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## NATIONAL SECURITY, TERRORISM AND ADMINISTRATION OF JUSTICE



Nuzhat Parveen Khan

Associate Professor, Faculty of Law, Jamia Millia Islamia, New Delhi

**Abstract:** "An avidity to punish is always dangerous to liberty. It leads men to stretch, to misinterpret, and to misapply even the best of laws. He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."

Thomas Paine

**Keywords:** National Security, Administration, history, magnanimity.

### INTRODUCTION:

We are living in perilous times. The world stands divided more than ever. Never in the history of mankind had a single event created a mass psychological impact, such as the September 11, 2001 attack on twin towers in Manhattan did. Closer back home, if the attack on Parliament was symbolic of the rising danger of terrorism, the 26/11 attack on Mumbai showcased the magnanimity of the situation. Terrorism is the most dreaded kind of "ism" we are facing today. Although terrorism has been on the forefront of all news in the decade gone by, it is not a new phenomenon. India especially has been under attack of terrorism in various forms ever since it gained independence.

The amount of misery, trauma it causes is miniscule as compared to the physical damage of property. It disrupts social order and instills a sense of insecurity in the public as well as the government and this is why, the menace of terrorism is dealt with strictly by state for it is order that needs to be preserved in a modern democratic civilized society. Stricter laws are prone to misuse, is a historically well known fact and thus the question of administration of justice in cases of trial of terror accused gains significance in a democratic society based on the ideals of rule of law. Different countries have different approaches to deal with the menace. Some nations treat acts of terrorism as a criminal matter and use their ordinary criminal justice systems to try accused terrorists. Other nations facing serious national security issues have used specialized courts or trial procedures to prosecute some terrorism cases. In this paper we will delineate the second approach that of having specialized courts especially in the context of India. But before that we will first quickly view the definitions of 'terrorism' and its interpretation.

### 2. DEFINITION OF TERRORISM

Just as the definitions of "good" and "bad" vary from person to person, the word "terrorism" connotes different meanings to different people depending on from

which spectrum they are viewing it. It is said that one man's terrorist is another man's freedom fighter. What the Israelis brand as terrorism, is fight for freedom from encroachment and oppression for the Palestinians. There is a thin line between resistance and terrorism which adds to the confusion in understanding the difference between both. The difficulty of defining terrorism lies in the risk it entails of taking positions. The political connotations of defining terrorism further complicate the issue. Left to its political meaning, terrorism easily falls prey to change that suits the interests of particular states at particular times. The Taliban and Osama bin Laden were once called freedom fighters (mujahideen) and backed by the CIA when they were resisting the Soviet occupation of Afghanistan. Post 9/11 they were on top of the international terrorist hit lists.

There is a grave threat of unwarranted repercussions by employing the political definition of terrorism as there is the danger of leaving the war against terrorism selective, incomplete and ineffective. The need to forge a universally agreed definition of terrorism is more than just a desirable political endeavor. It is also a legal undertaking prescribed by United Nations, which recognizes that "the effectiveness of the struggle against terrorism could be enhanced by the establishment of a generally agreed definition of international terrorism."

A definition of terrorism has to be comprehensive in order to avoid double standards, and it should encompass all forms of the act, irrespective of the perpetrator, actor, target, place or time. The European Union defines terrorism as "certain criminal offences set out in a list comprised largely of serious offences against persons and property which, 'given their nature or context, may seriously damage a country or an international organization where committed with the aim of seriously intimidating a population or unduly compelling a Government or international organization to perform or abstain from performing any act, or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structure of a

country or an international organization.”

### **3. NATIONAL SECURITY, ADMINISTRATION OF JUSTICE-SPECIALIZED TERRORISM TRIALS**

A single act of terrorism has far reaching effects and is capable of disrupting a broader range of activities. In addition to individual costs, terrorism can destabilize Governments, undermine civil society, jeopardize peace and security, and threaten social and economic development. Security of the individual is a basic human right and the protection of individuals is, accordingly, a fundamental obligation of Government. States therefore have an obligation to ensure the human rights of their nationals and others by taking positive measures to protect them against the threat of terrorist acts and bringing the perpetrators of such acts to justice.

