Prosecutors. — (1) for every Designated Court, the Central Government or, as the case may be, the State Government, shall appoint to be the public prosecutor and may appoint one or more persons to be the Additional Public Prosecutor or Additional Public Prosecutors:

Provided that the Central Government or, as the case may be, the State Government, may also appoint for any case or class or group of cases a Special Public Prosecutor.

(2) A person shall not be qualified to be appointed as a Public Prosecutor or an Additional Public Prosecutor or a Special Public Prosecutor under this section unless he has been in practice as an Advocate for not less than seven years or has held any post, for a period of not less than seven years, under the Union or a State, requiring special knowledge of law.

(3) Every person appointed as a Public Prosecutor or an Additional Public Prosecutor or a Special Public Prosecutor under this section shall be deemed to be a Public Prosecutor within the meaning of clause (u) of section 2 of the Code, and the provisions of the Code shall have effect accordingly.

14. Procedure and powers of Designated Courts. — (1) a Designated Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts that constitute such offence or upon a police report of such facts.

(2) Where an offence triable by a Designated Court is punishable with imprisonment for a term not exceeding three years or with fine or with both, the Designated Court may, notwithstanding anything contained in sub-section (1) of Section 260 or Section 262 of the Code, try the offence in a summary way in accordance with the procedure prescribed in the Code and the provisions of Section 263 to 265 of the Code, shall, so far as may be, apply to such trial:

Provided that when, in the course of a summary trial under this section, it appears to the Designated Court that the nature of the case is such that it is undesirable to try it in a
Appendix

summary way, the Designated Court shall recall any witnesses who may have been
examined and proceed to re-hear the case in the manner provided by the provisions of the
Code for such trial of such offence and the said provisions shall apply to and in relation to
a Designated Court as they apply to and in relation to a Magistrate:

Provided further that in the case of any conviction in a summary trial under this
section, it shall be lawful for a Designated Court to pass a sentence of imprisonment for a
term not exceeding two years.

(3) Subject to the provisions of this Act, a Designated Court shall, for the purpose of
trial of any offence, have all the powers a Court of Session and shall try such offence as if
it were a Court of Session so far as may be in accordance with the procedure prescribed in
the Code for the trial before a Court of Session.

(4) Subject to other provisions of this Act, every case transferred to a Designated
Court under sub-section (2) of Section 11 shall be dealt with as if such case had been
transferred under Section 406 of the Code to such Designated Court.

(5) Notwithstanding any thing contained in the Code, a Designated Court may, if it
thinks fit and for reasons to be recorded by it, proceed with the trial in the absence of the
accused or his pleader and record the evidence of any witness, subject to the right of the
accused to recall the witness for cross-examination.

15. Certain confessions made to police officer to be taken into consideration. – (1)
notwithstanding anything in the Code or in the Indian Evidence Act, 1872, but subject to
the provisions of this section, a confession made by a person before a police officer not
lower in rank than Superintendent of Police and recorded by such police officer either in
writing or on any mechanical device like cassettes, tapes or sound tracks from out of
which sounds or images can be reproduced, shall be admissible IN the trial of such person
for an offence under this act or rules made thereunder.

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

16. Protection of witnesses. – (1) notwithstanding anything contained in the Code, all
proceedings before a Designated Court shall be conducted in camera:

Provided that where the Public Prosecutor so applies, any proceedings or part
thereof may be held in open Court.

(2) A Designated Court may, on an application made by a witness or on its motion, take
such witness or on its own motion, take such measures as it deems fit for keeping the
identity and address of any witness secret.

(3) In particular, and without prejudice to the generality of the provisions of sub-section
(2), the measures, which a Designated Court may take under that sub-section, may include
(a) the holding of the proceedings at a place to be decided by the Designated Court;

(b) the avoiding of the mention of the names and addresses of the witnesses in its orders or judgements or in any records of the case accessible to public;

(c) the issuing of any directions for securing that the identity and addresses of the witnesses are not disclosed;

(d) that it is in the public interest to order that all or any of the proceedings pending before such a Court shall not be published in any manner.

17. Trial by Designated Courts to have precedence. – the trial under this Act of any offence by a Designated Court shall have precedence over the trial of any other case against the accused in any other Court (not being a Designated Court) and shall be concluded in preference to the trial of such other case and accordingly the trial of such other case shall remain in abeyance.

19. Power to transfer cases to regular Courts. – Where, after taking cognizance of any offence, a Designated Court is of opinion that the offence is not triable by it, it shall notwithstanding that it has no jurisdiction to try such offence, transfer the case for trial of such offence to any Court having jurisdiction under the Code and the Court to which the case is transferred may proceed with the trial of the offence as if it had taken cognizance of the offence.

