



Vidhi

Centre For Legal Policy

BETTER LAWS. BETTER GOVERNANCE

ANTI-TERROR LAW IN INDIA

A STUDY OF STATUTES AND JUDGMENTS, 2001 – 2014

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INTRODUCTION

‘Terrorism’, internationally, has proved impossible to define in a manner that is widely acceptable. There is lack of international consensus on the definition due to deep, almost insurmountable differences on issues such as the legal status of state-sponsored terrorism and national liberation movements. International conventions on terrorism currently focus on the methods of terrorism rather than on its intent. Therefore specific ‘sectoral’ conventions on hijacking, use of plastic and nuclear explosives, and terrorism financing, are the only international instruments currently in force.¹ Work on a Comprehensive Convention on International Terrorism, however, has also been underway since 1995, although talks have been at a deadlock due to the issues mentioned above.

Globally, India has had some role to play in the development of international law on terrorism. It was one of the earliest countries to call for a comprehensive treaty definition of terrorism.² Regionally, as well, some movement has taken place in the shape of the SAARC Regional Convention on Suppression of Terrorism and its Additional Protocol.³

While scholars of international law have made terrorism the subject of extensive study, concomitant attention has not been paid to the development of domestic law dealing with acts of terrorism in India. Here, as in the case of counter-terrorism in general, prosecution of suspected cross-border terrorists falls into two categories - cases that receive overwhelming public attention, such as the trial of Ajmal Kasab or Afzal Guru, and cases that remain largely removed from public view. There has been little study, in a systematic fashion, of the lines along which terrorism cases are prosecuted in India, and determine if and how they deviate from the requirements of due process and constitutional guarantees.⁴

This is a gap this Report seeks to address. In it, we look at the principle legal issues surrounding the phrasing and implementation of anti-terror legislation in India, their interpretation in courts, and the issues of coordination and federalism that crop up in the context of concurrent jurisdiction of investigation agencies under State and Central anti-terror laws. This Report does not make any claims about what is, or is not an act of terrorism; instead, it seeks to focus only on those offences that have been classified or dealt with as acts of terrorism by the Indian criminal justice system.

¹ Alex P Schmid, ‘The Definition of Terrorism’ in Alex P Schmid (ed), *The Routledge Handbook of Terrorism Research* (Routledge 2011) 39.

² CL Lim, ‘The question of a generic definition of terrorism under general international law’ in Kent Roach et al (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press 2005) 37.

³ The Convention was signed on 4th November 1987 and came into force on 22nd August, 1988. Pursuant to the new obligations devolving along member States *vide* UN Security Resolution 1373 of 2001, the Council of Ministers signed the Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism at the Twelfth SAARC Summit at Islamabad in 2004. This came into force on 12th January 2006. See <http://saarc-sec.org/areaofcooperation/detail.php?activity_id=21>.

⁴ For one of the few systematic studies carried out in the past, see Ujjwal Kumar Singh, *The State Democracy and Anti-Terror Laws in India* (Sage Publications, New Delhi 2007).

Our study is limited to the ambit of anti-terror laws that relate to the investigation and prosecution of acts of terrorism in India. This includes Central laws such as the Unlawful Activities (Prevention) Act, 1967 ('UAPA'), and State laws such as the Maharashtra Control of Organised Crime Act, 1999 ('MCOCA'). It does not deal with other laws relating to national security such as the various preventive detention acts and State laws on public safety in operation in India today.

This report has three chief objectives. First, it aims to map out the different substantive and procedural provisions that have been used to prosecute acts of terror in India, and examine how they interact with one another. Second, it identifies and attempts to untangle the constitutional issues surrounding the ongoing disputes between Centre and States on legislation used in cases of terrorism. Third, this Report traces the judicial interpretation of general and special criminal laws in cases of terrorism, to see how it deviates from the approach towards ordinary criminal trials.

Through this study, we hope to present a comprehensive picture of how terror laws operate in India today.

OVERVIEW OF LAWS

CHAPTER I: OVERVIEW OF LAWS

We begin this Report with an overview of laws pertaining to the trial of terror cases in India, in order to establish the landscape, which later chapters explore in more detail. This Chapter, therefore, outlines Central and State laws governing substantive offences and procedures in cases of terrorism, and presents a broad picture of how they operate in relation to one another.

A. Laws Governing Substantive Offences

A number of Central and State laws have been enacted or subsequently amended to deal with terrorism and related activities. The Indian Penal Code ('IPC'), and the Code of Criminal Procedure, 1973 ('CrPC'), contains provisions relevant to terror cases as well. Besides general provisions on murder, criminal conspiracy, etc., there are other provisions more directly concerned with terrorism and related offences. These include the offence of waging war against the Indian government,⁵ and sedition (words/signs/visible representation to bring hatred or contempt, or exciting disaffection towards the government in India).⁶ Terrorism cases, such as the Parliament attack case,⁷ Kasab's trial,⁸ and the Malegaon blasts case,⁹ have all involved charges under the IPC. However, considering the nature and gravity of terrorism, the Centre and States have enacted other specific legislations to deal with terrorism and related activities.

In 1985, Parliament enacted the TADA as a specific anti-terror legislation, in the backdrop of the 1984 Indira Gandhi assassination. The law remained in force till 1995, after which it lapsed, following widespread allegations of misuse. In the aftermath of the 2001 Parliament attack, the Prevention of Terrorism Act ('POTA'), 2002 was enacted. POTA also faced severe criticism for allowing widespread human rights abuses in the country.¹⁰ It contained a broad definition of a 'terrorist act' that covered political dissents, allowed prolonged pre-trial detentions, and

⁵ Indian Penal Code 1860 ('IPC'), section 121 (punishable with death or life imprisonment, along with fine).

⁶ IPC, section 124A (punishable with imprisonment for maximum three years or with fine or with both).

⁷ *State v Mohd Afzal*, 107 (2003) DLT 385 (Delhi High Court).

⁸ *State of Maharashtra v Mohammed Ajmal Mohammad Amir Kasab*, 2011 SCC OnLine Bom 229 (Bombay High Court) ('Kasab High Court case').

⁹ *Pragyasingh Chandrapalsingh Thakur v State of Maharashtra*, 2014 (1) Bom CR (Cri) 135 (Bombay High Court).

¹⁰ Prevention of Terrorism (Repeal) Act, 2004 ('POTA Repeal Act'), Statement of Objects and Reasons, para 2.

reversed the presumption of innocence of an accused. The law was thus repealed in 2004.¹¹ POTA is, however, relevant even today since the Act's repeal did not affect pending investigations and legal proceedings instituted under the Act.¹² Further, the repealing Act also permitted the institution of investigation, legal proceedings or remedies after repeal, although no Court was permitted to take cognizance of an offence under POTA after the expiry of one year since the repealing of the Act.¹³ As a result of this, several cases are currently pending under POTA even today, and the trial in the *Mulund Blasts* case of 2003, which involves charges under POTA, commenced only in July 2014, 11 years after the incident.¹⁴ The repealing Act made provisions for the POTA Review Committee to review all cases registered under the Act within a period of one year from the commencement of the repealing Act, and close cases where no *prima facie* case was made out against the accused.¹⁵ Three such Review Committees found that there was no *prima facie* evidence against two-thirds of the accused in POTA cases pending at the time of its repeal.¹⁶

Currently, the UAPA is the primary anti-terrorism law in force in India. This law was enacted by Parliament in 1967 to enable the imposition of reasonable restrictions on the rights to freedom of speech and expression, peaceful assembly, and formation of associations or unions in the interest of sovereignty and integrity of India.¹⁷ The original Act was targeted at unlawful activities of a general nature, and stringent provisions on terrorism were added only later through various amendments starting in 2004, following POTA's repeal. It was subsequently amended in 2008 in response to the Mumbai terrorist attacks. The amended UAPA incorporated the definition of a 'terrorist act' under section 15 and created new terrorist offences.¹⁸ It also increased the period of detention without bail¹⁹ and changed the presumption of innocence to

¹¹ Editorial, 'Rethink the new UAPA' *The Hindu* (20 December 2012)

<<http://www.thehindu.com/opinion/editorial/rethink-the-new-uapa/article4218425.ece>> accessed 13 June 2014.

¹² POTA Repeal Act, section 2(2).

¹³ POTA Repeal Act, section 2(2), proviso.

¹⁴ Mateen Hafeez, '11 Years After 3 Blasts Rocked Mumbai, Trial Finally Starts in Case' *The Times of India* (9 July 2014) <<http://timesofindia.indiatimes.com/city/mumbai/11-years-after-3-blasts-rocked-Mumbai-trial-finally-starts-in-case/articleshow/38093989.cms>> accessed 3 June 2015.

¹⁵ POTA Repeal Act, section 2(3).

¹⁶ Ujjwal Kumar Singh, *The State Democracy and Anti-Terror Laws in India* (Sage Publications, New Delhi 2007) 306.

¹⁷ Unlawful Activities (Prevention) Act, 1967 ('UAPA'), Statement of Objects and Reasons.

¹⁸ See Chapter III(B)(2) below.

¹⁹ UAPA, section 43D(2).

that of guilt where certain conditions were met,²⁰ thus bringing in the stringent provisions for which POTA was earlier criticised.²¹ The most recent amendments were made in 2013, which dealt largely with the economic and financial aspects of terrorism.²²

A person may be punished under the UAPA even where the offences punishable under the Act are committed outside India.²³ The rationale behind such a provision is that a legislation dealing specifically with acts of terrorism must take into consideration the possibility that the acts could have their source of planning or funding outside the territory of India. Acts occurring outside India could still threaten the *unity, integrity, security, economic security, or sovereignty of India*, which is what constitutes a ‘terrorist act’ as per the definition under section 15. Similarly, section 1(5) of the Act also applies to Indian citizens outside India; persons in government service, wherever they may be; and persons in ships and aircrafts registered in India, wherever they may be.

In addition to the UAPA, there are other Central and State laws intended to deal with specific public order and security situations in a localised area. The controversial Armed Forces (Special Powers) Act, 1958 (‘AFSPA’) is one such law enacted by Parliament to check insurgency in the North East²⁴ by giving additional powers to the armed forces in areas declared ‘disturbed areas’. These provisions were extended to Jammu & Kashmir in 1990 through the enactment of the Armed Forces (Jammu & Kashmir) Special Powers Act.

State legislatures have also enacted laws intended to address organised crime and militancy. These laws include the MCOCA, applicable in Maharashtra and Delhi;²⁵ the Karnataka Control of Organised Crime Act, 2000 (‘KCOCA’), and the Chhattisgarh Vishesh Jan Suraksha Adhiniyam, 2005 [Chhattisgarh Special Public Safety Act] (‘CVJSA’).²⁶

A reading of these laws shows that they were intended to deal with organised crime and gang violence. They punish a wide range of prolonged or serious criminal activities undertaken by individuals or unlawful associations, without being limited to terrorist offences. In spite of these broad provisions, there is no doubt today that States view these legislations as stringent anti-

²⁰ UAPA, section 43E.

²¹ Mark H Gitenstein, ‘Nine Democracies and the Problem of Detention, Surveillance, and Interrogation’, in Benjamin Wittes (ed), *Legislating the War on Terror: An Agenda for Reform* (Brookings Institution 2009), 11-12.

²² Unlawful Activities (Prevention) Amendment Act, 2012.

²³ UAPA, section 1(4).

²⁴ This includes the “States of Assam, Manipur, Meghalaya, Nagaland and Tripura and the Union Territories of Arunachal Pradesh and Mizoram” as per section 1(2) of the Act.

²⁵ Vide the Ministry of Home Affairs Notification No: GSR 6(E) dated 2 January 2002, under section 2 of the Union Territories (Laws) Act, 1950.

²⁶ Chhattisgarh Vishesh Jan Suraksha Adhiniyam, 2005 (Chhattisgarh Special Public Safety Act) (‘CVJSA’), section 1(2).

terrorism laws. The accused in the Malegaon blast case²⁷ were charged under provisions on commission of organised crime under MCOCA, along with provisions on terrorist acts under the UAPA. In the Binayak Sen case,²⁸ involving the arrest of the civil rights activist for his alleged links with Maoists, Sen was booked under provisions regarding unlawful activities and membership in unlawful organisation under CVJSA;²⁹ provisions on membership in unlawful association and terrorist organisation under UAPA;³⁰ and conspiracy and sedition under the IPC.³¹

Even while these broad provisions have been used in terrorism cases, Karnataka sought to amend the provisions of the KCOCA in 2009 to explicitly bring in provisions dealing with terrorist offences. The amendments sought to explicitly include a ‘terrorist act’ as an organised crime and extend death penalty for such acts.³² The Bill was passed in both Houses of the State Legislature, but did not receive Presidential assent.³³ This clearly demonstrates the Assembly’s aims to use KCOCA to directly address terrorist offences in the State, instead of confining its provisions to gang violence or other kinds of organised crimes, as was originally intended.

The use of both kinds of provisions – on unlawful activities and on terrorist acts – in the same terrorism case shows that the line between these two types of criminal activities is blurred, in law if not in fact. While a terrorist act can be regarded as organised crime or unlawful activity, it raises questions about the need to have multiple and overlapping laws addressing these activities. It also exposes the difficulties in defining ‘terrorist acts’ and ‘unlawful’ or ‘organised crimes’. Even while State laws on organised crime may have a broader and different objective in mind, when an organised terrorist act takes place, provisions of these more general State laws are inevitably attracted.

The above laws must be read together with other Central legislations regulating the use of arms, ammunition and explosives that have been used in terrorism cases. Some important laws include the Arms Act, 1956; Explosives Act, 1884; and Explosive Substances Act, 1908. Since terrorist acts often involve violation of one or the other legal provision regarding manufacture, use or

²⁷ *Sadhwi Pragya Singh Thakur v NIA*, (2014) 1 SCC 258.

²⁸ *Vinayak Sen v State of Chhattisgarh*, 2008 (1) CGLJ 127 (Chhattisgarh High Court).

²⁹ CVJSA, sections 8(1), (2), (4), (5).

³⁰ UAPA, sections 10(a)(i), 20, 21, 38, 39.

³¹ IPC, sections 120B, 121A, and 124A.

³² Vikhar Ahmed Sayeed, ‘An Act in Question’ (2009) 26(19) Frontline
<<http://www.frontline.in/static/html/fl2619/stories/20090925261910500.htm>> accessed 12 June 2014.

³³ M Venkatesha, ‘State awaiting President’s nod on legislations’ *The New Indian Express* (Bangalore, 21 May 2011) (updated 16 May 2012)
<<http://www.newindianexpress.com/states/karnataka/article472642.ece>> accessed 12 June 2014.

possession of arms and explosives, most terrorism cases, including Kasab's trial,³⁴ the Parliament attack case,³⁵ and the Malegaon blasts case,³⁶ have invoked provisions of these laws.

Most terror cases involve charges under multiple Central and State laws. For the 26/11 Mumbai attacks, for example, Ajmal Kasab was convicted under nine different Central Acts.³⁷ He was convicted under the IPC for offences such as murder,³⁸ criminal conspiracy,³⁹ waging of war,⁴⁰ collecting arms with intention of waging war,⁴¹ robbery,⁴² and wrongful confinement;⁴³ under the UAPA for commission of terrorist⁴⁴ and unlawful activities;⁴⁵ and under the Arms Act, 1959,⁴⁶ the Explosives Act, 1884⁴⁷ and the Explosive Substances Act, 1908⁴⁸ for offences relating to carrying and using of arms and explosives.⁴⁹

³⁴ *Kasab* High Court case.

³⁵ *State v Mohd. Afzal*, 107 (2003) DLT 385 (Delhi High Court).

³⁶ *Pragyasingh Chandrapalsingh Thakur v State of Maharashtra*, 2014 (1) Bom CR (Cri) 135 (Bombay High Court).

³⁷ *Kasab* High Court case.

³⁸ IPC, section 302.

³⁹ IPC, section 120B.

⁴⁰ IPC, section 121.

⁴¹ IPC, section 122.

⁴² IPC, section 392.

⁴³ IPC, sections 342, 343. Other offences include abduction for murder (IPC, section 364); causing hurt (IPC, section 332) and grievous hurt (IPC, section 333) to public servants; causing mischief by fire or explosive substance with intent to destroy a place (IPC, section 436. This offence is also punishable under Sections 3 and 4 of the Prevention of Damage to Public Property Act, 1984).

⁴⁴ UAPA, section 16.

⁴⁵ UAPA, section 13. Other offences include conspiracy for commission of terrorist act (UAPA, section 18) and being a member of a terrorist gang or organisation (UAPA, section 20).

⁴⁶ Carrying of arms (Arms Act, 1959, sections 25(1B)(a), 25(1A)); using arms (Arms Act, section 27).

⁴⁷ Explosives Act 1884, section 9B(1)(a),(b) (for import, possession, use and transportation of explosives under the Explosives Act).

⁴⁸ Explosive Substances Act, 1908, section 3(b) (for explosion causing death or serious injury).

⁴⁹ Other offences include causing damage to railway property (Railways Act, 1989, section 151); endangering safety of persons traveling by railway (Railways Act, section 153); contravention of

Apart from substantive laws, terrorism cases also often involve multiple investigating agencies. The 2007 Hyderabad Mecca Masjid bomb blast case, for example, involved the transfer of investigation multiple times, from the police to the CBI, and then to the National Investigation Agency ('NIA').⁵⁰ This shall be discussed in more detail in Part B(1) of this Chapter.

While the general procedural and evidence rules under the CrPC and Evidence Act apply to all criminal laws, some terrorism laws also provide for special rules deviating from these general principles. The legal framework on terrorism in India is thus complicated with various laws addressing similar issues. Multiplicity of laws has led to overlaps and conflicts in the past. The next section looks at the landscape of laws governing terror investigations and trials.

B. Laws Governing Investigation and Trial

In general, provisions under the CrPC on investigation and trial of offences are applicable to offences under the IPC and offences under special laws. Due to the gravity of terrorist offences, however, many terrorism-related laws contain additional (and different) provisions providing for special investigation agency or procedures, special courts or modified rules of evidence. This section discusses such special provisions on investigations and trials.