Terrorism poses a grave threat to security and the secular fabric of our nation. It tends to instill a sense of fear and distrust between groups and communities that differ on ideological background. It challenges the very legitimacy and authority of nation state, the basic function of state being the protection of its subjects from all kinds of threats-external as well as internal. Terrorist organizations challenge this basic feature of state and highlight the inability of the state to provide security and protect its subjects. Our Prime Minister Dr. Manmohan Singh in his address at the 59th Session of the U.N. General Assembly on 23rd September, 2004 observed: “Terrorism exploits the technologies spawned by globalization, recruits its foot soldiers on ideologies of bigotry and hatred, and directly targets democracies. And yet it is a sad reality networks of terror appear to cooperate more effectively than the democratic nations that they target.”

The impact on public of a terrorist attack is intense. Apart from the fear it instills in the hearts of public, it also creates a feeling of vengeance. Victims of terror attacks want to see justice getting done and if there is undue delay in administration of justice due to procedural lags, they would feel like taking law in their own hands to bring the perpetrators of terrorist acts to justice.

Thus the basic reason for the creation of specialized terrorism courts is to expedite the prosecution of alleged terrorists whose acts cause devastating consequences for the enjoyment of the right to life, liberty and physical integrity of victims. This demand for speedy justice is not a small concern in India, where the lag time from arraignment to prosecution ranges from many months to several years and to create a trial system that offers some due process protections, but is structured to result in a higher conviction rate than the ordinary court system would afford. In reality, these specialized courts have resulted in a low conviction rate and often appeared to target political enemies and particular minority populations within India for harsher treatment in courts that afford them fewer procedural and substantive protections.

#### **3.1 History of Specialized Courts**

Terrorism is not a twenty first century phenomenon and neither is the establishment of specialized courts. It was in 1967, the government enacted the Unlawful Activities

(Prevention) Act (UAPA) that served as a catchall legislation by which terrorist acts, among other crimes, could be prosecuted. Unlawful Activities (Prevention) Act (UAPA) authorized the central government to set up tribunals to determine whether particular organizations posed a threat to the safety of India, and would, therefore, be considered unlawful associations. Unlawful Activities (Prevention) Act (UAPA) also made membership in unlawful associations a prosecutable offense and immunized the government against claims of wrongful conduct, so long as the government acted in good faith in its execution of Unlawful Activities (Prevention) Act (UAPA). Unlawful Activities (Prevention) Act (UAPA), however, did not set up a system of separate courts to deal with prosecutions; instead, prosecutors utilized the flexibility of the criminalized acts under Unlawful Activities (Prevention) Act (UAPA) to try suspects within the standard criminal justice system.

Then in 1985, the government enacted the Terrorist and Disruptive Activities (Prevention) Act (TADA). It was India's first nationwide legislation specifically crafted to address the investigation and prosecution of terrorism. The motivation for the law's passage was the escalating threat of violence in Punjab and the concern that existing legislation, such as the Unlawful Activities (Prevention) Act (UAPA), granted insufficient powers to the government to combat and prosecute terrorism. Under Terrorist and Disruptive Activities Act (TADA), the government was granted the ability to convene specialized courts ('Designated Courts') to try terrorism cases.

Numerous aspects of the specialized court system significantly undercut rights afforded to defendants within the regular criminal justice process. For example, on the question of jurisdiction, the central or state government had the discretion to decide whether a case was referred to a Designated Court or to the standard criminal justice system. If any question arose as to the appropriateness of assigning a case to be tried by the Designated Court, the decision would be referred to the central government, whose decision on the matter was final.

For crimes that carried a prison sentence of three years or fewer, the Designated Court judge had the right to abrogate the usual criminal procedural process and hold an in camera summary trial at his or her discretion. Terrorist and Disruptive Activities Act (TADA) shifted the burden of proof onto defendants for various crimes including the possession of firearms and the financing of unlawful associations. Terrorist and Disruptive Activities Act (TADA) expired in 1995 amid heavy criticism that the government had misused the legislation to target racial and religious minorities and that it had not achieved the desired effect of stemming legitimately dangerous activity.