20. Appeal. – (1) notwithstanding anything contained in the Code, an appeal shall lie as a matter of right from any judgement, sentence or order, not being an interlocutory order, of a Designated Court to the Supreme Court both on facts and on the law.

(2) Except as aforesaid, no appeal or revision shall lie to any court from any judgement, sentence or order including an interlocutory order of a Designated Court.

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgement, sentence or order appealed from:

Provided that the Supreme Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days.

PART IV (MISCELLANEOUS)

20. Modified application of certain provisions of the Code. – (1) Notwithstanding anything contained in the Code or any other law, every offence punishable under this Act or any rule thereunder shall be deemed to be a cognizable offence within the meaning of clause (c) of Section 2 of the Code, and “cognizable case” as defined in that clause shall be constructed accordingly.

(2) Section 21 of the Code shall apply in relation to a case involving an offence punishable under this Act or any rule made thereunder, subject to the modification that the reference to “the state Government” therein shall be constructed as a reference to “the Central Government or the State Government”.
Appendix

(3) Section 164 of the Code shall apply in relation to a case involving an offence punishable under the Act or any rule made thereunder, subject to the modification that the reference IN sub section (1) thereof to “Metropolitan Magistrate or Judicial Magistrate” shall be constructed as a reference to “Metropolitan Magistrate, Judicial Magistrate, Executive Magistrate or Special Executive Magistrate.”

(4) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act or any rule made thereunder subject to the modifications that—

(a) the reference in sub-section (1) thereof to “Judicial Magistrate” shall be construed as a reference to “Judicial Magistrate, Executive Magistrate or Special Executive Magistrate”;

(b) the reference IN sub-section (2) thereof to “fifteen days”, “ninety days” and “sixty days”, whether they occur, shall be construed as references to “sixty days”, “one year” and “one year” respectively; and

(c) sub-section (2A) thereof shall be deemed to have been omitted.

(5) Section 268 of the Code shall apply in relation to a case involving an offence punishable under this Act or any rule made thereunder subject to the modifications that—

(a) the reference in sub-section (1) thereof—

(i) to the “State Government” shall be construed as a reference to the “Central Government or the State Government”:

(ii) to “order of the State Government” shall be construed as a reference to “order of the Central Government or the State Government, as the case may be”; and

(b) the reference in sub-section (2) thereof, to “State Government” shall be construed as a reference to “Central Government or the State Government, as the case may be.”

(6) Sections 366 to 371 and Section 392 of the Code shall apply in relation to a case involving an offence triable by a Designated Court subject to the modifications that the references to “Court of Session” and “High Court”, wherever occurring therein, shall be construed as references to “Designated Court” and “Supreme Court”, respectively.

(7) Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence punishable under this Act or any rule made thereunder.

(8) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act on any rule made thereunder shall, if in custody, be released on bail or on his own bond unless—

(a) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
The limitation on granting of bail specified in sub-section (8) are in addition to the limitations under the Code or any other law for the time being in force on granting of bail.

21. **Presumption as to offence under section 3.** – (1) in a prosecution for an offence under sub-section (1) of the section 3, if it is proved—

- (a) that the arms or explosives or any other substances specified in section 3 were recovered from the possession of the accused and there is reason to believe that such arms or explosives or other substances of a similar nature, were used in the commission of such offence; or
- (b) that by the evidence of an expert the finger prints of the accused were found at the site of the offence or on anything including arms and vehicles used in connection with the commission of such offence; or
- (c) that a confession has been made by a co-accused that the accused had committed the offence; or
- (d) that the accused had made a confession of the offence to any person other than a police officer,

the Designate Court shall presume, unless the contrary is proved, that the accused had committed such offence.

(2) In a prosecution for an offence under sub-section (3) of Section 3, if it is proved that the accused rendered any financial assistance to a person accused of, or reasonably suspected of, an offence under that section, the Designated Court shall presume, unless the contrary is proved, that the person has committed the offence under that sub-section.

22. **Identification of accused.** – Where a person has been declared a proclaimed offender in a terrorist case, the evidence regarding his identification by witnesses on the basis of his photograph shall have the same value as the evidence of a test identification parade.

23. **Saving.** – (1) Nothing in this Act shall affect the jurisprudence exercisable by, or the procedure applicable to, any Court or other authority under any law relating to the naval, military or air forces or other armed forces of the Union.

(2) For the removal of doubts, it is hereby declared that for the purposes of any such law as is referred to in sub-section (1), a Designated Court shall be deemed to be a court of ordinary criminal justice.