1. Investigation

The Parliament enacted the National Investigation Agency Act, 2008 ('NIAA') in the wake of the 26/11 Mumbai attacks. The Act aims to provide for a special investigation agency at the national level to investigate and prosecute offences affecting the sovereignty, security and integrity of India.⁵¹ The NIAA provides for the establishment of the NIA that may conduct investigation and prosecution when any offence is committed under the UAPA, SAARC Convention (Suppression of Terrorism) Act, Chapter VI of IPC (Offences against the State, including sedition and waging war against India), and other laws listed in its Schedule (known as Scheduled Offences).⁵² Under section 3(2) of the Act, NIA may investigate such offences throughout India and exercise all the powers of the police.

According to the NIAA, after an FIR is recorded with respect to a Scheduled Offence, the police officer must forward the report to the State government, which shall forward it to the Central government at the earliest.⁵³ Within fifteen days from the receipt of the report, the Central

rules under Passport Act (Passport (Entry into India) Act, 1920, section 3(3)); evasion of customs duty (Customs Act, 1962, section 135(1)(a)) and violation of provisions regarding entry into India (Foreigners Act, 1946, section 14).

⁵⁰ *NIA, Hyderabad v Devendra Gupta*, 2013 SCC OnLine AP 136 (Andhra Pradesh High Court).

⁵¹ National Investigation Agency, India
<http://www.nia.gov.in/writereaddata/FINAL_NIA_BROCHURE.pdf> accessed 11 August 2014.

⁵² National Investigation Agency Act, 2008 ('NIAA'), section 3 read with the Schedule.

⁵³ NIAA, section 6(1) and (2).

government shall determine if this is a fit case to be investigated by the NIA, based on whether the offence is a Scheduled Offence, the gravity of the offence, and other relevant factors.⁵⁴ The Central government may *suo moto* also direct the NIA to investigate an offence when it believes a Scheduled Offence has been committed.⁵⁵ The State government is thus obliged under the Act to bring to the notice of the Central government every potential terrorism related act, and it is up to the Central government to decide whether it shall be taken over by the national investigation body instead of the local one. The implications of these provisions are discussed in greater detail in Chapter II(C) of this report.

Once the NIA takes over the investigation, the State government and police shall stop their investigation and forward all relevant records to the NIA.⁵⁶ The NIA may request the State government to associate itself with the investigation, or may transfer the case back to the State government, with the prior approval of Central government.⁵⁷

In accordance with these provisions, the investigation of the Malegaon bombings was handed over to the NIA even though the blasts took place in the year 2006, before the NIAA was enacted. The case was initially registered at a Mumbai police station, but was transferred to the NIA in 2011 by the Union Home Ministry.⁵⁸ Similarly, the investigations of the 2007 Samjhauta Express blasts⁵⁹ and of the 2011 Delhi High Court blast case⁶⁰ were handed over from the police to the NIA. In the Hyderabad Mecca Masjid bomb blast case, there were three different investigating authorities involved—first the police, then the CBI, and finally the NIA. Other recent cases involving NIA investigation include the 2013 Bodh Gaya serial bomb blasts case⁶¹ and the 2013 Patna bombings.⁶² The validity of these transfers, and the constitutionality of the NIA, will be discussed in more detail in Chapter III(B).

The CVJSA, MCOCA, and KCOCA also contain provisions regarding investigation of offences committed under these laws. While these laws refer to the police as the relevant investigating

⁵⁴ NIAA, section 6(3).

⁵⁵ NIAA, section 6(4).

⁵⁶ NIAA, section 6(6).

⁵⁷ NIAA, section 7.

⁵⁸ *Pragyasingh Chandrapalsingh Thakur v State of Maharashtra*, 2014 (1) Bom CR (Cri) 135 (Bombay High Court).

⁵⁹ NIA Press Note, <http://www.nia.gov.in/writereaddata/Crime_No_09-2010.pdf> accessed 19 August 2014.

⁶⁰ *Aamir Abbas Dev v State through NIA*, 2014 (1) JCC 319 (Delhi High Court).

⁶¹ NIA Press Release, 'Charge sheet In Patna Blast Case' (New Delhi 29 May 2014) <<http://www.nia.gov.in/writereaddata/PressRelease29052014.pdf>> accessed 14 June 2014.

⁶² NIA Press Release, 'Both Gaya Serial Bomb Blast Case' (New Delhi 24 April 2014) <<http://www.nia.gov.in/writereaddata/PressRelease24042014.pdf>> accessed 14 June 2014.

agency, they prescribe the minimum rank police officers must have in order to approve the recording of information about commission of an organised crime⁶³ and in order to conduct investigation in such cases.⁶⁴

2. Courts

Establishing Special Courts has been a common response in India towards terrorist offences. Designated courts to try terrorist offences were established under TADA, and then again in POTA. After the repeal of POTA, while many of its substantive provisions were reintroduced through amendments in the UAPA, its provisions on Special Courts were modified and introduced into the new NIAA enacted in the same year. The NIAA empowers Central and State governments to establish Special Courts for the trial of Scheduled Offences.⁶⁵ It also ousts the jurisdiction of other courts with respect to a Scheduled Offence investigated by the NIA.⁶⁶ However, if an offence under the UAPA is not investigated by the NIA, a regular Court of Sessions may try it.⁶⁷ Even the State laws of MCOCA and KCOCA provide for setting up of Special Courts by State governments to try offences under the respective laws.⁶⁸

More than 35 Special Courts have been set up by the Indian government under the NIAA.⁶⁹ Many terrorism cases, including Kasab's trial,⁷⁰ the Parliament attack case,⁷¹ the Hyderabad Mecca Masjid blasts,⁷² Samjhauta Express blasts,⁷³ and the Delhi High Court blast case,⁷⁴ have involved trial in Special Courts.

⁶³ Maharashtra Control of Organised Crime Act, 1999 ('MCOCA'), section 23(1)(a); Karnataka Control of Organised Crime Act ('KCOCA'), section 24(1)(a); CVJSA, section 16(2).

⁶⁴ MCOCA, section 23(1)(b); KCOCA, section 24(1)(a); CVJSA, section 16(3).

⁶⁵ NIAA, sections 11(1), 22(1).

⁶⁶ NIAA, section 13(1).

⁶⁷ UAPA, section 2(1)(d).

⁶⁸ MCOCA, sections 5, 6; KCOCA, sections 5, 6.

⁶⁹ National Investigation Agency, India <<http://www.nia.gov.in/niasplcourts.aspx>> accessed 11 August 2014.

⁷⁰ 'Special court hands down death sentence for Kasab' *The Times of India* (7 May 2010) <<http://timesofindia.indiatimes.com/home/opinion/edit-page/Special-court-hands-down-death-sentence-for-Kasab/articleshow/5899235.cms>> accessed 14 June 2014.

⁷¹ *State v Mohd. Afzal*, 107 (2003) DLT 385 (Delhi High Court).

⁷² *NIA, Hyderabad v Devendra Gupta*, 2013 SCC OnLine AP 136 (Andhra Pradesh High Court).

⁷³ Harpreet Bajwa, 'Court Frames Charges in Samjhauta Blast Case' *The New Indian Express* (Panchkula 25 January 2014) <<http://www.newindianexpress.com/nation/Court-Frames-Charges-in-Samjhauta-Blast-Case/2014/01/25/article2018368.ece>> accessed 14 June 2014.

In *Redaul Khan v NIA*,⁷⁵ the Supreme Court held that where a person is arrested in connection with an offence under NIA, only a Special Court can remand the accused to police or judicial custody. Once the investigation is handed over to the NIA, only the Special Court can authorise further detention of the accused. Where a Special Court has not been constituted, such powers lie with the Sessions Court. The source of power to grant bail in such cases is section 437 of the CrPC, which is the general provision for granting bail for non-bailable offences, and not section 439, which deals with special powers of High Court or Sessions Court in granting bail.⁷⁶ This is because the Special Court is a court of original jurisdiction and cannot be regarded as a Sessions Court except to the extent provided by NIA itself.⁷⁷ The aggrieved party may appeal to the High Court in accordance with section 21(4) of NIA, but cannot directly approach the High Court under section 439 of the CrPC.⁷⁸

Special courts and procedures for terrorist cases have been under scrutiny of human rights activists who argue that these violate fundamental rights and due process requirements under the Indian Constitution.⁷⁹ However, the Indian Supreme Court has upheld the use of Special Courts for trial of terrorist offences, considering the need to expedite trial in such cases.⁸⁰ The need to ensure speedy trial and execution of punishment, especially if death penalty is awarded, has often been cited as one of the reasons for establishment of Special Courts.⁸¹ However, it is uncertain whether Special Courts fulfil this objective. While Kasab's trial is hailed as one of the quickest trial-to-execution cases in the history of India taking a little less than four

⁷⁴ *Aamir Abbas Dev v State through NIA*, 2014 (1) JCC 319 (Delhi High Court).

⁷⁵ *Redaul Hussain Khan v NIA*, (2010) 1 SCC 521.

⁷⁶ *Redaul Hussain Khan v State of Assam* (2009) 3 GLT 855 (Gauhati High Court); *Jayanta Kumar Ghosh v NIA*, 2014 (1) GLT 1 (Gauhati High Court); *Jibangshu Paul v NIA* 2011(3) GLT 615 (Gauhati High Court).

⁷⁷ *Jibangshu Paul v NIA* 2011(3) GLT 615 (Gauhati High Court).

⁷⁸ *Redaul Hussain Khan v State of Assam* (2009) 3 GLT 855 (Gauhati High Court); *Jayanta Kumar Ghosh v NIA*, 2014 (1) GLT 1 (Gauhati High Court); *Jibangshu Paul v NIA* 2011(3) GLT 615 (Gauhati High Court).

⁷⁹ Sudha Setty, 'Comparative Perspectives on Specialized Trials for Terrorism' (2010) 63 Me L Rev 131, 167, 169-70.

⁸⁰ *Kartar Singh v State of Punjab*, (1994) 3 SCC 569, para 369 (the case involved a challenge to the constitutional validity of TADA).

⁸¹ 'Special courts needed for terror related cases' (Amravati, 31 January 2012) <<http://timesofindia.indiatimes.com/city/nagpur/Special-courts-needed-for-terror-related-cases/articleshow/11692190.cms>> accessed 13 June 2014; 'Govt backs special courts for speedy trial of terror cases' *The Times of India* (New Delhi, 24 March 2013) <<http://timesofindia.indiatimes.com/india/Govt-backs-special-courts-for-speedy-trial-of-terror-cases/articleshow/19158953.cms>> accessed 13 June 2014.

years,⁸² it is also criticised for violating certain due process measures followed in ordinary criminal cases.⁸³ In contrast, Mohd. Afzal's trial, also under a Special Court under POTA, took 12 years, questioning the efficiency of Special Courts in ensuring speedy justice. Scholars have pointed out that Special Courts in fact share the same infrastructure and personnel as regular Courts of Sessions, their status as 'special' courts being often only in name.⁸⁴

Apart from Special Courts, an important mechanism introduced under POTA was the Review Committee, to be constituted by the Central government and each State government.⁸⁵ At the time of the original enactment it had two functions - (a) to review a refusal of an application by the Central Government to de-notify a terrorist organisation from the Schedule (the Schedule to POTA contained a list of organizations notified as terrorist organization by the Central government); and (b) to review all orders passed by the competent authority regarding the authorisation for interception of communication, as allowed for in the Act in certain circumstances. In the former case, the decision of the Review Committee would be binding. In the latter, on an order of disapproval by the Review Committee, the interception was to stop and any evidence obtained was to be destroyed.

The powers of the Review Committees were considerably expanded by the 2003 POTA amendments that amended section 60 of the Act and empowered the Review Committee with the power to examine whether there was a *prima facie* case for proceeding against the accused. The decision of the Review Committee was made binding. This amendment was criticised due to the vast expansion of the powers of the Review Committee it entailed, and the conflict it posed between proceedings in the Special Court and the decisions of the Review Committee. In *Mahmadhusen Abdulrahim Kalota Shaikh v Union of India*,⁸⁶ the Supreme Court held that if the Review Committee decided that there were no *prima facie* grounds to proceed against the accused, the case is deemed to have been withdrawn.

⁸² Sandeep Joshi, 'Kasab's is the second-quickest 'trial-to-execution' case' *The Hindu* (22 November 2011) <<http://www.thehindu.com/news/national/kasabs-is-the-secondquickest-trialtoexecution-case/article4120253.ece>> accessed 13 June 2014; Rama Lakshmi, 'Stakes High for India in Emotionally Charged Mumbai Trial' *The Washington Post* (Mumbai, 22 June 2009) <<http://www.washingtonpost.com/wp-dyn/content/article/2009/06/21/AR2009062101731.html>> accessed 13 June 2014.

⁸³ Sudha Setty, 'Comparative Perspectives on Specialized Trials for Terrorism' (2010) 63 *Me L Rev* 131, 169.

⁸⁴ Jayanth K Krishnan and Viplav Sharma, 'Exceptional or Not? An Examination of India's Special Courts in the National Security Context' in Fionnuala Ni Aoláin and Oren Gross (eds), *Guantánamo and Beyond: Exceptional Courts and Military Commissions in Comparative Perspective* (Cambridge University Press 2013) 283-302, 283.

⁸⁵ Prevention of Terrorism Act, 2002 ('POTA'), section 60.

⁸⁶ *Mahmadhusen Abdulrahim Kalota Shaikh v Union of India*, (2009) 2 SCC 47.

POTA was repealed in 2004, but the Review Committees were directed to review all cases under the Act to determine whether a *prima facie* case for proceeding against the accused existed. The Committees were required to review all cases by September 2005, but numerous cases had not been reviewed and over 400 persons remained under detention. Three Review Committees were constituted which reviewed 263 cases involving 1,529 accused persons and determined that there was no *prima facie* evidence under POTA against 1,006 of them.⁸⁷ The Bombay High Court in *Aatif Nasir Mulla v The Central POTA Review Committee*⁸⁸ noted that there was no provision in the Repeal Act as to what would be the consequence of failing to review a case. The Court held that while cases where cognizance had not been taken before the end of one year from the commencement of the Repeal Act would be withdrawn, cases where the Court had already taken cognizance would not be affected by the failure of the Review Committee to review such case.⁸⁹

3. Criminal Procedure

In general, all provisions of the CrPC are applicable to terrorism-related laws unless inconsistent with special provisions.⁹⁰ Special laws like the UAPA, MCOCA, and KCOCA have general overriding provisions as well as additional modifications in the application of the CrPC. For example, the UAPA, MCOCA, and KCOCA specify modified periods of detention from those prescribed under the CrPC.⁹¹ Further, these Acts prescribe additional restrictions on grant of bail other than those provided under CrPC.⁹²

As a result, where a CrPC provision is explicitly overridden by a special law, the special law shall prevail. For example, in the 2007 Hyderabad Mecca Masjid bomb blasts case, the Sessions Judge-cum-NIA Special Court found that there were reasonable grounds for believing that the accusations against the two accused persons under various Acts, including UAPA, were *prima facie* true, but still granted them bail under section 437 of the CrPC. The proviso to section 43D(5) of UAPA provides that a person accused of an offence under UAPA is not entitled to be

⁸⁷ V Venkatesan, 'Short on Strategy' (2008) 25(25) Frontline
<<http://www.frontline.in/static/html/fl2525/stories/20081219252513300.htm>> accessed 19 August 2014; Ujjwal Kumar Singh, *The State Democracy and Anti-Terror Laws in India* (Sage Publications, New Delhi 2007) 306.

⁸⁸ *Aatif Nasir Mulla v The Central POTA Review Committee*, 2010 SCC OnLine Bom 1379 (Bombay High Court).

⁸⁹ *Aatif Nasir Mulla*, para 28.

⁹⁰ Section 43C of the UAPA explicitly provides that all provisions of CrPC shall be applicable to all arrests, searches and seizures under the UAPA, except where inconsistent with the UAPA; [;;;;;;], Section 7(2) of Explosives Act, 1884 and Section 24A(3) of the Arms Act, 1959 also provide for application of CrPC provisions relating to searches to searches under these Acts.

⁹¹ UAPA, section 43D(2); MCOCA, section 21(2); KCOCA, section 22(2).

⁹² See Chapter IV(C) below.

released on bail if the accusation is *prima facie* true. In an appeal against the order granting bail, the Andhra Pradesh High Court held UAPA barred the grant of bail in this case. This position is further clarified by section 43D(6) of UAPA, which lays down that these restrictions on granting bail are in addition to the restrictions under the CrPC or any other law.⁹³

From this brief overview, it is clear that multiple laws come in to play in the State response to what it sees as acts of terrorism. Conflicts inevitably arise in the interaction of these multiple overlapping laws and investigating agencies. The next chapter, therefore, explores challenges to federal relations in India that have arisen as a result of counter-terrorism efforts in the last 15 years.

⁹³ *NIA, Hyderabad v Devendra Gupta*, 2013 SCC OnLine AP 136 (Andhra Pradesh High Court). See also *Jayanta Kumar Ghosh v NIA*, 2014 (1) GLT 1 (Gauhati High Court).

ISSUES OF FEDERALISM

CHAPTER II: ISSUES OF FEDERALISM

Questions have been persistently raised regarding whether counter-terrorism efforts have violated principles of federalism in India. While the proposed National Counter Terrorism Centre brought this issue to the political forefront, the introduction of legislative enactments and investigating agencies in the past have had to tackle potential challenges to the federal structure. This Chapter looks at such issues in more detail, and tackles the question of whether, and how, counter-terrorism has affected the balance of power between Centre and State in India. Specifically, it looks at the aspects of conflicts between Centre and State laws and issues of federalism that have arisen with respect to investigation agencies.

A. Conflicts between Centre and State Laws

The previous chapter showed that a number of State and Central laws exist to deal with terrorism. Questions have been raised on the legislative competence to enact these laws, and the consequences in case of conflict between the provisions of a State law and a Central law, i.e. which law will prevail over the other. This section thus examines two aspects of terrorism laws from the perspective of the principle of federalism as enshrined in the Indian Constitution: (i) constitutional challenges to laws on the ground of lack of legislative competence of the Parliament / State legislature; (ii) overriding effect in case of conflicting provisions.

1. Challenges to Legislative Competence

Laws related to terrorism fall within multiple entries of the Seventh Schedule to the Constitution. In the Union List, it relates to the 'defence of India', 'armed forces', and 'preventive detention'.⁹⁴ In the State List, 'public order', and 'police'⁹⁵ are used to legislate on activities related to terrorism, while 'criminal law', 'criminal procedure', and 'preventive detention in connection with public order'⁹⁶ find a place in the Concurrent List.