In the wake of attack on Indian Parliament in December 2001, India expanded its antiterrorism laws to grant additional authority and power to the central government to maintain national security. The Indian Parliament enacted the Prevention of Terrorism Act, 2002 (POTA), which mirrored Terrorist and Disruptive Activities Act (TADA) provisions in numerous ways. The government, in conducting antiterrorist activities and in case of a self-determined emergency, was authorized to set aside ordinary

legal protections in numerous respects, including criminalizing association or communication-without any criminal intent-with terrorist suspects, broadening the right to wiretap any person within India without authorization, extending the duration and scope of preventative detention measures, allowing confessions to police officers to be admitted as substantive evidence, and denying arrested suspects access to counsel.

Prevention of Terrorism Act (POTA) authorized specialized terrorism courts ("Special Courts") and set up specific guidelines for the management of such cases. The Special Courts system mirrored TADA's limitation of rights for defendants, including the discretion of the central government or state government to decide whether a case was referred to a Special Court or to the standard criminal justice system. Likewise, the Special Court judge could hold a summary trial at his or her discretion for offenses carrying a sentence of fewer than three years.

One notable difference between Terrorist and Disruptive Activities Act (TADA) and Prevention of Terrorism Act (POTA) was the burden-shifting provisions in POTA. The right of the Special Court to take judicial notice that the offense had occurred if so requested by the government -a feature that essentially shifted the burden of proof from the prosecution to the defendant, was not limited to only firearms and financing offenses, as they were under TADA. Under Prevention of Terrorism Act (POTA), the burden of proof could be shifted for any offense under the statute. Courts also had the right to proceed with a trial in the absence of the defendant, so long as the right of the defendant to recall witnesses for later cross-examination was preserved. Despite curtailing numerous procedural rights, POTA, like Terrorist and Disruptive Activities Act (TADA), preserved the right of appeal to the appropriate high court or Supreme Court for defendants convicted in a Special Court. Additionally, defendants maintained the right to cross-examine witnesses and to have limited access to relevant evidence.

Prevention of Terrorism Act (POTA) was met with a great deal of opposition from human rights advocates and opposition political parties based on fears of misuse and abuse in its application. In the years that it was in effect, Prevention of Terrorism Act (POTA) appeared to be used selectively to target particular populations. Evidence from the state of Gujarat suggests that arrests under Prevention of Terrorism Act (POTA) may also have been religiously selective. Furthermore, critics argued that the insufficient procedural protections in Special Courts were further weakened by judges who often erred on the side of the prosecutors under the rationale that they were acting as a government safeguard against defendants who were likely terrorist threats.

Prevention of Terrorism Act (POTA) became a driving issue in the 2004 parliamentary election and the newly formed UPA government followed up on one of his major election promises to repeal Prevention of Terrorism Act (POTA) and repealed the same in 2004. However, many key provisions of Prevention of Terrorism Act (POTA) were immediately incorporated into the Unlawful Activities (Prevention) Act (UAPA) via amendments in order to ensure

that specific antiterrorism legislation remained in effect. These amendments also curtailed the government's power considerably in declining to authorize specialized courts to try terrorism suspects and by limiting the government's ability to shift the burden of proof onto defendants.

Numerous major terrorist attacks occurred after the repeal of Prevention of Terrorism Act (POTA), including the 2006 bombings in Varanasi and Mumbai that killed at least 215 people combined, and attacks in Bengaluru, Ahmedabad, and New Delhi in 2008, that killed over eighty people combined. However, none of those events prompted new legislation specifically addressing issues of terrorism; instead, the government sought flexibility within the existing criminal justice system in order to prosecute the cases more rapidly than ordinary cases.