24. **Saving of orders.** – Where an order purports to have been made and signed by any authority in exercise of any power conferred by or under this Act, a court shall, within the meaning of the Indian Evidence Act, 1872, presume that such order was so made by that authority.

25. **Overriding effect.** – The provisions of this Act or any rule made thereunder or any order made under any such rule shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act.

26. **Protection of action taken under this Act.** – No suit, prosecution or order legal proceeding shall lie against the Central Government or a State Government or any officer
or authority of the Central Government or State Government or any other authority on whom powers have been conferred under this Act or any rule made thereunder, for anything which is in good faith done or purported to be done in pursuance of this Act or any rule made thereunder or any order issued under any such rule.

27. Power of the Supreme Court to make rules. — The Supreme Court may, by notification in the Official Gazette, make such rule, if any, as it deem necessary for carrying out the provisions of this Act relating to the Designated Courts.

28. Power to make rules. — (1) without prejudice to the powers of the Supreme Court to make rule under section 27, the Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

(a) regulating the conduct of persons in respect of areas the control of which is considered necessary or expedient and the removal of such persons from such areas;

(b) the entry into, and search of, —

(i) any vehicle, vessel or aircraft; or

(ii) any place, whatsoever,

reasonably suspected of being used for committing the offences referred to in section 3 or section 4 or for manufacturing or sorting anything for the commission of any such offence;

(C) conferring powers upon, —

(i) the Central Government;

(ii) a State Government;

(iii) an Administrator of a Union territory under article 239 of the Constitution;

(iv) an officer of the Central Government not lower than that of a Joint Secretary; or

(v) an officer of a State Government not lower than that of a District Magistrate. To make general or special orders to prevent or cope with terrorist acts or disruptive activities:

(d) The arrest and trial of persons contravening any rules or any order made thereunder;

(e) The punishment of any person who contravenes or attempts to contravene or abets or attempts to abet the contravention of any rule or order made thereunder with imprisonment for a term which may extend to seven years or for a term which may not be less than six months but which may extend to seven years or with fine or with imprisonment as aforesaid and fine;

(f) Providing for the seizure and detention of any property in respect of which such contravention, attempt or abetment as is referred to in clause (e) has been committed and for the adjudication of such seizure and detention, whether by any court or by any other authority.
29. **Rules to be laid before Houses of Parliament.** – Every rules made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

30. **Repeal and saving.** – (1) the Terrorist And Disruptive Activities (Prevention) Ordinance, 1987, is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Act.
Bibliography
BIBLIOGRAPHY

PRIMARY SOURCE:

The All India Report

The Constituent Assembly Debates

The Constitution of India

The Criminal Procedure Code

The Declaration On Torture Or Other Cruel, In Human Or Degrading Treatment Or Punishment

The Indian Evidence Act

The Indian Penal code

The International Covenant of Civil and Political Rights,

The International Covenant of Economic, Social and Cultural Rights

The Lok Sabha Debates

The Maintenance of Internal Security Act

The National Security Act

The Preventive Detention Act

The Rajya Sabha Debates

The Supreme Court Cases

The Supreme Court Reports

The Terrorist And Disruptive Activities Act

The Universal Declaration of Human Rights
Amnesty International Reports
Human Rights Committee Reports
Human Rights Watch World Report
India Development Report
India Human Rights Practices
Indian Social Institute Reports
Peoples Union of Democratic Rights Reports.
Report of the working group on Arbitrary Detention

BOOKS:

\[\text{Agarwal, H. O., International Law and Human Rights, C. L. Publication, Allahabad, 1999.}\]

Asirvatham, Eddy and Mishra, K.K., Political Theory, S. Chand & Company, New Delhi, 1998.


\[\text{Bajwa, G.S., Human Rights in India: Implementation and Violation, Anmol Publication, Delhi, 1995.}\]


Bibliography


Khanna, D. P., *Reforming Human Rights*, Manas Publishing, New Delhi,


Bibliography


**ARTICLES:**


Bibliography


PERIODICALS:

Aligarh Law Journal
Banaras Law Journal
Criminal Law Journal
Economic and political Weekly
India Today
Indian Bar Review
Indian Law Institute Journal
Journal of Constitutional and Parliamentary Studies
Journal of Indian Social institute
Journal of Muslim World League
Legal News and Views
The Daily
The Deccan Herald
The Forum Gazette
The Frontier
The Frontline
The Hindu
The Hindustan Times
The Independent
The Indian Express
The Indian Express
The Mainstream
The Observer
The Statesman
The Telegraph
The Times of India
The Times Of India
The Tribune