Terrorism laws have been challenged in the past on the ground of lack of legislative competence. However, it has been established early on that the Centre retains the power to enact laws related to combating terrorism. This was the question in *Kartar Singh v State of Punjab*,⁹⁷ where the constitutional validity of TADA was challenged before the Supreme Court on the ground that Parliament does not have the legislative competence to enact TADA. It was contended that such a law falls within the power of State legislatures under Entry 1 of List II on public order. However, the Court held that Parliament has legislative competence to enact TADA. It explained that 'public order' under Entry 1 in the State List is confined to disorders of lesser gravity having an impact within the boundaries of the State. More serious activities

⁹⁴ Constitution of India, Schedule VII, List I, Entries 1, 2 and 9 respectively.

⁹⁵ Constitution of India, Schedule VII, List II, Entries 1 and 2 respectively.

⁹⁶ Constitution of India, Schedule VII, List III, Entries 1, 2 and 3 respectively.

⁹⁷ (1994) 3 SCC 569.

threatening the security and integrity of the country as a whole were held to be falling within the ambit of Entry 1 of the Union List relating to defence of India, and, in any event, under the residuary power conferred on Parliament under Article 248 read with Entry 97 of the Union List. After examining the legislative provisions and the Preamble of the Act, the Court concluded that TADA deals with grave emergent situations created either by external forces particularly at the borders or by anti-nationals threatening the integrity and sovereignty of India.⁹⁸

This reasoning was applied to POTA as well in *PUCL v Union of India*.⁹⁹ The Court upheld the legislative competence of Parliament to enact POTA. In doing so, the Court explained that Entry 1 of the State List ('public order') empowers States to enact a legislation relating to public order or security in so far as it affects or relates to a particular State. The Court noted that terrorism is a trans-national and not a State-specific problem, affecting the security and sovereignty of the nation. The present day problem of terrorism does not fit within 'public order' under the State List, which is confined to disorders of lesser gravity having an impact within the State. In line with *Kartar Singh*, the Court held that activities of a more serious nature which threaten the security and integrity of the country as a whole fall within the ambit of Entry 1 of the Union List relating to defence of India.¹⁰⁰

Similar challenges have been posed to the AFSPA in *Naga People's Movement of Human Rights v Union of India*.¹⁰¹ Here, the Court said that the subject matter of the AFSPA falls within Entries 2 (armed forces of the Union) and 2A (deployment of armed forces of the Union in any State in aid of the civil power) of the Union List and Article 248 read with Entry 97 of the Union List (residuary powers of the Union), rather than within Entry 1 of the State List. The Court noted that this implies that the State legislature does not have the power with respect to the use of armed forces of the Union in aid of the civil power for the purpose of maintaining public order in the State. Entry 1 of the State List deals with 'public order', but it expressly excludes such use of armed force of the Union.

This case provided an opportunity for the Court to go into the relationship between Centre and State when armed forces are deployed 'in aid of the civil power'. The Court noted that even after deployment of armed forces, the civil power of the State will continue to function. The armed forces cannot supplant or substitute the State's civil power. On the contrary, the armed forces shall operate in cooperation with the civil administration so that the situation threatening public order is effectively dealt with.¹⁰²

Examining the provisions of the AFSPA, the Court concluded that the Act does not enable the armed forces to substitute the civil powers of the State. The powers conferred under AFSPA only provide for cognizance of offences, search, seizure and arrest, and destruction of arms dumps

⁹⁸ *Kartar Singh*, para 68.

⁹⁹ AIR 2004 SC 456.

¹⁰⁰ *Kartar Singh*, para 73.

¹⁰¹ (1998) 2 SCC 109. ('PUCL')

¹⁰² *Naga People's Movement of Human Rights v Union of India*, (1998) 2 SCC 109, para 28.

and shelters and structures used as training camps or hide-outs for armed gangs. The other functions, like the police, magistrates, prosecuting agency, courts, and jails, will be attended by the State's criminal justice machinery. Conferment of such powers on the Central government does not imply supplanting of the civil powers of the State because the powers can be exercised by the armed forces only with the cooperation of the authorities of the State government. Thus, the constitutional validity of AFSPA on the ground of legislative competence was upheld.

Questions have also arisen regarding the competence of States to enact laws that relate to terrorism, most notably the MCOCA. In the case of *Zameer Ahmed Latifur Rehman Sheikh v State of Maharashtra*,¹⁰³ the constitutional validity of MCOCA was challenged on the ground that the Maharashtra legislature does not have the legislative competency to enact certain provisions.

MCOCA defines 'organised crime' in section 2(1)(e) as any continuing unlawful activity with the objective of, *inter alia*, promoting insurgency.¹⁰⁴ The reference to 'insurgency' was challenged before the Bombay High Court on the ground that the crime 'promoting insurgency' does not fall under Entry 1 of the State List or Entry I of the Concurrent List or any other entry of the State List or Concurrent List. Rather, 'insurgency' falls within the ambit of Parliament's residuary powers.

The Court noted that MCOCA is an Act to make provisions for, *inter alia*, organised crime by organised crime syndicates. It was held that in pith and substance, MCOCA falls under Entry 1 of the Concurrent List that refers to criminal law. Insurgency has relevance to defence of India as well. An incidental overlap or entrenchment between State and Central laws is permissible. However, this overlap does not affect the dominant part of Entry 1 of the Union List. Thus, it was held that section 2(1)(e) is valid.¹⁰⁵ In another case, the Supreme Court held that the subject matter of MCOCA is maintaining public order and prevention by police of commission of serious offences affecting public order and, therefore, it is relatable to Entries 1 and 2 of the State List.¹⁰⁶

Nevertheless, while the constitutionality of MCOCA was upheld on the basis of its envisaged aim of tackling organised crime and organised crime syndicates, the reality is that laws such as MCOCA, and its associates such as the KCOCA are now increasingly being used to deal with the threat of terrorism. The trend towards enacting State laws to deal with terrorism, most noticeable in the recent Gujarat Control of Terrorism and Organised Crime Bill 2015 ('GCTOC'), raises significant questions about the need for such State laws, given the Central anti-terror legislation UAPA. This is especially important when one considers the powers enshrined in the

¹⁰³ 2007 (6) Bom CR 294 (Bombay High Court).

¹⁰⁴ MCOCA, section 2(1)(e); KCOCA, section 2(1)(e).

¹⁰⁵ *Zameer Ahmed Latifur Rehman Sheikh v State of Maharashtra*, (2010) 5 SCC 246, paras 47 and 48.

¹⁰⁶ *State of Maharashtra v Bharat Shanti Lal Shah*, (2008) 13 SCC 5, para 55.

GCTOC, such as clause 16, which permits certain confessions made by an accused to a police officer admissible in evidence; clause 20, which extends the investigation period by the police from up to 90 days to 180 days and imposes restrictions on granting bail; or clause 25, which provides immunity to government officials for acts done in good faith. More importantly, it also dilutes the argument regarding the 'incidental' nature of overlap between State and Central anti-terror/organised crime laws. Notably, the GUJCOC (Gujarat Control of Organised Crime) Bill was renamed as GCTOC Bill after questions arose about the need for the Bill given, *inter alia*, the absence of any history of organised crime and syndicates in Gujarat, unlike Mumbai.

The above judgments indicate that for Parliament to be competent to enact a law on terrorism, it must, in pith and substance, deal with graver issues on the defence of India, affecting sovereignty and national integrity. On the other hand, States have the competence to enact laws dealing with criminal activities by unlawful associations (like MCOCA and KCOCA). Further, where the Centre enacts laws (like AFSPA) deploying its forces in a State to aid the State in maintenance of public order, the validity of such laws would be upheld where the Union forces are merely aiding, and not substituting, the civil power of the State in maintaining peace and order. While the legislative competence of the Parliament to enact anti-terror laws seems fairly settled, the competence of States to enact laws purportedly dealing with organised crime, but used in anti-terror cases, requires a relook.

2. Conflicts between Centre and State Laws

While the above cases show that both Parliament and State legislatures have the competence to make laws within their respective spheres and minor overlaps are permissible, situations arise where there is a direct conflict between the provisions of two laws and it is impossible to justify such conflict as an incidental overlap. The doctrine of repugnancy, as provided under Article 254 of the Indian Constitution, provides that where such conflict arises with respect to entries in the Concurrent List, the Central law shall prevail over the State law except where the State law has received Presidential assent.

This was a question in *Zameer Ahmed Latifur Rehman Sheikh v State of Maharashtra*,¹⁰⁷ where the constitutional validity of MCOCA was challenged. It was argued that assuming 'insurgency' is covered by Entry 1 of Concurrent List, the Union law (UAPA) shall prevail over the State law (MCOCA). It was argued that although MCOCA had received Presidential assent as per Article 254(2), after the enactment of MCOCA, Parliament enacted POTA which was intended to curb terrorism and insurgency. As a result, MCOCA became inoperative. After the repeal of POTA, the provisions to curb terrorism and insurgency were incorporated under UAPA. It was argued that both such laws fall within Entry 1 of Concurrent List. Therefore, UAPA shall prevail over MCOCA.

However, the Court held that section 2(1)(e) of MCOCA was not repugnant to the provisions of UAPA. While 'promoting insurgency' as mentioned under section 2(1)(e) of MCOCA is one of the facets of terrorism, the offence of terrorism as defined under UAPA is not identical to the offences under MCOCA. Since the State law is not repugnant to the Central one, the question of implied repeal of MCOCA as per Article 254 does not arise.

¹⁰⁷ 2007 (6) Bom CR 294 (Bombay High Court).

The issue of overlap between the UAPA and MCOCA has not been settled. While certain cases relating to terrorism have been tried under MCOCA,¹⁰⁸ the Supreme Court, in *Zameer Ahmed Latifur Rehman Sheikh v State of Maharashtra*, held that the 'ambit and scope of each is distinct from each other' since the MCOCA principally deals with criminal activities by organised crime syndicates whereas the UAPA deals with terrorist and certain unlawful activities.¹⁰⁹ In August 2014, a MCOCA Special Court, relying on this precedent, distinguished between MCOCA that covers organised crime and UAPA that targets terrorism. According to the Court, a syndicate or gang envisaged under MCOCA is one that indulges in organised crime mainly for pecuniary benefits. On the contrary, UAPA covers terrorist organisations indulging in striking terror or posing threat to the unity, integrity, security, and sovereignty of India. An organised crime syndicate and terrorist organisation cannot run concurrently. Based on this analysis, the Judge concluded that the 2012 Pune serial bomb blasts do not amount to an organised crime and thus do not invoke the provisions of MCOCA. The accused will be tried under UAPA and IPC.¹¹⁰

In spite of the holding that MCOCA is not repugnant to the UAPA, Presidential assent has become a conventional practice for securing the constitutional validity of legislations like MCOCA. The KCOCA received the assent of the President on the 22 December 2001. The Andhra Pradesh Act, APCOCA, came into force on 5 November 2001 after it received Presidential assent.¹¹¹ In consequence of Section 1(4) that stipulates that the Act would be in force only for three years from the date on which it took effect, the Act lapsed in 2004. In 2006 the AP State Government sought to reintroduce the law and the APCOC Bill, 2006 was submitted to the President for assent, but the approval from the President was never granted. Similarly, the Rajasthan Bill was also pending approval before the President.¹¹²

A similar Bill by the State of Gujarat, the GUJCOC Bill, 2003 could not be brought into force because the President refused to give assent to the Bill.¹¹³ While the state has been trying to

¹⁰⁸ *Ashok Gyanchand Vohra v State of Maharashtra*, 2005 SCC OnLine Bom 1493; *Lt. Col. Prasad Shrikant Purohit v State of Maharashtra (through ATS, Mumbai)*, 2011 SCC OnLine Bom 1435; *Isharul Haq Abdul Hamid Shaikh v State of Gujarat*, (2009) 5 SCC 283.

¹⁰⁹ *Zameer Ahmed Latifur Rehman Sheikh v State of Maharashtra*, (2010) 5 SCC 246, para 75.

¹¹⁰ Muzamil Jaleel, 'Court draws line between organised crime and terror' *The Indian Express* (New Delhi, 15 August 2014) <<http://indianexpress.com/article/india/india-others/court-draws-line-between-organised-crime-and-terror>> accessed 18 August 2014.

¹¹¹ V Venkatesan, 'POTA in disguise' (2008) 25(17) *Frontline* <<http://www.frontline.in/static/html/fl2517/stories/20080829251701900.htm>> accessed 12 April 2014.

¹¹² Rajeev Dhavan, 'Mechanism, not Terror Law, is the Answer' *India Today* (9 February 2009) <<http://indiatoday.intoday.in/story/Mechanism,+not+terror+law,+is+the+answer/1/27648.html>> accessed 12 April 2014.

¹¹³ 'APCOCA may return soon' *Times of India* (Hyderabad, 31 January 2006) <<http://timesofindia.indiatimes.com/city/hyderabad/Apcoca-may-return-soon/articleshow/1393535.cms>> accessed 12 April 2014.

bring the law in force since 2003, the failure to receive Presidential assent has become the roadblock. The Bill was passed by the Gujarat Assembly in 2004 and sent to the Centre for Presidential assent. However, the President returned the Bill in July 2009 with a message to reconsider the Bill. The State resubmitted the Bill without any amendment in November 2009.¹¹⁴ In 2009, the Home Minister refused to recommend to the President to give assent to the Bill stating that the Bill was in conflict with Parliamentary law, the UAPA. Clause 16 of the Bill allows admissibility of confessional statements of accused before a police officer during trial and Clause 20 provides that no accused will be released on bail if the prosecutor opposes it.¹¹⁵ The then Home Minister, P. Chidambaram, stated that the last expression of mind of Parliament was in amending UAPA, where Parliament expressed that confessions before a police officer are inadmissible and the decision to grant bail rests with the magistrate or court and not with the prosecutor. The Centre returned the Bill to the state asking it to make the requisite amendments in order for the Bill to be considered for Presidential assent.¹¹⁶ This however has not yet taken place. The Bill, renamed as GCTOC, was passed by the Gujarat Assembly in 2015, and continues to retain provisions that restrict bail and recognize confessions made before the police.¹¹⁷

In 2010, Madhya Pradesh sought to enact its own anti-terrorism law modelled on MCOCA, called the Madhya Pradesh Aatankvadi Evam Ucchedak Gatividhiyan Tatha Sangathit Apradh Niyantaran Videheyak (Madhya Pradesh Terrorist and Disruptive Activities and Control of Organised Crimes Bill). Since the provisions of the Bill are repugnant to provisions under Central laws such as UAPA, CrPC and Evidence Act, the Bill was sent to the President for his assent in accordance with Article 254(2). The Bill had been waiting for Presidential assent.¹¹⁸ The then Solicitor General advised the President not to give his assent to the Bill. He denied the State's power to enact such a law and stated that only Parliament could legislate on the issue of terrorism. He

¹¹⁴ Vishwa Mohan, 'President stonewalls Gujarat's anti-terror law again' *Times of India* (28 March 2012) <<http://timesofindia.indiatimes.com/india/President-stonewalls-Gujarats-anti-terror-law-again/articleshow/12433976.cms>> accessed 12 April 2014.

¹¹⁵ Vishwa Mohan, 'President stonewalls Gujarat's anti-terror law again' *Times of India* (28 March 2012) <<http://timesofindia.indiatimes.com/india/President-stonewalls-Gujarats-anti-terror-law-again/articleshow/12433976.cms>> accessed 12 April 2014.

¹¹⁶ 'Centre returns GUJCOC Bill, asks state to amend 3 clauses' *The Indian Express* (New Delhi, 1 August 2009) <<http://archive.indianexpress.com/news/centre-returns-gujcoc-bill-asks-state-to-amend-3-clauses/478913/>> accessed 12 April 2014.

¹¹⁷ Rahi Gaikwad, 'Gujarat anti-terror Bill passed finally' *The Hindu* (Gandhinagar, 31 March 2015) <<http://www.thehindu.com/news/national/other-states/gujarat-passes-controversial-antiterror-bill/article7053036.ece>> accessed 1 June 2015.

¹¹⁸ Pratul Sharma, 'Over 100 bills from states in queue for government's nod' *The New Indian Express* (New Delhi, 13 May 2013) <<http://www.newindianexpress.com/nation/Over-100-bills-from-states-in-queue-for-government's-nod/2013/05/13/article1587608.ece>> accessed 16 June 2014.

further stated that since the law will fall within the Union List, even Presidential assent could not validate it. He differentiated this law from MCOCA, stating that while MCOCA deals with issues of public order and organised crime, the Madhya Pradesh law seeks to deal with terrorism, a matter that does not fall within 'public order' under the State List.¹¹⁹ The State had sent a draft of the Bill to the Centre in 2007 as well. However, the Centre returned the Bill to the State, stating that its approval was not required at that stage. It is only after the State Legislature passes the Bill and seeks the Governor's approval, that the Bill could be sent to the President for his assent.¹²⁰

Thus, from practice it is clear that the enactment of State laws along the lines of MCOCA may be stalled by withholding of Presidential assent, as has been done for the Bills from Madhya Pradesh and Gujarat. While States have argued that MCOCA is operating in Maharashtra and Delhi, and there is no reason why similar laws should not operate in other States, the objections that the Centre had, however, seems to be on the details of the proposed laws, that went beyond the provisions of MCOCA, and which were leading to more direct conflicts with Central laws. Explicitly adopting provisions on 'terrorism' in State laws seems both beyond the legislative competence of States, and contributes further to the lack of clarity surrounding the operation of anti-terror laws in India.

3. Impact of State Laws: MCOCA v. Central Acts

While one dimension of the federalism tussle is to examine how Courts have demarcated their spheres of operation when these laws have been challenged, the other aspect is to look at how this demarcation plays out in practice, as referred to above. State laws such as MCOCA contain specific investigation-related provisions giving investigating bodies greater powers than that available under general law. This section examines the impact of such provisions in light of existence of other Central laws on investigation of terrorism cases as well as general laws on criminal investigation and procedure.