The impetus for legislative change came after the horrific 26/11 terrorist attack in Mumbai in 2008, which shook the entire nation. In the three day attack 163 people were killed by ten gunmen of Pakistani origin. It triggered outrage among the Indian public and a demand for stronger national security and antiterrorism measures. In response, the Lok Sabha, rapidly passed two pieces of legislation: the National Investigation Agency Act and further amendments to the Unlawful Activities (Prevention) Act (UAPA).

The National Investigation Agency (NIA) Act established a National Investigation Agency to coordinate national security and counterterrorism operations, but also reinstated the Special Courts that had been eliminated in the 2004 repeal of Prevention of Terrorism Act (POTA). All of the provisions regarding the Special Courts, including those relating to jurisdiction, the burden of proof lying with the defendant, the right of the Special Court to use summary trials, and the right of the Special Court to proceed without the defendant in attendance are identical to the language in Prevention of Terrorism Act (POTA) that Parliament had rejected four years earlier. In some respects the scope of the current legislation is broader than Prevention of Terrorism Act (POTA) since the National Investigation Agency Act (NIAA) covers numerous offenses that were not within the scope of POTA.

The 2008 amendments to Unlawful Activities (Prevention) Act (UAPA) are even stronger than the National Investigation Agency Act (NIAA) with regard to the powers accorded to the government in investigating and prosecuting terror-related crimes even in ordinary courts. The 2008 Unlawful Activities (Prevention) Act (UAPA) amendments broaden the definition of a terrorist act, expand the power of police to conduct search and seizure, extend the limits on preventive detention to 180 days without charge, limit or abolish the right to bail in many cases, and shift the burden of proof onto the accused.

The trial of the Ajmal Amir Kasab, the lone surviving gunman from the Mumbai 2008 attack is a telling example of how the system has worked under National Investigation Agency Act (NIAA). The trial began in June 2009 in a special court designated for the case, and by November 2012 Kasab was sent to gallows after his mercy petition was rejected by the President. The speed of the trial was remarkable for the notoriously slow Indian judicial system. Nonetheless, serious due process concerns surfaced

with regard to this trial, such as the fact that defense counsel was allowed only fifteen minutes per day to meet with Kasab, and that all attorney-client meetings took place in the presence of police and court officials. Both restrictions reflect significant shifts away from standard procedures in the ordinary criminal justice system.

Critics of the 2008 legislation argue that the Act is a repetition of previous missteps in Terrorist and Disruptive Activities Act (TADA) and Prevention of Terrorism Act (POTA). They note that the 2008 UAPA amendments reflect a convergence of the draconian counterterrorism policies of Terrorist and Disruptive Activities Act (TADA) and Prevention of Terrorism Act (POTA) with ordinary criminal procedure, creating a framework by which innocent citizens could be arrested, held in preventive detention, tried in a nonpublic Special Court and be convicted solely because they were unable to overcome a presumption of guilt. Critics also object to the lack of external checks and oversight on the implementation of the legislation: Terrorist and Disruptive Activities Act (TADA) and Prevention of Terrorism Act (POTA) both contained sunset provisions, whereas the 2008 Unlawful Activities (Prevention) Act (UAPA) amendments do not. Further, the 2008 Unlawful Activities (Prevention) Act (UAPA) amendments do not require any meaningful judicial scrutiny of the prosecutor and the central government's decision as to whether detainees will be prosecuted within the ordinary court system or in a Special Court.

### **3.2 Legal Treatment of Specialized Terrorism Courts**

The use of these Special Courts has been upheld, with some reservations, by the Indian Supreme Court. In *Kartar Singh v. State of Punjab*, the constitutionality of Terrorist and Disruptive Activities (Prevention) Act (TADA) and similar legislation was addressed by the court. Specifically, the court undertook a review of the legality of Special Courts and their procedures as articulated under Terrorist and Disruptive Activities (Prevention) Act (TADA). The petitioner's challenge to the Designated Court/Special Court system was based on Article 21 of the Indian Constitution and the Indian Supreme Court's decision in *Maneka Gandhi v. Union of India*, which interpreted Article 21 as establishing a guarantee of substantive due process.