The constitutional validity of MCOCA has been challenged on the ground of lack of legislative competence with respect to specific investigation-related provisions on interception of communications. As seen earlier, with respect to the broader subject matter of MCOCA, the Supreme Court and the Bombay High Court have already upheld its constitutional validity.¹²¹ This time, the challenge was made in the Supreme Court in *State of Maharashtra v Bharat Shanti Lal Shah* specifically with respect to the competence of the State legislature to enact provisions

¹¹⁹ Maneesh Chhibber, 'SG to govt: Only Parliament can make laws to deal with terror' *The Indian Express* (New Delhi, 2 December 2013) <<http://archive.indianexpress.com/news/sg-to-govt-only-parliament-can-make-laws-to-deal-with-terror/1202025/0>> accessed 16 June 2014.

¹²⁰ Milind Ghatwal, 'MP set to get stringent anti-terror law' *The Indian Express* (Bhopal, 24 March 2010) <<http://archive.indianexpress.com/news/mp-set-to-get-stringent-antiterror-law/594850/>> accessed 16 June 2014.

¹²¹ *Zameer Ahmed Latifur Rehman Sheikh v State of Maharashtra*, 2007 (6) Bom CR 294; *State of Maharashtra v Bharat Shanti Lal Shah*, (2008) 13 SCC 5.

regarding interception of telegraph communications.¹²² Entry 31 of the Union List empowers the Central legislature to enact a law in respect of posts and telegraph, telephones, wireless, broadcasting, and other like forms of communication. It was argued that the Telegraph Act is an existing law with respect to these matters. Sections 13 to 16 of MCOCA, providing for interception of wire, electronic and oral communication, were then argued to be invalid.

As with other challenges to laws of this nature, the Supreme Court upheld the constitutional validity of these provisions. It held that MCOCA authorises the interception of such communication only for the purpose of prevention of commission of an organised crime. In contrast, the Telegraph Act permits interception of communication if there was public emergency and in the interest of public safety.¹²³ The grounds of interception under MCOCA and Telegraph Act are completely different. The subject matter of MCOCA is maintaining public order and prevention by police of commission of serious offences affecting public order and are relatable to Entries 1 (public order) and 2 (police) of the State List. Even if the content of MCOCA may have encroached upon the scope of Entry 31 of the Union List, this is merely an incidental encroachment. Since the main purpose of the Act is within the parameter of Entries 1 and 2 of the State List, sections 13 to 16 cannot be held as invalid on the ground that the State has no legislative competence to enact these provisions.

This judgment is significant as it implies that if the broader subject matter of the State law is within the limits of its powers, it may incidentally encroach upon the Union's powers and provide for supplementary matters. The previous section discusses how Indian courts have demarcated the powers of the Centre and States in enacting terrorism-related statutes. Thus, it seems that as long as the State law is within its broader powers to enact a law dealing with public order, it may even provide more draconian procedural provisions that are in conflict with the Central law.

The fact that MCOCA has received Presidential assent as per Article 254 of the Constitution was also relevant in the Court's decision. Since Presidential assent has been obtained, even where the subject matter is found to be covered under Concurrent List, the Act will remain constitutionally valid. The Court noted that Entries 1 (criminal law), 2 (criminal procedure) and 12 (evidence) of the Concurrent List can aid the Entries in the State List. Thus, this judgment brings out the significance of the requirement of Presidential assent under Article 254. Even though the broader subject matter may be covered under the State List, overlapping Entries in the Concurrent List also become relevant. And this necessitates taking the assent of the President to avoid the application of doctrine of repugnancy.

Once Presidential assent has been obtained, the provisions of the State law will override the Central Acts, allowing States to enact laws in direct conflict with Central laws for matters that fall within the Concurrent List. Even otherwise, with respect to general criminal laws such as IPC or CrPC, provisions of special laws, State or Central, shall continue to prevail. The question to ask, however, is that where Presidential assent has been denied before, as happened twice in

¹²² *State of Maharashtra v Bharat Shanti Lal Shah*, (2008) 13 SCC 5.

¹²³ Indian Telegraph Act, 1885, section 5(2).

the case of GUJCOCA (and currently pending before the President in its present form), whether the number of prior denials should be taken into consideration by the President in making his decision.

B. Multiple Investigating agencies

The three major investigating agencies that come into play in terrorism cases are the police, NIA and CBI. Since 'police' is a State subject under the Indian Constitution, different States regulate the police through their own laws. State police may also have specialised units to deal with terrorist offences, such as the Anti-Terrorism Squad ('ATS') of the Mumbai police.¹²⁴ As seen above, various State laws on terrorism, such as CVJSA, MCOCA and KCOCA, provide additional provisions relating to investigation of such offences by the police. The CBI is governed by the Delhi Special Police Establishment Act, 1946 ('DSPE Act'), a Central law that was enacted to constitute a special police force to investigate certain offences in Delhi and other Union Territories. The CBI may investigate cases in States as well but only with the consent of the concerned State government.¹²⁵ In the past, many terrorism cases have involved CBI investigation, including the 1993 Mumbai bomb blast cases,¹²⁶ and the Rajiv Gandhi assassination case.¹²⁷ The NIA, as has already been seen, was constituted under NIAA to specifically investigate terrorism related offences under certain Central laws, and, unlike the CBI, does not require the consent of a State to initiate investigation.

Police involvement becomes inevitable in all terrorism cases, since it is the police that first registers the case. Later on, after complying with the prescribed procedure, other investigation agencies may become involved. For example, the Hyderabad Mecca Masjid bomb blast case was transferred from the police to the CBI to the NIA, thus involving all three agencies. The case was initially registered by the police. It was then transferred to CBI, which re-registered the case, took up the investigation and even filed the chargesheet. Thereafter, considering the gravity of the offence, the Ministry of Home Affairs, Government of India transferred the case to NIA, which then took up the investigation.¹²⁸

Multiplicity of investigating agencies is likely to cause confusion and conflicts. Multiplicity of bodies creates problems such as poor resourcing of capability, bureaucratic infighting, and

¹²⁴ See Mumbai Police, 'Anti Terrorism Squad' <<https://mumbaipolice.maharashtra.gov.in/antiterrorismsquad.asp>> accessed 12 August 2014.

¹²⁵ Delhi Special Police Establishment Act, 1946, section 6.

¹²⁶ Central Bureau of Investigation, 'Bombay Bomb Blast Cases' <<http://cbi.nic.in/fromarchives/bombayblast/mumblast.php>> accessed 12 August 2014.

¹²⁷ *State of Tamil Nadu through Superintendent of Police, CBI/SIT v Nalini*, (1999) 5 SCC 253.

¹²⁸ *NIA, Hyderabad v Devendra Gupta*, 2013 SCC OnLine AP 136 (Andhra Pradesh High Court).

coordination difficulties.¹²⁹ This section looks at Centre-State conflicts and overlaps with respect to investigation of terrorism cases and how courts have resolved such federalism questions.

1. Constitutional Validity of NIAA

The constitutional validity of NIAA was challenged before the Bombay High Court by an accused in the Malegaon bomb blast case on the ground of lack of legislative competence of Parliament to enact such law.¹³⁰ The accused in the case were arrested for offences under the IPC, UAPA, Indian Explosive Substance Act, and Arms Act. The case was registered at a Mumbai police station, and then re-registered by the ATS. After the sanction of the Deputy Inspector-General of ATS, provisions of MCOCA were invoked and chargesheet was filed by ATS before the MCOCA Special Court.¹³¹ The Court took cognizance of the crime, and discharged all the accused from the provisions of MCOCA in July 2009. In an appeal, the High Court struck down the order of discharge. The accused then filed a petition before the Supreme Court against the High Court order. In April 2011, the Union Home Ministry handed over the investigation of the Malegaon blasts to the NIA without the consent of the Maharashtra government. Subsequently, the petitioner, who was in custody since October 2008 in the case, challenged the constitutional validity of NIAA.

This case highlights the Centre-State ‘battle of turf’ in dealing with terrorist offences. The petitioner pointed out that the Centre has encroached upon the State subject of ‘police’ by, in effect, creating a nation-wide police agency in the form of NIA. He also argued that in the backdrop of the 2008 Mumbai attacks, by ‘exploiting the emotional outrage, generated throughout the country’, Parliament enacted this law overreaching its powers. He pointed out that unlike the CBI, the NIA did not need the consent of the State to initiate investigation.

In reply, the respondent emphasised on the need for the Centre to intervene in terrorist offences. The respondent argued that since the ultimate responsibility of protecting national security and sovereignty lies on the Union executive, it is imperative that the Centre should step in. Further, instead of usurping State powers, the NIA merely supplements the State law enforcement, considering local limitations of individual States to tackle cross-border offences.

The Bombay High Court upheld the constitutional validity of NIAA. In doing so, the Court highlighted the grave nature of terrorist offences and the backdrop of large-scale terrorist activities involving complex inter-State and international linkages, which necessitated the setting up of an agency at Central level for investigation of offences having national ramifications. It held that the NIA has been created as an investigating agency at the national level to investigate and prosecute offences affecting the sovereignty, security and integrity of

¹²⁹ Manoj Shrivastava, *Re-energizing Indian Intelligence* (Vij Books, New Delhi 2013) 65.

¹³⁰ *Pragyasingh Chandrapalsingh Thakur v State of Maharashtra and Major Ramesh Upadhyay v Union of India*, 2014 (1) Bom CR (Cri) 135.

¹³¹ See MCOCA, section 23(2), which lays down the requirement for prior sanction of the police before cognizance is taken by the Special Court of an offence under MCOCA.

India, and other matters such as friendly relations with foreign States. This was not akin to setting up of a police force.

Further, examining the constitutional scheme, the Court concluded that Parliament had the legislative competence to enact NIAA. Parliament may enact a law on any matter not covered under the State List. The Court looked at several Entries that could enable Parliament to enact such a law, including Entry 8 of List I that allows Parliament to set up the CBI, and Entries 1 and 2 of the Concurrent List dealing with 'criminal law' and 'criminal procedure' respectively. The Court further noted that since Parliament is not incompetent to enact a law in relation to police force in the Union Territories, it could also set up an agency such as the NIA for the nation as a whole to deal specifically with the Scheduled Offences, which include offences that are within the domain of the Centre, such as those related to hijacking and weapons of mass destruction.

On the issue of consent of the State, the Court pointed out the differences between the DSPE Act and the NIAA. Specifically, the Court noted that while a Central government notification under former could enable the CBI to investigate any offence once State permission was obtained, the NIA can investigate only offences under Acts enumerated under the Schedule to NIAA. Hence, a provision requiring State government's consent was not required under NIAA.

The fact that NIAA deals only with investigation and prosecution machinery for certain offences carved out of Central laws, and does not create an offence by itself, was also material in upholding the validity of the Act. The Court noted that this makes the Act, in pith and substance, a law under Entry 2 of List III dealing with 'criminal procedure'. If Parliament was competent to create the Scheduled Offences with respect to which the NIAA was enacted, there is no reason why it will not be competent to provide for investigation and prosecution machinery for such offences. Parliament could provide such machinery in those Central laws itself, or amend the CrPC to provide for a special mechanism for certain offences, or enact another statute for the same purpose. The question of usurpation versus supplementation is an important one. The Bombay High Court in the Malegaon blast case said that NIAA entailed the latter. NIAA contains provisions requiring the police to conduct investigation till the NIA takes over;¹³² allowing NIA to request the State government to associate with the investigation;¹³³ and allowing NIA to transfer the case to the State government for investigation or trial (on previous approval of the Central government).¹³⁴ Noting such provisions, the Court concluded that NIAA merely supplements the State governments rather than usurping their powers or displacing them altogether. However, a holistic reading of the statute leaves no doubt that the statute primarily empowers the Central government to hand over investigation to NIA, with States having no say in an NIA investigation.

¹³² NIAA, section 6(7).

¹³³ NIAA, section 7(a).

¹³⁴ NIAA, section 7(b).

A study of judgments on the validity of terror laws reveals that almost invariably Courts have upheld the constitutionality of the laws.¹³⁵ While not explicitly stated in most cases, deference to executive powers in matters related to defence and security have undoubtedly played a role in these judgments. Issues of co-ordination, however, do not get resolved by Court verdicts upholding multiple investigating agencies.

Coordination issues arising out of investigation by multiple agencies were recently demonstrated in the investigation of a case relating to Indian Mujahideen operatives. Based on a Union Home Ministry order, the NIA registered a case under UAPA in June 2012. In the meantime, the Delhi police also registered an FIR. The NIA initiated proceedings for either getting the case transferred to the NIA or for a merger of the two agencies. Before the Delhi High Court, the NIA alleged that the Delhi police failed to reply to the NIA. Subsequently, the Union Home Ministry ordered the transfer of the case from the police to the NIA. However, the Delhi police did not hand over the relevant papers to the NIA, because of which, no investigation was conducted by the NIA. Further, the Delhi police had already filed a chargesheet in the matter. In contrast, the Delhi police claimed that in a meeting in March 2014, it was decided that the Delhi police would continue with the investigation in the case.¹³⁶ This case reveals how such chaos and confusion can cause enormous delay in the investigation of a terrorism case and leaves the question open as to whether the current framework of multiple agencies has enhanced inter-State and State-Centre coordination in efforts to collectively deal with terrorism, or whether it has created ground for greater chaos and conflicts.

2. Proposal to set up NCTC

Post 26/11, the Union Home Minister proposed the setting up of a National Counter Terrorism Centre (NCTC) to counter terrorism by preventing, containing and responding to terrorist attacks. It was proposed that this body be modelled on the NCTC of the US Homeland Security Department.¹³⁷ It was envisaged that the NCTC would be responsible for overall supervision and coordination of intelligence related to terrorism, in the hope of a more coordinated response towards the problem of terrorism in India.¹³⁸

¹³⁵ See, e.g., *Kartar Singh* (upholding the validity of TADA); *PUCL* (upholding the validity of POTA).

¹³⁶ *Syed Maqbool v State*, Crl. M. C. 3687/2013 (Delhi High Court) 20 March 2014, http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=62438&yr=2014; NIA Press Note, 'NIA Response to the news item "Home Ministry asks NIA to stay away from case relating to IM"' (11 April 2014) <http://www.nia.gov.in/writereaddata/PressRelease11042014_new.pdf> accessed 15 June 2014; 'Home Ministry asks NIA to stay away from case relating to IM operatives' *The Economic Times* (New Delhi, 11 April 2014) <http://articles.economictimes.indiatimes.com/2014-04-11/news/49058752_1_the-nia-nia-counsel-delhi-police> accessed 15 June 2014.

¹³⁷ Manoj Shrivastava, *Re-energizing Indian Intelligence* (Vij Books, New Delhi 2013) 20-21.

¹³⁸ Manoj Shrivastava, *Re-energizing Indian Intelligence* (Vij Books, New Delhi 2013) 68.

However, this proposal met with fierce opposition from the States, with Chief Ministers from as many as fourteen States opposing the move on the ground that it is violative of the principle of federalism.¹³⁹ Considering the cross-border nature of terrorism; lack of resources and expertise of States to tackle the problem; and the serious terrorism threat facing the country that the States have been unable to deal with till now, many do not dispute the need to have a national-level body such as the NCTC.¹⁴⁰ Time and again, various political leaders have stated that terrorism needs to be tackled collectively.¹⁴¹ Instead of the imaginary ‘terrorism-versus-federalism’ divide, the fight against terrorism must co-exist with federalism.¹⁴²

However, the Centre’s proposal as well as the manner in which it aimed to execute it, alarmed the States. The major point of objection was vesting NCTC with police powers of arrest, search, and seizure. Under the proposal, NCTC shall be established as a wing of the Intelligence Bureau (‘IB’), India’s internal security agency under the Union Home Ministry. Thus, the IB, in effect, will be given police powers.¹⁴³ The States allege that this is an encroachment into their police powers. The problem was worsened by the Centre’s attempt to set up the NCTC through an executive order, without consulting the States on the matter, raising doubts over Centre’s claims to fight terrorism collectively.¹⁴⁴

The debate over establishment of NCTC demonstrates that despite repeated statements on the need to respond to terrorism together with Centre-State coordination, such attempts have instead led to Centre-State turf battles.¹⁴⁵

¹³⁹ South Asia Terrorism Portal, ‘Chief Ministers Opposing NCTC’ (26 February 2012) <<http://www.satp.org/satporgtp/countries/india/document/papers/2012/NCTC2012.htm>> accessed 18 August 2014; ‘More states oppose NCTC, govt in firefighting mode’ *The Times of India* (19 February 2012) <<http://timesofindia.indiatimes.com/india/More-states-oppose-NCTC-govt-in-firefighting-mode/articleshow/11944951.cms/>> accessed 12 August 2014.

¹⁴⁰ Ved Marwah, ‘The Tribune Debate: NCTC’ *The Tribune* (11 March 2012) <<http://www.tribuneindia.com/2012/20120311/edit.htm#3>> accessed 12 August 2014.

¹⁴¹ See, e.g., ‘NCTC need of the hour: Chidambaram’ *IBN Live* (12 May 2012) <<http://ibnlive.in.com/news/nctc-need-of-the-hour-chidambaram/256961-75.html>> accessed 13 August 2014; ‘Centre, States Need to Work Together for NCTC: Shinde’ *Outlook* (11 June 2013) <<http://www.outlookindia.com/news/article/Centre-States-Need-to-Work-Together-for-NCTC-Shinde/800437>> accessed 13 August 2014.

¹⁴² ‘Fight against terror must co-exist with federalism: Jaitley’ *The New Indian Express* (25 February 2013) <<http://www.newindianexpress.com/nation/article1478389.ece/>> accessed 13 August 2014.

¹⁴³ Manoj Shrivastava, *Re-energizing Indian Intelligence* (Vij Books, New Delhi 2013) 186-87.

¹⁴⁴ Ved Marwah, ‘The Tribune Debate: NCTC’ *The Tribune* (11 March 2012) <<http://www.tribuneindia.com/2012/20120311/edit.htm#3>> accessed 12 August 2014.

¹⁴⁵ See Ved Marwah, ‘The Tribune Debate: NCTC’ *The Tribune* (11 March 2012) <<http://www.tribuneindia.com/2012/20120311/edit.htm#3>> accessed 12 August 2014.

C. Conclusions

When the issue of federalism is raised vis-à-vis counter-terrorism, the dominant fear is that laws and agencies created to fight terror concentrate power in the Centre. This is certainly the fear propelling objections to the proposed NCTC, and formerly to the NIA.

This Chapter has demonstrated, however, that the way counter-terrorism efforts have played out may just as validly be seen as a sign of the growing power of States against a relatively weaker Centre in the period between 2001 and 2015, when various anti-terrorism laws were sought to be enacted and enforced. This has led to State-specific implementation of anti-terror laws,¹⁴⁶ since, till 2008, implementation of anti-terror laws was largely dependent on the State police. This was coupled with the growing assertion of States like Gujarat, Andhra Pradesh, and Madhya Pradesh of their power to enact their own laws which could be used to tackle terrorism. In fact, in light of the recent amendments to the UAPA and the implicit/explicit extension of the state organised crime laws to situations concerning terrorism, issues of competence and repugnancy require a judicial re-examination.

The creation of the NIA may be seen as the Centre reasserting its right to tackle terrorism as part of its duties relating to the defence of India. By doing away with the need for States' consent in investigating terror cases, the attempt was to bring back control over the implementation of anti-terror laws to the Centre.

¹⁴⁶ Manoj Mate and Adnan Naseemullah, 'State Security and Elite Capture: The Implementation of Anti-Terrorist Legislation in India' (2010) 9:3 *Journal of Human Rights* 262.

JUDICIAL INTERPRETATION

CHAPTER III: JUDICIAL INTERPRETATION OF SUBSTANTIVE PROVISIONS

While terrorism trials involve ordinary criminal charges such as murder and criminal conspiracy covered under the IPC, India has also enacted special laws such as the UAPA post-independence, creating specific terrorism-related offences. The next two Chapters look at how some of these provisions (in the IPC or unique to anti-terror laws) have been interpreted by the Courts. They seek to understand the extent to which the perceived nature of terrorism as an ‘extraordinary crime’ has influenced the way in which Courts have interpreted, and responded to challenges to anti-terror laws.

To better explore this question, we first turn to judicial interpretations of substantive offences related to terrorism. This Chapter looks at (A) offences in the IPC used in terror trials; (B) definition of terrorism in special laws such as the POTA and UAPA; (C) the relation between ‘terrorism’ and ‘unlawful activity’ in the UAPA; (D) the offence of ‘membership to terrorist organisations’; and (E) the offence of ‘terrorism financing’.

A. Terrorism Related Offences in the IPC

Committing terrorist acts under the UAPA often involves the commission of other offences, usually under Chapter VI of the IPC - *offences against the State*. Chapter VI spans from section 121 to 130 in the IPC, and primarily contains the offence of ‘waging war against the Government of India’ (section 121),¹⁴⁷ and ‘sedition’ (section 124A).¹⁴⁸ Let us consider how courts have understood the same, in cases involving terrorist acts or terrorist organisations.

1. Waging War - Section 121

Can a terrorist act amount to waging war against the Government of India, as required by section 121 of the IPC? This question has been considered several times in the past few decades. Particularly, in *Nazir Khan v State of Delhi*,¹⁴⁹ *State v Navjot Sandhu*,¹⁵⁰ and *Mohd Ajmal Amir*

¹⁴⁷ Section 121 of the IPC reads: ‘Whoever, wages war against the Government of India, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life and shall also be liable to fine.’

¹⁴⁸ Section 124A of the IPC reads: ‘Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.’

¹⁴⁹ (2003) 8 SCC 461 (*‘Nazir Khan’*).

¹⁵⁰ (2005) 11 SCC 600 (*‘Navjot Sandhu’*).

Kasab v State of Maharashtra,¹⁵¹ the Supreme Court elaborated upon the offence of ‘waging war’ under section 121 in today’s world.

All three cases involved foreign nationals - Pakistani citizens - who had been captured in India. In *Nazir Khan*, the accused persons of Pakistani origin had abducted foreign nationals (British and American citizens) and used them as leverage to free some terrorists who were in jail at that time. The trial court, *inter alia*, convicted them under section 121 of the IPC. This was premised on their intent to “overawe the Government of India by criminal force and to bring out hatred and contempt in the people of India and to arouse dissatisfaction in a section of people in India against the Government of India established by laws and collected materials and arms for the aforesaid offences”¹⁵² when committing a terrorist act as per section 3(1) of the TADA.¹⁵³ The Supreme Court upheld this conviction and elaborated:

The expression “waging war” means and can only mean waging war in the manner usual in war. In other words, in order to support a conviction on such a charge it is not enough to show that the persons charged have contrived to obtain possession of an armoury and have, when called upon to surrender it, used the rifles and ammunition so obtained against the Government troops. It must also be shown that the seizure of the armoury was part and parcel of a planned operation and that their intention in resisting the troops of the Government was to overwhelm and defeat these troops and then to go on and crush any further opposition with which they might meet until either the leaders of the movement succeeded in obtaining the possession of the machinery of Government or until those in possession of it yielded to the demands of their leaders.¹⁵⁴

This judgment mainly repeats abstractions of prior decisions, not providing clarity on important questions where ‘terrorist acts’ are being committed. Two questions stand out. *First*, did the trial court mean that whenever one committed an offence under section 3(1) TADA seeking to ‘overawe the Government of India’, it satisfied the intention required under section 121 IPC?

¹⁵¹ (2012) 9 SCC 1.

¹⁵² *Nazir Khan*, para 29.

¹⁵³ Section 3(1) of TADA read: ‘Whoever with intent to overawe the Government as by law established or 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 substances or lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or 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.’

¹⁵⁴ *Nazir Khan*, para 34.

Second, while observing that the nature of Chapter VI offences rest on securing allegiance to the State,¹⁵⁵ how would it then apply to foreign nationals who were not even *domiciled*¹⁵⁶ in India?

Before answering these questions, it is important to understand what ‘war’ means. In *Navjot Sandhu*, the accused persons were again convicted for committing terrorist acts [this time under POTA] and waging war. The acts concerned involved an attack at the Indian Parliament. The accused persons managed to bring a car full of explosives into the complex, but were ultimately foiled in their attempts. Some security personnel were killed in the crossfire. After referring to the earliest decisions from England on the point, relating to their laws of treason, the Court specifically stated: ‘*Whether this exposition of law on the subject of levying war continues to be relevant in the present day and in the context of great socio-political developments that have taken place is a moot point*’.¹⁵⁷ This exposition revealed that earlier, acts intended to obtain an object of ‘general public nature’ could amount to waging war. Further, it was the earlier position that the scale of the act remained irrelevant to determine whether an offence under section 121 of the IPC was made out.¹⁵⁸ According to the Court in *Navjot Sandhu*, it was necessary to restrict and modulate the import of the former observation today, in a democratic India.¹⁵⁹ Further, it held that the scale of the act was certainly relevant to help determine whether there was intent to wage war.¹⁶⁰

More interestingly, however, is the disjunct between the decisions of the High Court and the Supreme Court on the use of principles of international law in defining and understanding ‘war’. The Delhi High Court in *State v Mohd. Afzal*¹⁶¹ referred to these principles to hold that ‘war is a flexible expression’ and has to be understood in the context of inter-State and intra-State (non-international armed conflict) wars. Thus, keeping in mind the distinction between international and municipal law in understanding ‘war’, insurgency is treated to be an act of waging war against the Government of India and can be committed even by a solitary person.¹⁶² Nevertheless, while the Supreme Court in *Navjot Sandhu* upheld the decision of the Delhi High Court, it failed to identify that international humanitarian law distinguished between

¹⁵⁵ *Nazir Khan*, para 33. The headnote to Chapter VI in the IPC suggests this as well, however the offences therein are considered as being committed against the ‘Government of India’ or ‘Government established by law’.

¹⁵⁶ This refers to the private international law concepts of domicile. See, Cheshire, North and Fawcett, *Private International Law* (14th edn, Oxford University Press 2008) 153.

¹⁵⁷ *Navjot Sandhu*, para 264.

¹⁵⁸ See, *Maganlal Radha Krishan v Emperor*, AIR 1946 Nag 173.

¹⁵⁹ *Navjot Sandhu*, para 281.

¹⁶⁰ *Navjot Sandhu*, para 283.

¹⁶¹ *State v Mohd. Afzal*, (2003) 107 DLT 385.

¹⁶² *State v Mohd. Afzal*, (2003) 107 DLT 385, paras 181-190.

international and non-international armed conflict. In doing so, it failed to take cognizance of the development in the principles of international law and the Geneva Conventions.¹⁶³

Moving on, the location of section 121 in Chapter VI, which enumerates offences against the State, showed how this offence was aimed at ‘subverting the authority of the Government or paralysing the constitutional machinery’¹⁶⁴ and consequently, disturbing public peace and disrupting normal channels of government. The most important factor for upholding the conviction under section 121 was the target of the attack - India’s Parliament. If there was anything that would paralyse the constitutional machinery, it was destroying the very fountainhead of democracy in the State. Section 121 of the IPC, however, speaks of the ‘Government of India’, not the Republic of India. That the Court appreciated this difference becomes clear in its discussion - the Government is seemingly shown to be the Executive.¹⁶⁵ Later, the Court emphatically states: ‘The attempted attack on the Parliament is an undoubted invasion of the sovereign attribute of the State including the Government of India which is its alter ego’¹⁶⁶ and terrorist acts prompted by an intention to ‘strike at the sovereign authority of the State/Government’ is tantamount to waging war, regardless of the numbers or force employed. Further,

the planned operations if executed, would have spelt disaster to the whole nation. A war-like situation lingering for days or weeks would have prevailed. Such offensive acts of unimaginable description and devastation would have posed a challenge to the Government and the democratic institutions for the protection of which the Government of the day stands.¹⁶⁷

Both questions raised above after *Nazir Khan* were addressed. Would every terrorist attack amount to waging war? The Court clarified that ‘though every terrorist act does not amount to waging war, certain terrorist acts can also constitute the offence of waging war and there is no dichotomy between the two’.¹⁶⁸ The Court went on to state that despite the overlap between the two acts, the degree of animus or intent and the magnitude of acts done were indicators to help decide whether the terrorist act amounted to waging war. Thus, according to the Court the difference was a matter of degree, but the distinction was by no means clear, and gets even thinner if the terror act is compared with an act aimed at ‘overawing the Government by means of criminal force’.¹⁶⁹ This was reaffirmed by the Supreme Court in *Ajmal Kasab*, when it

¹⁶³ See generally, Chintan Chandrachud, *International Humanitarian Law in Indian Courts: Application, Misapplication, and Non-application* in APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES 389 (Derek Jinks *et al.* eds, 2014).

¹⁶⁴ *Navjot Sandhu*, para 272.

¹⁶⁵ *Navjot Sandhu*, para 284.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Navjot Sandhu*, para 277.

¹⁶⁹ *Navjot Sandhu*, para 278.

rejected the submission that a ‘terrorist act’ would automatically exclude the act from the purview of section 121, since the “provisions of Chapter IV of the Unlawful Activities (Prevention) Act and those of Chapter VI of the Penal Code, including Section 121, basically cover different areas.”

Secondly, could section 121 apply to persons (foreigners) who did not owe their allegiance to India? Yes, it could, as a literal reading of section 121 and the use of the word ‘whoever’, showed it could not be so restricted. If foreign nationals entered Indian territory stealthily with a view to ‘subvert[ing] the functioning of the Government and destabilis[ing] the society’, they should be held guilty under section 121 IPC.¹⁷⁰

The Court also refuted other arguments, which help clarify the law. Waging ‘war’ did not refer to war in a public international law context; there was no need for a declaration or for entities with representative character to be involved; and it included insurrection or a civilian uprising. Nor did it require the intent to *replace* the existing Government with a new one.¹⁷¹

Thus, *Navjot Sandhu* helped clarify several points of contention. The only lasting controversy, which remained was the nature of the target when one *waged war*. When section 121 said ‘Government of India’, did it refer to the Executive, or to the Republic? This was specifically addressed by the Court in *Ajmal Kasab*. The accused was involved in the infamous 26/11 Mumbai attacks, targeting several public buildings, which in turn led to many deaths. The trial court convicted the accused, both under section 15 of the UAPA and section 121 of the IPC. It was argued that ‘Government of India’ under section 121 could not be equated with ‘State’, and therefore an attack at a railway station could by no means come within its import. It was also argued that since the UAPA referred to ‘State’ and section 121 referred to ‘Government’, the two could never occur together and in fact section 121 must be deemed repealed.¹⁷²

The Court rejected the latter argument as extreme.¹⁷³ With respect to the former argument, it turned to the history of section 121, and how ‘Government of India’ was inserted to replace ‘Queen’ after independence. This was understood to reflect that in a democracy, the sovereign is nothing but the people; and it is the sovereign will of the people, which vests in Government.¹⁷⁴ Thus, the Court rightfully used principles of international law to use sovereignty, instead of merely the Executive (the ‘Government’) as the underlying basis for a State, and held that

the expression ‘Government of India’ is used in Section 121 to imply the Indian State, the juristic embodiment of the sovereignty of the country that derives its legitimacy from the collective will and consent of its people. The use of the phrase “Government of India” to signify the notion of sovereignty is consistent with the

¹⁷⁰ *Navjot Sandhu*, para 288.

¹⁷¹ *Navjot Sandhu*, paras 287 and 289.

¹⁷² *Kasab* Supreme Court case, para 529.

¹⁷³ *Kasab* Supreme Court case, para 542.

¹⁷⁴ *Kasab* Supreme Court case, para 538.

principles of Public International Law, wherein sovereignty of a territorial unit is deemed to vest in the people of the territory and exercised by a representative government.¹⁷⁵

The conviction was accordingly upheld.

Therefore, it becomes clear that the offences of waging war and committing terrorist acts have a lot in common. Demarcating clear boundaries is a very difficult task, but not impossible. The courts have been correct in relying on the illustration to Section 121 of the IPC to refrain from interpreting 'war' too narrowly, although the Supreme Court has erred in *Navjot Sandhu* by removing non-international armed conflicts from the purview of 'war'. Further, they have been right in their resolution of the distinction between 'Government' and 'State' while interpreting section 121's prohibition against waging war against the Government of India by giving effect to a broader notion of sovereignty and public international law. Some issues persist though, such as the Court's dismissal of the argument based on allegiance. Given the nature of these offences, it is plausible to think that this pertains to persons owing allegiance to India. If so, that would exclude all the accused persons in the three cases discussed above. Further, courts will have to be careful against stretching the interpretation of 'war' too broadly, and including acts disrupting peace and public order within its mandate, given that such acts should ordinarily be tackled by the ordinary criminal law. Section 121 of the IPC should not be used as section 124A on sedition sometimes has, to stifle protest and dissent.

2. Sedition - Section 124A

The offence of sedition is primarily associated with political ends - there must be an intention to create disaffection towards the Government of India and disturbance of public order. When terrorist acts can amount to waging war, there is no doubt these can involve cases of sedition. The law on sedition was authoritatively discussed in *Kedar Nath Singh v State of Bihar*;¹⁷⁶ in the context of terrorism the Supreme Court has only discussed sedition in *Nazir Khan*. In the latter case, the Court observed:

Section 124A deals with 'Sedition', Sedition is a crime against society nearly allied to that of treason, and it frequently precedes treason by a short interval. Sedition in itself is a comprehensive term, and it embraces all those practices, whether by word, deed, or writing, which are calculated to disturb the tranquility of the State, and lead ignorant persons to endeavour to subvert the Government and laws of the country. The objects of sedition generally are to induce discontent and insurrection, and stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action, and the law considers as sedition all those practices which have for their object to excite discontent or dissatisfaction, to create public disturbance, or to lead to civil war; to bring into hatred or contempt the Sovereign or the Government, the laws or constitutions of the realm, and generally all endeavours to promote public disorder.¹⁷⁷

¹⁷⁵ *Kasab* Supreme Court case, para 537.

¹⁷⁶ AIR 1962 SC 955.

¹⁷⁷ *Nazir Khan*, para 37.

Based on this discussion, the Court added to the text of section 124A, the idea of inciting “ignorant” people to insurrection and rebellion. Insurrection and rebellion links the concept of sedition closely to waging war as it is understood under section 121. Further, the exhortations of sedition nearly amounting to treason only strengthen these ties. Thus, where terrorist acts are bordering on fulfilling the requirements under section 121, it is highly likely that charges are filed under section 124A as well.

Further, sedition seems more intrinsically linked to political ideology than the offence of waging war under section 121 - which brings the latter closer to terrorist acts as understood under the UAPA. This is illustrated in the case of *Asit Kumar Sengupta v State of Chattisgarh*.¹⁷⁸ Here, the accused was charged with sedition under section 124A, IPC, as well as sections 18 and 39, UAPA (conspiracy to commit a terrorist act, and support given to a terrorist organisation) for spreading disaffection towards the Government of India in conspiracy with members of a banned organisation, the Communist Party of India (Maoist). The Court drew a connection between the IPC and the UAPA offences in the following manner:

This Court sees the provisions of Section 124A IPC, the Act of 2005 [CVJSA] and the Act of 1967 [UAPA] have an element of commanding to deter the citizens of this country to refrain from indulging in sedition and doing or assisting any act of terrorism or by assisting such organisations in their act of terrorism, as these penal provisions have the effect of upholding and protecting the sovereignty, unity and integrity of India, to safeguard public property and to abjure violence.¹⁷⁹

Due to this connection, once it was established that the accused had furthered the activities of an organisation banned under the UAPA, the Court felt that the elements of both sedition and conspiracy to commit a terrorist act had been met in the present case. Thus, as with the offence of waging war, the interpretation of the offence of sedition in cases relating to terrorist acts brings it in close proximity with the special provisions of anti-terror laws.

B. Definition of ‘terrorist act’

Globally, in both international and municipal law, it is the *act* of terrorism that has been defined,¹⁸⁰ rather than going into questions of what defines a terrorist. This approach avoids

¹⁷⁸ 2012 (3) BLJ 81 (*‘Asit Kumar’*).

¹⁷⁹ *Asit Kumar*, para 62.