The court first noted that the purpose of Terrorist and Disruptive Activities (Prevention) Act (TADA) and other similar legislation was to expedite the trial process in instances where national security concerns are implicated. It lauded this goal, noting that the right to a speedy trial was fundamental in limiting pretrial detention, protecting a defendant's right to defend himself, and fulfilling societal interests in the resolution of a case.

With regard to the specialized procedures and burden-shifting in favor of the prosecution, the court upheld the constitutionality of Terrorist and Disruptive Activities (Prevention) Act (TADA) based on the limited application of the laws to suspected acts of terrorism, as well as the dire national security situation and the corresponding need for flexibility within the criminal justice system. The court took note of the fact-seemingly with approval-that the provisions

of Terrorist and Disruptive Activities (Prevention) Act (TADA) in question mirrored those of the Northern Ireland Emergency Provision Act of 1978, used as part of the counterterrorism effort during the Troubles. The court rejected a substantive due process argument as well, noting, like many United States' courts, that the judiciary did not have the right to substitute its own judgment for that of the legislature with regard to the appropriate measures to take combating national security threats.

### **4. CONCLUSION**

Terrorism poses the biggest threats to world order in present times. It is a menace against entire humanity. It is a criminal act of extremely dangerous nature, with graver and far reaching disastrous consequences. Its profound capability of disrupting public order makes it quintessential for the state authority to keep a strong check on any kind of terrorist activities. However, it is needless to say that the law enforcing authorities have to observe the rule of law while dealing with activities of any nature disturbing public order. The observance of rule of law is essential feature and requirement of a civilized society more so, in a democratic republic. Thus a lot of care has to be taken while dealing with the prosecution of accused of terrorism as the non observance of the rule of law by the state authority is detrimental to the democratic ideals and existence of a civilized society.

Although the constitutionality of specialized courts may not be at issue after the *Kartar Singh* decision, it remains unclear whether the new Special Courts under the National Investigation Agency Act (NIAA) can avoid the pitfalls that plagued previous iterations of the specialized terrorism courts, namely a low conviction rate, selective prosecution of particular ethnic and religious groups and a concern for serious human rights abuses. Given that the current legislation is broader and further reaching than Prevention of Terrorism Act (POTA), yet has been stripped of some of POTA's oversight of the police and prosecutors, it is to be seen how future Special Courts deliver both justice and national security effectively.

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Thomas Paine, *Dissertations on First Principles of Government* (1795).

Turkey, Germany and France for example.

United Kingdom, Israel, and India for example.

Sami Zeidan, "Desperately Seeking Definition: The International Community's Quest for Identifying the Specter of Terrorism," 36 *Cornell Int'l L.J.* 491(2004).

*Ibid.*

General Assembly Resolution 42/159 of December 7, 1987, Article 1 of Framework Decision on Combating Terrorism (2002).

Human Rights, Terrorism and Counter Terrorism, Fact Sheet no.32(Office of the United Nations High Commissioner of Human Rights).

In cases of massive terrorist attacks such as the 26/11 attack on Mumbai, there is a public outrage and demand for speedier justice pressurizing administration to take stringent

steps.

Jayanth K. Krishnan, "India's 'Patriot Act': POTA and the Impact on Civil Liberties in the World's Largest Democracy," 22 *Law & Ineq. J.* 265, 280 (2004).

See Sachin Mehta, "Repeal of POTA Justified," available at, <http://www.legalservicesindia.com/articles/pota.htm> (last visited Jan. 23, 2013) where the author points out that authorities had achieved only a one-percent conviction rate under the Terrorist and Disruption Activities (Prevention) Act (TADA), despite the fact that TADA granted prosecutors the ability to use a broader range of evidence than was admissible in the regular criminal justice system.

Under TADA, evidence indicated that Muslims were arrested en masse whenever unrest occurred, whereas violence committed by Hindus went largely unacknowledged. See Krishnan, *supra* note 10 at 270-71, 275.

Unlawful Activities (Prevention) Act, No. 37 of 1967.

Section 5.

Sections 10-14.