¹⁸⁰ The ‘Terrorism Conventions’, colloquially called, consist of: (1) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, (2) International Convention against the Taking of Hostages, (3) International Convention for the Suppression of Terrorist Bombings, (4) International Convention for the Suppression of the Financing of Terrorism, (5) International Convention for the Suppression of Acts of Nuclear Terrorism, (6) Convention on Offences and Certain Other Acts Committed on Board Aircraft, (7) Convention for the Suppression of Unlawful Seizure of Aircraft, (8) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, (9) Convention on the Physical Protection of Nuclear Material, (10) Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the

difficult questions of motive and ideology.¹⁸¹ This does not mean, however, that the definition of a terrorist act has been easy either - the subjectivity of term lends to difficulties in adopting a global definition.¹⁸² Law in India follows a similar approach - terrorist acts are well defined but terrorism itself rarely finds definition.¹⁸³

1. The TADA and POTA

The earliest Indian anti-terror laws came in the wake of secessionist activity after the assassination of former Prime Minister Ms Indira Gandhi. These consisted of the Terrorist Affected Areas (Special Courts) Act 1984, and Terrorist and Disruptive Activities (Prevention) Act 1987¹⁸⁴ (the TADA laws). Although the latter law was repealed, the definition provided therein has formed the basis for subsequent legislation. For example, in the now repealed POTA, although introducing new elements such as membership of an unlawful organisation¹⁸⁵ or funding terrorism,¹⁸⁶ the basic definition of a terrorist act¹⁸⁷ was largely drawn from the corresponding

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, (11) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, (12) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, (13) Convention on the Marking of Plastic Explosives for the Purpose of Detection. See, Text and Status of the United Nations Conventions on Terrorism <https://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml> accessed 18 May 2014.

¹⁸¹ In 2004, a consolidation of this approach was seen in a working definition adopted by the United Nations Security Council (UNSC Res 1566 of 8 October 2004, S/RES/1566 (2004)) which stated that the following acts are never justifiable:

criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terrorism the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism (emphasis supplied).

¹⁸² The League of Nations defined it as: 'All criminal acts directed against a State along with intended or calculated to create a statute of terror in the minds of particular persons or a group of persons or the general public.' *Nazir Khan v State of Delhi*, (2003) 8 SCC 461.

¹⁸³ The Supreme Court of India accepted this to be true for India. See, *Hitendra Vishnu Thakur v State of Maharashtra*, (1994) 4 SCC 602.

¹⁸⁴ The Act initially came into force in 1985 for a two-year period. After it lapsed in 1987 it was re-promulgated as an ordinance and re-enacted in 1987.

¹⁸⁵ POTA section 3(1)(b).

¹⁸⁶ POTA section 3(1), Explanation.

¹⁸⁷ POTA section 3(1)(a).

TADA provision.¹⁸⁸ Thus the salient components in the TADA definition - of intention to threaten the country¹⁸⁹ or the people, usage of certain weapons¹⁹⁰ and likely effects of the acts¹⁹¹ - lived on in POTA, which was purportedly enacted in response to the terror attacks in the USA of September 11, 2001.

The repeal of TADA meant India was, for a brief period, without any substantial anti-terror legislation. The Law Commission, therefore, in its 173rd Report provided a model law for the same.¹⁹² This subsequently became POTA. It is to this law and its definitions of terror we first turn.

While section 3(1) of POTA seemed at first glance to reiterate the definition under TADA, some key elements were changed based on the Law Commission's report. First, the Law Commission specifically altered the *mens rea* element. It removed 'intent to overawe the government', replacing it with 'intent to threaten the unity, integrity and sovereignty of India'.¹⁹³ It also removed intent to 'alienate any section of the people or to adversely affect the harmony amongst different sections of the people'. The reason behind this change was not indicated. However, the different terms indicate that a terrorist act had to be directed towards the stability of the *union* and not merely the *government* currently in power. The Commission clarified that the former includes the latter.¹⁹⁴ This seems to be in line with the discussion in the previous section regarding the Court's interpretation of section 121 of the IPC's criminalisation of waging war 'against the Government of India' and the idea that terror attacks, as understood today, are not only intended to overthrow the government.

Second, section 3(2) of the POTA substantially broadened the scope of the offence, by making membership or support of a banned organisation a terrorist act. This was influenced by the UK

¹⁸⁸ TADA section 3(1).

¹⁸⁹ Or 'Government as by law established' under TADA.

¹⁹⁰ Extended in POTA by 'any other means whatsoever'.

¹⁹¹ Only one cause out of five is completely different between TADA and POTA. While TADA included a likely cause of alienating any section of the people or adversely affecting the harmony among different sections, this was absent in POTA, which meanwhile introduced damage to government property as a likely effect.

¹⁹² Law Commission of India, *Prevention of Terrorism Bill 2000* (173rd Report, Ministry of Law and Justice, Government of India 2000). Annexure II contained the Draft Bill as prepared by the Law Commission of India.

¹⁹³ See, Chapter IV (discussion on Part II of the Criminal Law Amendment Bill), Law Commission of India 173rd Report (above).

¹⁹⁴ *Ibid.*

Anti-Terrorism Bill,¹⁹⁵ introduced in the House of Commons before the Report was written.¹⁹⁶ Relying on the same Bill, unauthorised possession of certain firearms in notified areas, and in some cases even beyond them, was made a terrorist act.

2. The Law Today: Unlawful Activities (Prevention) Act

POTA was subsequently repealed in 2004.¹⁹⁷ The resulting vacuum was filled by amending the 1967 UAPA, and making it capable of addressing ‘terrorist acts’.¹⁹⁸ The Act has been amended several times since.¹⁹⁹

Currently, section 15(1) reads:

Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security, economic security or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country, -

(a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause -

- i. death of, or injuries to, any person or persons; or*
- ii. loss of, or damage to, or destruction of, property; or*
- iii. disruption of any supplies or services essential to the life of the community in India or in any foreign country; or*
- iiia. damage to the monetary stability of India by way of production or smuggling or circulation of high quality counterfeit Indian paper currency, coin, or of any other material; or*
- iv. damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or*

(b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or

(c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or an international or inter-governmental organisation or any other person to do or abstain from doing any act;

commits a terrorist act.

¹⁹⁵ This Bill went on to become the Terrorism Act 2000 (UK).

¹⁹⁶ Law Commission of India 173rd Report (above).

¹⁹⁷ POTA Repeal Act.

¹⁹⁸ Unlawful Activities (Prevention) Amendment Act, 2004. The Amendment Act inserted a new Chapter IV dedicated to punishing terrorist activities.

¹⁹⁹ Unlawful Activities (Prevention) Amendment Act, 2008; Unlawful Activities (Prevention) Amendment Act, 2012.

Further, a terrorist act includes an act which constitutes an offence as per any of the international treaties specified in the Second Schedule.²⁰⁰ While a number of international treaties have been incorporated within the UAPA itself through the Second Schedule, Parliament enacted the SAARC Convention (Suppression of Terrorism) Act, 1993 to give effect to the South Asian Association for Regional Cooperation ('SAARC') Convention on Suppression of Terrorism that was signed in 1987. The Act gives the provisions of the Convention the force of law in India. This implies that any act which is an offence as per certain international treaties, such as the Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, Convention for the Suppression of Unlawful acts Against the Safety of Civil Aviation, 1971, etc.,²⁰¹ will also be considered a terrorist offence within India.²⁰² The Convention also makes murder, assault, kidnapping, hostage-taking, and offences relating to explosives and dangerous substances as terrorist offences when they are used as a "means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or serious damage to property."²⁰³ All these offences are considered as terrorist offences and not as political offences for the purpose of extradition.²⁰⁴ This implies that India cannot refuse to extradite a person accused of such an offence on the ground that the offence is of a political character, thus exempt from extradition obligations.²⁰⁵ However, this law is generally not invoked in terrorism cases. If invoked, this Act itself is sufficient to involve the NIA for investigation since it is listed as one such law under the NIAA.²⁰⁶

The First Schedule to UAPA provides a list of terrorist organisations, which the Central Government may modify.²⁰⁷ Mere membership of such a terrorist organisation is an offence under the UAPA. The Act provides that a person "who associates himself, or professes to be associated, with a terrorist organisation with intention to further its activities" commits an offence relating to "membership of a terrorist organisation", and is punishable with imprisonment for maximum ten years or with fine or with both.²⁰⁸ Further, giving support to a terrorist organisation through money or property, arranging meeting with a person to further its

²⁰⁰ UAPA, section 15(2).

²⁰¹ Some of these treaties are also mentioned in the Second Schedule to the UAPA.

²⁰² SAARC Convention (Suppression of Terrorism) Act, 1993, section 3, read with SAARC Regional Convention on Suppression of Terrorism (4 November 1987), Article 1.

²⁰³ SAARC Convention on Suppression of Terrorism, Article 1(e).

²⁰⁴ SAARC Convention (Suppression of Terrorism) Act, 1993, section 5, read with SAARC Convention on Suppression of Terrorism, Article 1.

²⁰⁵ See, Extradition Act, 1962, section 31(1)(a).

²⁰⁶ NIAA, section 2(1)(f) read with The Schedule.

²⁰⁷ UAPA, section 35.

²⁰⁸ UAPA, section 38.

activities, or addressing a meeting to encourage support;²⁰⁹ and raising funds for a terrorist organization²¹⁰ are also offences under the UAPA.

Under the UAPA, the commission of a terrorist act is punishable with death or life imprisonment along with fine, if such act resulted in death of any person; and with imprisonment for minimum five years and maximum life imprisonment along with fine, in all other cases.²¹¹ Further, conspiring, attempting or abetting commission of a terrorist act; raising funds for terrorist act; harbouring or concealing any terrorist (except a spouse); holding any property obtained from commission of any terrorist act or acquired through terrorist fund; threatening or restraining any witness; organising camps for imparting training in terrorism; and recruiting any person for commission of a terrorist act; are some other offences under the Act. All these acts, except the last two, were also offences under the POTA. The UAPA also punishes membership of a terrorist gang or a terrorist organisation, which is involved in terrorist act with imprisonment that may extend to imprisonment for life, along with fine.²¹² A 'terrorist gang' is defined as any association, other than terrorist organisation, whether systematic or otherwise, involved in terrorist act.²¹³ In *Redaul Hussain Khan v NIA*,²¹⁴ the Gauhati High Court discussed at length the distinction between a terrorist organisation and terrorist gang. It observed that the intent behind making the distinction was to ensure that even terrorist acts committed by individuals or organisations not listed in the Schedule should not be permitted to escape prosecution under the Act.

Thus, the UAPA, amended successively in 2004, 2008, and 2013, also reflects the definition drafted in 1987 while introducing TADA. Though it introduced a few additional components to reflect modern times, the salient structure remains the same - in terms of intention, weapon of choice and likely effects of the act.²¹⁵ Thus, remnants of TADA are found till today, in a statute last amended as recently as in 2013.

3. Judicial Interpretation of Terrorism

The Indian Supreme Court has noted the impossibility of giving a precise definition of terrorism. The Court has tried to demarcate terrorist offences from other crimes by stating that while even terrorist offences may involve death, injury, or destruction of property: First, the intent behind such act and its extent are much greater, overawing the government or terrorizing the people of disturbing the harmony of the society as a whole, and Second, the effect of a terrorist act

²⁰⁹ UAPA, section 39 (punishable with imprisonment for maximum ten years or fine or both).

²¹⁰ UAPA, section 40 (punishable with imprisonment for maximum fourteen years, or with fine, or with both).

²¹¹ UAPA, section 16.

²¹² UAPA, section 20.

²¹³ UAPA, section 2(1)(l).

²¹⁴ *Redaul Hussain Khan v NIA*, 2012 SCC OnLine Gau 341, paras 81-97.

²¹⁵ UAPA, section 15(1).

travels much beyond the capacity of the ordinary penal law.²¹⁶ These two ingredients have been established through judicial interpretation, which sets cases of terrorism apart.

(a) *Intent to strike terror must always be present*

The Court has clarified on several occasions in the context of TADA, that merely committing acts of the kinds mentioned in the definition of ‘terrorist act’ is insufficient to convict. The act must always be committed with the requisite intention.²¹⁷ An example used by the Court makes this clear: a shooting spree by itself would not be a ‘terrorist act’, unless the act carried with it an intention to strike terror.²¹⁸ Naturally, such incidents may result in a feeling of terror within the community, but they would still not be ‘terrorist acts’. More importantly, these decisions were given before the 2008 amendment, which changed the existing mental element of “intent to threaten the unity, integrity, security, sovereignty of India or to strike terror in the people...”, to “intent to threaten *or likely to threaten* the unity, integrity, security, sovereignty of India or with intent to strike terror *or likely to strike terror*...” This gives rise to an objective and vague standard of what is “likely” to strike terror, apart from the perpetrator’s intent and will thus expand the scope and purview of section 15.

As the Gauhati High Court recognised in *Redaul Hussain Khani*,²¹⁹ the 2008 amendment expanded the definition of terrorist act under section 15, making it ‘more expansive’ and bringing under its ambit a greater number of acts; ‘expan[ded]’ the scope of section 17 on terrorist financing; and ‘fetter[ed]’ the Court’s discretion to grant bail to an accused.

This becomes clear when we compare the decisions in *Niranjan Singh* and *Girdhari Parmanand Wadhva*. *Niranjan Singh* involved a gang war, where the accused persons set out to murder their rivals. They attacked the deceased Raju and Keshav, succeeded in killing them with knives and iron rods. Their stated intention was to murder their rivals for gaining control over the town, then ‘no one will raise a voice against them’.²²⁰ The Court held that a statement that a show of violence would create terror among the people was insufficient to show that the acts committed were ‘terrorist acts’. The Court drew a distinction between the terror that might result as a consequence of the criminal acts (which would not be covered under TADA) and the intention of causing terror or panic that drives the accused to murder (and is covered under TADA).²²¹

²¹⁶ *Hitendra Vishnu Thakur v State of Maharashtra*, (1994) 4 SCC 602.

²¹⁷ *Niranjan Singh Karam Singh Punjabi v Jitendra Bhimraj Bijaya*, (1990) 4 SCC 767 (‘Niranjan Singh’); *Hitendra Vishnu Thakur v State of Maharashtra*, (1994) 4 SCC 602; *Girdhari Parmanand Wadhva v State of Maharashtra*, (1996) 11 SCC 179 (‘Girdhari Parmanand’).

²¹⁸ *Hitendra Vishnu Thakur v State of Maharashtra*, (1994) 4 SCC 602, para 11.

²¹⁹ *Redaul Hussain Khan v NIA*, 2012 SCC OnLine Gau 341, paras 2, 63-68.

²²⁰ *Niranjan Singh*, para 9.

²²¹ *Niranjan Singh*, para 12: ‘In our opinion the Designated Court was right in coming to the conclusion that the intention of the accused persons was to eliminate Raju and Keshav for gaining supremacy in the underworld. A mere statement to the effect that the show of such violence would create terror or fear in the minds of the people and none would dare to oppose

In *Girdhari Parmanand Wadhva*, a boy had been kidnapped for ransom. He was murdered consequent to non-payment of the ransom amount. The gang-leader absconded and there were charged framed against the remaining accused under section 3(1), TADA. There was evidence to suggest the murder was committed to send a message to society that refusal to meet demands of the gang would result in such consequences. Relying on this alleged statement by the absconded gang-leader, the Court upheld the conviction under TADA.²²²

The court thus places great emphasis on the intention of striking terror in the minds of people, disturbing public order, destabilising public administration, or threatening the security or integrity of the country; acts and consequences that are not limited to crimes committed against individuals, but focus on the “impact of the of the crime and its fall out on the society and the potentiality of such crime in producing fear in the minds of the people or a section of the people which makes a crime, a terrorist activity”.²²³ Given the scarcity of direct evidence collected to establish intention, it is not surprising to see the scale of activity being used as a convenient test over time to ascertain whether or not there was a prior intention. This becomes clear when we consider cases such as *State v Navjot Sandhu*.²²⁴ Targeting the Indian Parliament would certainly send shockwaves through the country, and the Court equally considered this evidence of the intention to commit a terrorist act.

It is possible that even after the 2008 and 2013 amendments, while interpreting section 15, the Court will pay attention to the “psychological element that distinguishes it from other political offences, which are invariably accompanied by violence and disorder” and the accompanying “sense of insecurity”,²²⁵ given the jurisprudence developed so far viewing terrorism as a method of coercive intimidation.²²⁶ However, till the Supreme Court definitively interprets the amendments, nothing more can be said.

them cannot constitute an offence under Section 3(1) of the Act. That may indeed be the fall out of the violent act but that cannot be said to be the intention of the perpetrators of the crime. It is clear from the statement extracted earlier that the intention of the accused persons was to eliminate the rivals and gain supremacy in the underworld so that they may be known as the bullies of the locality and would be dreaded as such. But it cannot be said that their intention was to strike terror in the people or a section of the people and thereby commit a terrorist act.’

²²² *Girdhari Parmanand*, para 39: The Court believed ‘such killing cannot but send a shock wave and bring about terror in the minds of the people of the locality’.

²²³ *Girdhari Parmanand*, para 39. Today, such cases of gang violence would clearly not be considered terrorist acts in light of the lines drawn between the UAPA and acts such as MCOCA. See, *Zameer Ahmed Latifur Rehman Sheikh*.

²²⁴ (2005) 11 SCC 600.

²²⁵ *PUCL*, para 6.

²²⁶ *Yakub Abdul Razak Memon v State of Maharashtra*, (2013) 13 SCC 1, para 1542.