Section 18.

Terrorist and Disruptive Activities (Prevention) Act, Act No. 28 of 1987, amended by Act No. 43 of 1993.

TADA was preceded by the Terrorist Affected Areas (Special Courts) Act, Act No. 61 of 1984, The TAA Act applied to all regions of India except Jammu and Kashmir. Although TADA was initially enacted with the same carve-out for Jammu and Kashmir, it was quickly amended to apply to all regions of India.

See Krishnan, *supra* note 10 at 267.

Section 9 TADA, 1987.

Ss. 9(1), 9 (2).

Section 9(3).

Section 14(2).

Section 21.

TADA was enacted in 1985 with a two-year sunset provision. However, its duration was extended by the Terrorist and Disruptive Activities (Prevention) Act, 1987, Act No. 28 of 1987, amended by Act No. 43 of 1993. The 1987 version of TADA was substantially identical to the original version from 1985, and was renewed repeatedly until it was allowed to expire in 1995.

See *supra* note 11.

The Prevention of Terrorism Act, No. 15 of 2002, (POTA) was enacted March 28, 2002, replacing the Prevention of Terrorism Ordinance, No. 9 of 2001.

Section 3(5).

section 43.

Ss.48(2), 49.

Section 32. The admissibility of confessions is a reversal of the pre-POTA rule that confessions to police officers are generally inadmissible.

Section 52.

Ss. 23-34.

POTA section 23(1). As with TADA, the central government made the final decision on whether a case was appropriately tried in a Special Court. POTA section 23(3).

Section 29(2).

Section 29(1).

*Ibid.*

Section 29(5).

Section 34, preserving a right of appeal to a high court, but eliminating the right of direct appeal through the ordinary judicial processes to attempt to streamline the appeals process.

Ss. 29(2), (5).

C. Raj Kumar, "Human Rights Implications of National Security Laws in India: Combating Terrorism While Preserving Civil Liberties," 33 *Denv. J. Int'l L. & Pol'y* 195, 196 (2005).

Human Rights Watch, *World Report 2003 (Events of 2002)* 241 (2003).

See *Supra* note 11.

See Anil Kalhan, et al., "Colonial Continuities: Human Rights, Terrorism and Security Laws in India," 20 *Colum. J. of Asian L.* 93 (2006) at 165.

Prevention of Terrorism (Repeal) Act, No. 26 of 2004.

The Unlawful Activities (Prevention) Amendment Ordinance, No. 29 of 2004.

Unlawful Activities (Prevention) Amendment Ordinance, section 45.

National Investigation Agency Act No. 34 of 2008.

Unlawful Activities (Prevention) Amendment Bill, Bill No. 76 of 2008, amending the Unlawful Activities (Prevention) Act, No. 37 of 1967.

Section 11.

Section 13.

Section 16.

*Ibid.*

B.B. Pande, "Anti-Terror Legislation," available at <http://ssrn.com/abstract=1458279> (last visited Jan. 23, 2013).

UAPA 2008 Amendments ss. 15-18.

UAPA 2008 Amendments section 12.

*Ibid.*

*Ibid.*

*Ibid.*

See pande *supra* note 54.

A sunset clause is a legal provision that provides for the expiry of a law or part of a law at a later date. Such a device makes the law to which it applies temporary, whereas legislation is ordinarily permanent in that it persists unless and until repealed by subsequent legislation. Legislative inaction thus results in the continuance of the law. By contrast, the continued validity of legislation subject to a sunset clause is contingent upon some future action by the legislature. See John Ip, "Sunset clauses and counterterrorism legislation," *P.L.*, 74 (2013). (1994) 3 *S.C.C.* 569.

Article 21 reads: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

(1978) 2 *S.C.R.* 621

The Court noted the protections of the Magna Carta, the Sixth Amendment of the U.S. Constitution and the 1974 Speedy Trial Act.

Justice Shivraj Patil, "Human Rights, Terrorism and Internal Security," 1 *Bharti L. Rev.* 26 (2012).

*Ibid.*

*Ibid.*

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