However, there has been little emphasis to discuss what might encompass the definition of terrorist act in the 21st century, especially after the 2008 amendment to the UAPA, which adds an element of uncertainty to the definition. The broad definition subsumes most kinds of subjective and (now) objective conduct within it, making it difficult to raise definitional challenges. Apart from the expansion of the *mens rea* element by introducing the “likelihood” test, the 2008 and 2013 amendments have also expanded the *actus reus* element of the offence. Section 15 now punishes a person who does the stipulated act by “using bombs, dynamite.... or by any other means of whatever nature to cause...” or who “detains, kidnaps or abducts any person.... or does any other act in order to compel any person to do or abstain from doing any act.” In fact, section 15(1)(c) on kidnapping is substantially similar to section 364A of the IPC; thus giving the police the liberty to charge a person under a more stringent and harsher anti-terror legislation, for what may essentially be a simple kidnapping, if the act could “likely threaten” the unity, integrity, economic security, sovereignty of India or “likely” strike terror in any section of the people of India or abroad. It is no surprise thus, that the amendments to the UAPA, introduced after the Mumbai attacks, have been roundly criticised for introducing uncertainty and vagueness in the law.²²⁷

(b) Different from usual law and order problems

The Court has remained consistent in its opinion that ‘terrorist acts’, under the TADA, POTA, or UAPA, cannot be equated with mere law and order problems. The nature and fall out of the intended act is such that ordinary law enforcement proves insufficient to address it under the ordinary penal law.²²⁸ The differences are primarily noted to be of two kinds here: (i) the deliberate and systematic use of coercive intimidation with the intent contemplated in the anti-terror legislation (UAPA or TADA) explained above, by use of such weapons enumerated in such legislation to attain objects such as creating terror, insecurity, fear, and panic in the minds of the people,²²⁹ and (ii) the scale of activity becoming cross-border, either within or beyond India.²³⁰ This approach of the Court has been summed up in *PUCL v Union of India*:

Terrorist acts are meant to destabilize the nation by challenging its sovereignty and integrity, to raze the constitutional principles that we hold dear, to create a psyche of fear and anarchism among common people, to tear apart the secular fabric, to overthrow democratically elected government, to promote prejudice and bigotry, to demoralize the security forces, to thwart the economic progress and development and so on. This cannot be equated with a usual law and order problem

²²⁷ Ravi Nair, *The Unlawful Activities (Prevention) Amendment Act 2008: Repeating Past Mistakes*, *ECONOMIC AND POLITICAL WEEKLY* 10 (2009); Menaka Guruswamy, *Countering Terror or Terrorising the Law?*, *SEMINAR # 599* (2009).

²²⁸ *Kartar Singh; PUCL; Madan Singh v State of Bihar*, (2004) 4 SCC 622; *Hitendra Vishnu Thakur v State of Maharashtra*, (1994) 4 SCC 602, para 7.

²²⁹ *Hitendra Vishnu Thakur v State of Maharashtra*, (1994) 4 SCC 602; *Madan Singh v State of Bihar*, (2004) 4 SCC 622.

²³⁰ *Kartar Singh; PUCL; Madan Singh v State of Bihar*, (2004) 4 SCC 622; *Mohd Khalid v State of West Bengal*, (2002) 7 SCC 334.

within a State. On the other hand, it is inter-state, inter-national or cross-border in character. Fight against the overt and covert acts of terrorism is *not a regular criminal justice endeavor*. Rather it is defence of our nation and its citizens. It is a challenge to the whole nation and invisible force of Indianness that binds this great nation together. Therefore, terrorism is a new challenge for law enforcement. ... Terrorism is definitely a criminal act, but it is *much more than mere criminality*. Today, the government is charged with the duty of protecting the unity, integrity, secularism and sovereignty of India from terrorists, both from outside and within borders. *To face terrorism we need new approaches, techniques, weapons, expertise and of course new laws.*²³¹ (Emphasis added)

It is important to make this distinction given that anti-terror laws depart from the ordinary criminal procedural law of the country in terms of the stringency of their provisions, including maximum and minimum sentences and bail provisions; the duration of permissible police custody; the time taken to file a charge sheet and the procedure of law adopted for trial. As discussed, after the 2008 and 2013 amendments to the UAPA, this distinction between ordinary criminal law and anti-terror laws is becoming harder to draw, since fear is now being used as a touchstone to re-introduce extraordinary and exceptional jurisprudence (of the TADA and POTA era) with an expansion of both the *actus reus* and *mens reus* elements of the offence. This needs critical re-evaluation to prevent these extraordinary laws from becoming part of our ordinary criminal justice system.

C. Membership of terror organisations

While section 20 of the UAPA criminalizes membership to a terrorist gang or organisation, section 38 criminalises wider offences related to membership such as associating with or professing to associate with a terrorist organization. This was the first time that membership of a terrorist organisation was criminalised in India. Thereafter, section 3(5) of the TADA was worded almost identically to section 20 of the UAPA. Consequently, the treatment given to both the sections is also almost identical.

The first issue that courts have considered is whether these sections are so widely worded as to criminalize passive membership of a terrorist organization. In other words, whether any person *merely* by being a part of a terrorist organisation could be prosecuted under this section even if the individual does not actually commit any terrorist or other unlawful activities.

This section has considered a number of times by the Indian Supreme Court. In 2011, the Court delivered three judgments all pertaining to this point of law. In *State of Kerala v Raneeef*,²³² the matter had reached the Supreme Court as an appeal against a bail decision. The accused was a member of the Popular Front of India ('PFI'), which was not designated as an unlawful organisation under the UAPA at the time.

The court held that since the PFI was not banned, the accused could not be penalised for belonging to it. The Court further observed that even if they were to presume that PFI is an

²³¹ PUCL, para 9.

²³² (2011) 1 SCC 784.

illegal organization, they were ‘yet to consider whether all members of the organisation can be automatically held to be guilty’.²³³ The Court also held that there was no *prima facie* proof that the accused was involved in the crime and had thus not violated the proviso to section 43D(5) of the UAPA on bail.

The Court built upon this reasoning more directly in *Arup Bhuyan’s case*, (delivered by the same bench that year). Here, the accused was prosecuted under section 3(5) of the TADA for allegedly being a member of the United Liberation Front of Asom (‘ULFA’). The court held that if the section was read literally it would violate Article 19 of the Constitution. Therefore, ‘mere membership of a banned organisation will not make a person a criminal unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence’.²³⁴ Similarly, in *Indra Das v State of Assam*,²³⁵ the court while endorsing the decision in *Arup Bhuyan* held that reading section 20 of the UAPA literally would be inconsistent with fundamental rights (primarily Article 19) and principles of democracy.²³⁶ Thus, the Court read down section 3(5) of TADA and rejected the principle of ‘guilt by association’ in which membership is penalised whether further proof that there was specific intent to further the illegal aims of the organisation.

This represents a shift in the court’s approach from earlier decisions like *Kartar Singh v State of Punjab*,²³⁷ where the Court considered this provision of the TADA, along with others, and upheld its constitutionality per se, without reading it down as the Supreme Court did in 2011. Here, the primary concern was the threat of terrorism, and the necessity for drastic action - the 2011 judgments see a reappearance of concern for the fundamental rights of the accused.²³⁸

A slightly different approach was adopted by the Bombay High Court in its 2013 decision of *Jyoti Babasaheb Chorge v State of Maharashtra*.²³⁹ In this case, the court held that the inequitable consequence of this section, such ‘that a drastic punishment inasmuch as the imprisonment that can be awarded for being a member of such a gang or organization, can be for life’ is the reason why this provision needs to be read with Article 19 of the Constitution and read down.²⁴⁰ Thus, the focus here was not on the ‘guilt by association’ implication of the provision, nor its undermining of democratic principle, as earlier; strangely it implied that a less harsh punishment in this section might have sustained its constitutionality. Such a reading should be

²³³ *State of Kerala v Raneef*, (2011) 1 SCC 784, para 10.

²³⁴ *Arup Bhuyan v State of Assam*, (2011) 3 SCC 377, para 12.

²³⁵ (2011) 3 SCC 380.

²³⁶ *Indra Das*, para 27.

²³⁷ (1994) 3 SCC 569.

²³⁸ Atli Stannard, ‘Mere Membership of a Banned Organisation Cannot Carry Criminal Liability’ (2011) JCL 157.

²³⁹ 2013 Bom CR (Cri) 186 (Bombay High Court).

²⁴⁰ *Jyoti Babasaheb Chorge v State of Maharashtra*, 2012 SCC OnLine Bom 1460, para 16.

rejected in favour of the Supreme Court's earlier pronouncements in *Arup Bhuyan* and *Indra Das*.

D. Terror financing

In 2013, a set of amendments were introduced to the UAPA, which penalised financial activities related to terrorism. *First*, it introduced the concept of 'offences threatening economic security' within the scope of a terrorist act under section 15, including the smuggling of 'high value' counterfeit currency. Since this is a recent amendment, it has not been judicially interpreted in any significant manner. It is thus, not yet clear under what circumstances counterfeiting, already an offence under the IPC, will rise to the level of economic terrorism. In January 2014, it was reported that an NIA Court had convicted persons accused of possessing and circulating counterfeit currency under section 15 UAPA.²⁴¹ What amount of circulating counterfeit currency satisfied 'damaging monetary stability of India' would become important, not only for defining terrorism but also in abetting it.

Second, the amendments enlarged section 17 of the UAPA, which criminalise the funding of terrorist activities. After 2013, it has an expanded the scope both with regard to the *activities* as well as the *purpose* for which of financing. The following are the points of difference:

- 1) The section now clarifies that an offence is made out if the proceeds are used by a terrorist gang or organisation, even if a terrorist act is eventually not committed by using those funds. This enlarges the scope, since the earlier version required the funds be used to *commit a terrorist act*. Now, if any money is transferred to an association classified as a terrorist organisation or gang, anyone associated with that money is guilty of an offence. This amendment is a likely response to judicial decisions such as *Londhoni Devi v NIA*.²⁴² Here, the appellant had been accused of raising funds for the terrorist act committed by United National Liberation Front of Manipur. The court indicated that all financial transactions with a terrorist gang would not fall within the purview of this section. While it did not lay down a clear test, it indicated that a differentiation could be made with respect to money raised for legal activities and those raised for the commission of any terrorist act.
- 2) The amended section does not differentiate between legitimate and illegitimate sources of funding - proceeds of a salary legally earned, if used for the purpose of a terrorist organisation, for example, would fall foul of this provision.
- 3) In keeping with the amendments to section 15, 'high quality' counterfeiting is also deemed raising funds for the purpose of terrorism.

²⁴¹ PTI, 'NIA court gives life term to 6 accused in fake currency case' *Business Standard* (20 January 2014) <http://www.business-standard.com/article/pti-stories/nia-court-gives-life-term-to-6-accused-in-fake-currency-case-114013000860_1.html> accessed 8 June 2014.

²⁴² 2011 (3) GLT 805 (Gauhati High Court).

The wider approach to terror financing introduced through the 2013 amendment reflects the court's interpretation in *Redaul Hussain Khan v NIA*²⁴³ where the appellant had raised funds for the purchase of arms and ammunition by the terrorist outfit DHD(J). While stating that the money raised must be intended to be used for terror financing, the Court held that this section would cover raising, collecting and providing funds to *any person known to engage in terrorist acts*. The fundraiser need not know exactly *what* terrorist act would be committed since it is difficult to find evidence of conspiracy.

On the question of what constitutes 'support' of terrorist activity, the Supreme Court has also held that it is not necessary for an organisation to be declared unlawful for it to commit terrorist acts, even support given to an association not declared unlawful would be criminalised as long as there was *knowledge* that terrorist acts were being committed.²⁴⁴ This was the approach of the Courts under the 2008 version of section 17. Now, the law also punishes transfers to an undeclared organisation (known as a 'terrorist gang' in the UAPA), where the transfer may have been made for a legitimate purpose. The requirement of a likelihood that a terrorist act be committed with the funds is no longer present. How the courts interpret the newly expanded provision remains to be seen.

Amendments made to the UAPA on terror financing while well-intentioned have significantly broadened the scope of section 17, while introducing an element of uncertainty, especially given the 'likelihood' test. For instance, the distinction between the offences of under section 15(1)(iii-a) of the UAPA and sections 489A-D of the IPC is unclear, insofar as both deal with counterfeiting, and while section 15 was enacted to protect the 'economic security' of the country, the IPC provisions are meant to 'not only to protect the economy of the country but also to provide adequate protection to currency notes and bank notes.'²⁴⁵ In fact, somewhat counter-intuitively, the minimum punishment for the offence of economic terrorism is five years under section 16(b), while counterfeiting is punished under Section 489A-D for a minimum term of seven or ten years. However, the UAPA might have other more stringent provisions when it comes to bail or 180-day police custody. Further, as already discussed, the amendments to section 17 on raising funds from legitimate sources, regardless of whether they are used to finance a terrorist act, increase the scope of abuse given that the prosecution need only show that the accused knew that such "funds are likely to be used...in part" for a terrorist act or by a terrorist organisation, bringing in many legitimate transactions within its purview. For instance, what if a person contributes money for the charitable activities of an organisation, which is not listed in Schedule 1, but eventually commits a terrorist act? Regardless of whether such persons are finally convicted, being charged under the UAPA itself has serious practical consequences in light of the time spent in pre-trial detention due to denial of bail and delay in the conclusion of trial. For all these reasons, the amendments to the UAPA vest the investigating agencies with a lot of discretion, and hence the potential for abuse, and need to be interpreted restrictively.

²⁴³ 2012 SCC OnLine Gau 341, para 74.

²⁴⁴ *Redaul Hussain Khan v NIA*, (2010) 1 SCC 521, paras 15, 16.

²⁴⁵ *K Hashim v State of Tamil Nadu*, AIR 2005 SC 128.

E. Unlawful activity and unlawful associations

1. Unlawful Activity under the UAPA

Before the 2004 amendments brought in explicit provisions on terrorist activities under UAPA, its provisions on unlawful activities were used in terrorism cases. The POTA and UAPA were explicitly connected, since a person who was a member of an unlawful organisation was deemed to have committed a terrorist act if he caused death or grievous injury. For example, the LTTE was listed as an unlawful organisation under the UAPA, and an offensive speech by one of its supporters in a public meeting invoked provisions of both the POTA and UAPA.²⁴⁶

Subsequent to amendments introduced to the UAPA in 2004,²⁴⁷ ‘unlawful activity’ has now been defined as any action taken (by an individual or association) through acts or words or signs, -

- ‘(i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or
- (ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India; or
- (iii) which causes or is intended to cause disaffection against India;’²⁴⁸

By the same amendment, ‘terrorist act’ was defined in a way very similar to POTA, and TADA before it.²⁴⁹ The primary difference between unlawful and terrorist activities is the element of violence in a terrorist act, which is not a requirement for an unlawful activity. The definition, instead, focuses on the broad intention and effect of causing disruption of the sovereignty and territorial integrity of India,²⁵⁰ disaffection against India²⁵¹ or inciting cession or secession of a part of Indian territory.²⁵² The Supreme Court has noted that there is a common feature between these two concepts, namely the essential element of a challenge or threat or likely threat to the sovereignty, security, integrity, and unity of India. However, while a terrorist act requires some physical act like the use of bombs and other weapons, an unlawful activity ‘takes

²⁴⁶ *P Nedumaran v State*, (2004) 1 CTC 721 (Madras HC); POTA, sections 21(1)(a) and 21(3) read with UAPA, section 13(1)(b).

²⁴⁷ UAPA Amendment Act, 2004, section 4. This has remained the same even after the 2008 and 2013 amendments.

²⁴⁸ UAPA, section 2(1)(o).

²⁴⁹ See above, Chapter III(B).

²⁵⁰ UAPA, section 2(1)(o)(ii).

²⁵¹ UAPA, section 2(1)(o)(iii).

²⁵² UAPA, section 2(1)(o)(i).

in its compass even a written or spoken words or any other visible representation intended or which supports a challenge to the unity, sovereignty, integrity and security of India'.²⁵³

Despite the distinction between unlawful activities and terrorist acts, unsurprisingly, both are invoked in terrorism cases. This was done when Dr. Binayak Sen was alleged to have been associated with the banned terrorist organisation Communist Party of India (Marxist Leninist),²⁵⁴ and in the Mecca Masjid bomb blast case.²⁵⁵

The UAPA defines 'unlawful associations' as well. This includes within its ambit those associations that aim to undertake any unlawful activity or any activity punishable under sections 153A or 153B of the IPC prejudicial to national integration or harmony.²⁵⁶ The UAPA empowers the Central government to declare an association as unlawful. However, it is not necessary for an organisation to be declared unlawful in order to attract the provisions punishing a terrorist act. It has been held that UAPA's provisions on terrorist acts could be invoked against an organisation engaging in such activities, even though it was declared as 'unlawful' at a later date.²⁵⁷ The list of terrorist organisations is in the First Schedule to the UAPA and the government regularly notifies the lists of unlawful associations. As of 18th February, 2014, there are 36 notified terrorist organisations and 15 notified unlawful associations in India.²⁵⁸ Of these 36 notified terrorist organisations, 10 are present in the list of unlawful associations as well,²⁵⁹ which means there are five unlawful associations which are not notified terrorist organisations and 26 terrorist organizations that are not notified unlawful associations (Refer to the Appendix). Thus, although by definition, a terrorist act seems to be a subset of an unlawful activity, the inclusion of some terrorist organisations in the list of unlawful associations and the exclusion of others obscures the government rationale in notifying these lists. Further, judicial discourse has not developed sufficiently in this regard to definitively clarify this issue. It is pertinent to note that on 16th February 2015, the Central

²⁵³ *Zameer Ahmed Latifur Rehman Sheikh v State of Maharashtra*, (2010) 5 SCC 246, para 77.

²⁵⁴ *Vinayak Sen v State of Chhattisgarh*, 2008(1) CGLJ 127; UAPA, sections 10(a)(i), 20, 21, 38, 39.

²⁵⁵ *NIA, Hyderabad v Devendra Gupta*, 2013 SCC OnLine AP 136 (Andhra Pradesh High Court); UAPA, sections 13, 15, 16, 18, 19, 23.

²⁵⁶ UAPA, section 2(1)(p).

²⁵⁷ *Jayanta Kumar Ghosh v NIA*, 2014 (1) GLT 1 (Gauhati High Court), para 10 citing *Redaul Hussain Khan v National Investigation Agency*, (2010) 1 SCC 521, para 16.

²⁵⁸ Lok Sabha Unstarred Question No. 3981 to be answered on the 18th February, 2014: 'Terrorist Organisations' (Government of India, Ministry of Home Affairs), Annexures I and II.

²⁵⁹ *Ibid.*

government added the Islamic State/Islamic State of Iraq and Levant/Islamic State of Iraq and Syria/Daish as the 38th organisation in the First Schedule of the Act.²⁶⁰

While a member of an unlawful association can be imprisoned only up to two years,²⁶¹ a member of a terrorist organisation could be given a life term.²⁶² Unlike the notification of an unlawful association,²⁶³ the listing of a terrorist organisation does not need confirmation by a tribunal.²⁶⁴ Thus, it is important to develop a rational classification method while identifying an organisation as a terrorist organisation or an unlawful association.

2. Unlawful Activity in State Laws

State laws such as the MCOCA and the CVJSA usually have provisions related to unlawful activity. However, unlike UAPA, which is largely focussed around sovereignty and integrity of India, the definition under CVJSA involves concerns such as maintenance of public order, peace and tranquillity; checking violence, terrorism, vandalism and other acts generating fear and apprehension in the public; and checking the use of firearms and explosives.²⁶⁵ The distinction between UAPA and CVJSA reflects the differences in the concerns of the Parliament vis-à-vis a State legislature. Enacted by Parliament, the UAPA is targeted at graver offences that threaten the unity, integrity, or sovereignty of the country as a whole. In contrast, CVJSA, although drafted along similar lines as UAPA, reflects Chhattisgarh's concerns around serious criminal activities threatening law and order in the State.

On the other hand, MCOCA and KCOCA appear to be targeting a broader set of criminal activities. They define 'organised crime' as any continuing unlawful activity²⁶⁶ involving violence, intimidation, coercion, or other unlawful means, with the objective of gaining undue economic or other advantage, or promoting insurgency.²⁶⁷ Thus, apart from the mention of 'insurgency' that hints that these laws aim to prevent terrorism related activities, they seem to

²⁶⁰ Bharti Jain, 'Centre bans ISIS as terrorist organisation,' *The Times of India*, 26th February 2015, available at <<http://timesofindia.indiatimes.com/india/Centre-bans-ISIS-as-terrorist-organization/articleshow/46385269.cms>>

²⁶¹ UAPA, section 10.

²⁶² UAPA, section 20.

²⁶³ UAPA, sections 3, 4.

²⁶⁴ UAPA, section 35.

²⁶⁵ CVJSA, section 2(e).

²⁶⁶ 'Continuing unlawful activity' is defined as an activity prohibited by law, which is a cognizable offence punishable with imprisonment of three years or more, undertaken as a member of or on behalf of an organised crime syndicate in respect of which more than one chargesheet have been filed within the preceding period of ten years and that Court has taken cognizance of such offence. (MCOCA, section 2(1)(d)).

²⁶⁷ MCOCA, section 2(1)(e); KCOCA, section 2(1)(e).

be targeting any kind of continuing and serious criminal activity. However, as explained above, these laws, especially MCOCA, have also been used in terrorism cases.

Besides defining the criminal ‘activity’, these laws also define ‘unlawful association,’ depending upon the objects and activities of the association. The CVJSA define ‘unlawful associations’ and ‘unlawful organisations’²⁶⁸ respectively as associations that undertake or encourage ‘unlawful activities’. Similarly, KCOCA and MCOCA define an ‘organised crime syndicate’ as a group indulging in ‘organised crime’.²⁶⁹

While all these laws punish mere membership in terrorist or unlawful organisations, the Supreme Court has held that a difference must be made between active ‘knowing’ membership and passive ‘nominal’ membership. All members should not automatically be punished without examining whether the member specifically intended to accomplish the aims of the organisation or participated in its unlawful activities.²⁷⁰

It is useful to note that while the UAPA covers two sets of crimes – ‘terrorist’ and ‘unlawful’ – the State laws are concerned with unlawful (or organised) activities and organisations. Even though terrorist activities do often fall within the scope of these State laws, these Acts do not explicitly carve out terrorism as a special concern, but treat it as part of the set of criminal laws dealing with serious or organised criminal activities.

It is evident that there are overlaps between the definitions in the UAPA and in the State laws. It has been held that even though the definition of ‘organised crime’ under MCOCA is very broad, its meaning must be understood keeping in view the object and purpose of the law. Application of MCOCA provisions should be limited to acts having a direct nexus with the commission of a crime that MCOCA seeks to prevent or control. Many offences, such as criminal breach of trust or cheating, could fall within the definition of ‘organised crime’ under MCOCA and may be committed by an organised crime syndicate. However, that itself may not be sufficient to attract the provisions of MCOCA.²⁷¹ In such cases, the accused could be prosecuted under the general law of IPC and IPC provisions on unlawful assemblies may be invoked.²⁷² However, when both these laws are applicable, provisions under both may be invoked. For example, in an assault and murder case involving an organised crime syndicate, charges were framed under both IPC provisions on unlawful assembly and MCOCA provisions on organised crime.²⁷³

²⁶⁸ UAPA, section 2(1)(p); CVJSA, section 2(f).

²⁶⁹ MCOCA, section 2(1)(f); KCOCA, section 2(1)(f).

²⁷⁰ *State of Kerala v Raneef*, (2011) 1 SCC 784.

²⁷¹ *Ranjitsing Brahmajeetsing Sharma v State of Maharashtra*, (2005) 5 SCC 294, para 24.

²⁷² *Sherbahadur Akram Khan v State of Maharashtra*, 2007 (1) Bom CR (Cri) 26 (Bombay High Court).

²⁷³ *Farman Imran Shah @ Karu v State of Maharashtra*, 2014 (3) Bom CR (Cri) 144 (Bombay High Court).

The overlap between the general criminal law, the extraordinary Central anti-terror legislation, and the special State level laws can lead to confusion about the jurisdiction of different agencies, the resolution in case of conflict, and the discretion to the investigation agencies in framing charges. This again points to the difficulties in defining a terrorist act and drafting legal provisions to punish such acts, arising out of the cross-cutting nature of terrorism encompassing several offences.

In conclusion, many amendments brought to the UAPA in 2008 have substantially increased the scope and purview of various offences, introduced uncertainty, and included acts that were already punishable under the IPC. This is unsurprising, given that the 2008 amendments, passed in December after the Mumbai terror attacks, were passed in Parliament without thorough debate and without referring the Bill to any Parliamentary Committee despite calls by several members to do so. In many cases, the 2008 and 2013 amendments have re-introduced controversial provisions of the now-repealed TADA and POTA, which are liable to be misused.

CHAPTER IV: JUDICIAL INTERPRETATION OF PROCEDURAL ISSUES

Special trial procedures are prescribed under the UAPA, and formerly POTA, when it comes to the trial of terrorism-related cases. This Chapter looks at how these procedures differ from ordinary criminal procedure, the conflicts that have arisen due to such differences, and the way such conflicts have been resolved by the Courts. Specifically, this Chapter looks at the following aspects: (A) Investigation; (B) Arrest and Detention; (C) Bail; (D) Evidence; and (E) Sentencing. Before progressing, it is important to bear in mind that these procedural differences assume importance when we consider that in cases of similar offences under the IPC (such as counterfeiting), investigation agencies would probably prefer the UAPA for its procedural flexibility and stringent bail provisions.

A. Investigation

Investigation of terror acts in India have been characterised by delays and frequent handovers. Occasionally, issues with the investigation of a case have impacted the eventual verdict as well, as in the 2014 judgment of the Supreme Court on the Akshardham attack in 2002.²⁷⁴

The Akshardham attack resulted in the killing of 33 persons while 86 persons were grievously injured. The investigation of the attack was initiated with the lodging of an FIR on 25th September 2002 for offences under POTA and the IPC, including waging war, sedition, criminal conspiracy, and murder. Investigation was handed over to the Police Inspector of the local Crime Branch of Gandhinagar. Among the evidence collected were two letters allegedly found on the person of the killed attackers.

After about a week, the DG of the Gujarat Police handed over the investigation to the Anti-Terror Squad in Gujarat on 3rd October 2002. It was yet again handed over to the ACP, Crime Branch, Ahmedabad almost a year later on 28th August 2003, during which not much progress was made. Thereafter, five accused were arrested a day after the transfer, i.e. on 29th August 2003, and POTA was invoked a day after that. On 31st August, the IGP Kashmir sent a fax message to the IGP Operations at ATS Gujarat, stating that the sixth accused was being held in the custody of the Kashmir police and he was brought to Ahmedabad and arrested on 12th September 2003.

The POTA special court sentenced the three accused to death and one to life imprisonment besides imposing lesser sentences on two others. On appeal, the Gujarat High Court upheld the verdicts, holding that the attack was an act of retaliation against the incidents of communal riots, which took place in the State of Gujarat in the months of March and April, 2002.²⁷⁵ On the

²⁷⁴ *Adambhai Sulemanbhai Ajmeri and Ors v State of Gujarat*, 2014 (7) SCALE 100. (Akshardham case)

²⁷⁵ *State of Gujarat v Adambhai Sulemanbhai Ajmeri*, 2010 SCC OnLine Guj 5293 (Gujarat High Court).

issue of delays in investigation, the High Court referred to *State of W.B. v Mir Mohammad Omar*,²⁷⁶ which stated that courts should bear in mind the time constraints on the police officers in the present system, the ill-equipped machinery they have to cope with, and the traditional apathy of respectable persons towards them. The High Court also relied upon the case of *Rotash v State of Rajasthan*²⁷⁷ for the principle that investigation may not be fool-proof, but defective investigation would not lead to total rejection of the prosecution case. So saying, it dismissed the appeals of the accused persons.

In 2014, the Supreme Court on appeal said that the lower courts in the *Akshardham* case had ignored important lapses in investigation, such as a year's delay in recording the statement of the accomplices. The judgment delivered by Justice Patnaik characterised the investigation in this case as having been conducted 'casually and with impunity',²⁷⁸ leading to gross violations of fundamental rights. The Court came to the conclusion that the ATS had been 'shooting in the dark for a year without any result', before transferring the case to the Crime Branch, following which arrests were made within a day. The Judges described this sequence of events as 'shrouded with suspicion'.²⁷⁹

Issues of investigation have also arisen with respect to handovers to the NIA. In the Malegaon blasts case of 2008, investigation was handed over in 2008 from the Azan Nagar Police Station where the FIR was first registered to the ATS Police Station in Mumbai. Three years later, through a Central government notification in 2011, the Union Home Ministry then handed over the case to the NIA without the consent of the Government of Maharashtra. This was challenged by Pragma Singh Thakur in *Pragya Singh Thakur v State of Maharashtra*,²⁸⁰ who also challenged the legislative competence of the Centre to enact the NIAA, as discussed above.²⁸¹

The question before the Bombay High Court was whether section 6 of the NIAA violated Articles 14 and 21 of the Indian Constitution, on the ground that it gave arbitrary and unbridled power to the Central government to transfer cases to the NIA, that too without any guidelines for the exercise of that power. The Court upheld the validity of section 6, saying that not all Scheduled Offences would be investigated by the NIA. The Central government was in fact constrained in its decisions under section 6, being bound to give due regard to the 'gravity' of the offence, which entails looking at factors affecting the sovereignty and security of the State, international relations, and existing treaty obligations. Moreover, the Central government is still obliged to record its requisite opinion, with reasons for the same.

²⁷⁶ (2000) 8 SCC 382.

²⁷⁷ (2006) 12 SCC 64.

²⁷⁸ Akshardham Attack case, para 111.

²⁷⁹ Akshardham Attack case, para 131.

²⁸⁰ *Pragyasinh Chandrapalsingh Thakur v State of Maharashtra*, 2014 (1) Bom CR (Cri) 135 (Bombay High Court).

²⁸¹ See Chapter III(B) of this report.

The next question before the Court was whether section 6 gave the power to transfer pending/completed investigations, regardless of whether the charge sheet had already been filed, to the NIA to start afresh or for a 'reinvestigation', or whether only new investigations could be transferred. The argument on behalf of the petitioner was that because of the transfer under section 6, NIA would indulge in 'reinvestigation' instead of 'further investigation', which could not be done pursuant to an executive order, and must be ordered by a competent court. The counsel for the petitioner relied upon various cases to argue that the prosecuting agency cannot reinvestigate or carry out a *de novo* investigation on its own, since that power was reserved for the superior court, which would have to consider whether there had been 'element of unfairness in the previous investigation and which pricks the judicial conscience of the Court'. Conversely, the respondent argued that any investigation pending on the date of the coming into force of the NIAA could be transferred pursuant to section 6, and the NIA did not only apply to offences committed after it came into force. The Court refused to read down section 6 to only apply to new investigations merely because of the possibility of abuse, saying that this would defeat the object and purpose of the NIAA. Further, it held that there was no vested right in a person in matters of procedure, unlike the right to prosecution or defence, in a prescribed manner. However, the Court agreed that only superior courts have the power to order fresh/*de novo*/reinvestigation, and if the petitioners believed that the NIA began reinvestigation under the garb of additional investigation or the scheme of the CrPC was being flouted, the petitioners could approach the competent court or a superior court for remedy.

There were also multiple handovers of investigation in the Mecca Masjid blast cases, which took place in 2007. The FIR was initially lodged in the Hussaini Alam Police Station, Hyderabad, and subsequently transferred to the CBI which filed its first charge sheet in 2010. The cases were again transferred to the NIA through the Union Home Ministry order in 2011. Although the trials in the Mecca Masjid blasts are still pending, investigation in these cases has been severely criticised.²⁸² Thirty-nine people, all Muslims, were arrested in the days following the blast, but were all subsequently acquitted. The Sessions Judge, in one acquittal, commented on the lack of evidence against the accused, noting that '[e]xcept the alleged confessional statement rendered to police office there is no other evidence available connecting the accused with the theory of conspiracy to wage war against Government of India established under law...'²⁸³ In the Report of the State Minorities Commission, the police was clearly accused of *mala fide*, with the Report stating '...there has been evident a bizarre execution of power and a defiant attitude displayed by the agency responsible, the police, as regards established procedure of law.'²⁸⁴ Further, seventy people, who were falsely implicated and were victims of police violence, were later offered a total of Rs 70 lakh as compensation by the Chief Minister of Andhra Pradesh. In

²⁸² Sharib Ali, 'Politics of Terror: The Mecca Masjid Blast Case' (2013) 48(34) EPW 36.

²⁸³ National Commission for Minorities, 'Note on visit to Hyderabad with Reference to the minorities and Mecca Masjid Blast Case' <http://ncm.nic.in/pdf/Mecca_Masjid.pdf> accessed 20 August 2014.

²⁸⁴ National Commission for Minorities, 'Note on visit to Hyderabad with Reference to the minorities and Mecca Masjid Blast Case' <http://ncm.nic.in/pdf/Mecca_Masjid.pdf> accessed 20 August 2014.

the meantime, Swami Aseemanand's confession in jail revealed his and Abhinav Bharat's links to the Mecca Masjid blasts, and this revelation of 'Hindutva terror' resulted in the investigation taking a completely different turn.²⁸⁵

Investigations of terror cases in India do not, therefore, present a reassuring picture. They are characterised by delays, frequent handovers, issues of coordination, and accusations of *mala-fide*. Partly, this is a product of multiple investigating agencies, who have been seen to often engage in turf wars, and partly, this is the consequence of poor intelligence gathering, analysis, and sharing across agencies. In spite of such lapses, trials are rarely set aside on these grounds, with decisions such as the 2014 Supreme Court *Akshardham* decision being rare exceptions.

B. Arrest and Detention

Article 22 of the Constitution guarantees the fundamental right against arrest and detention of all persons in India (and not just citizens), except on the fulfilment of certain conditions. The statutory enactment of this constitutional guarantee can be found in Chapter V of the CrPC.²⁸⁶ However, a discussion of arrest and detention provisions assumes importance in the context of terrorism trials, given the various anti-terror legislations governing the same. The arrest and detention provisions in POTA, and now UAPA, are different from those in the CrPC that govern ordinary criminal cases. Apart from these Central enactments, the MCOCA has similar provisions, which have been applied in terrorism trials in the past. These issues are discussed below.

1. Constitutional Safeguards

Before embarking on a discussion of the restrictions on individual freedoms imposed by law, it is useful to lay out the relevant fundamental rights guaranteed to every person in India. Article 22(1) of the Constitution provides that every person arrested and detained in custody in India has a fundamental right to being informed, as soon as possible, of the grounds for such arrest and the right to consult and be defended by a legal practitioner of her/his choice. Moreover, such person, once detained in custody, is required to be produced before the nearest Magistrate within a period of twenty-four hours of such arrest and cannot be detained beyond this twenty-four hour period without a Magistrate's authority.²⁸⁷

Exceptions to the above are provided in case of enemy aliens and operation of preventive detention laws as enumerated in Article 22(3) of the Constitution. Nonetheless, no law permitting preventive detention may detain a person for a period longer than three months, unless certain conditions are fulfilled.²⁸⁸

²⁸⁵ Sharib Ali, 'Politics of Terror: The Mecca Masjid Blast Case' (2013) 48(34) EPW 36.

²⁸⁶ See Code of Criminal Procedure 1973, sections 41D, 50, 57.

²⁸⁷ Constitution of India, Article 22(2).

²⁸⁸ Constitution of India, Article 22(4)-(7).

Moreover, every person has a fundamental right against self-incrimination, that is, no person accused of any offence shall be compelled to be a witness against her/himself.²⁸⁹

The sections below will examine how these fundamental guarantees have been upheld or restricted by law.

2. Arrest

Specific procedures for arrest are found in almost all legislations concerning terrorism, even if peripherally. Two important provisions in this respect govern the exclusion of anticipatory bail and rights of the arrested person.

(a) *POTA*

Section 52 of POTA provided for procedures to be followed on arrest. Section 49, a continuation of an identical TADA provision,²⁹⁰ excluded the possibility of applying for anticipatory bail under section 438 of the CrPC. This provision continues in section 43D(4) of the UAPA. An identical provision is also present in section 21(3) of MCOCA.

Section 52 of POTA was purportedly enacted in furtherance of certain guidelines laid down by the Supreme Court in *DK Basu v State of West Bengal*,²⁹¹ specifically, guidelines 2, 3, and 10, though it also reflects the fundamental rights guaranteed under Articles 21, 22(1), and 20(3) of the Constitution.²⁹² In fact, as stated by the Supreme Court in the *Parliament Attack* case, section 52(2) of POTA goes a step further than the constitutional guarantee in Article 22(1) and

‘casts an imperative on the police officer to inform the person arrested of his right to consult a legal practitioner, soon after he is brought to the police station. Thus, the police officer is bound to apprise the arrested person of his right to consult the lawyer. To that extent, Section 52(2) affords an additional safeguard to the person in custody.’²⁹³

In the *Parliament Attack* case, the accused were not informed of their right to consult a legal practitioner either at the time of arrest, or even later when POTA offences were added. Although it may not have been a mandatory requirement initially, section 52 came into play as soon as POTA offences were added.²⁹⁴ The importance given by the Court to section 52(2) of

²⁸⁹ Constitution of India, Article 20(3).

²⁹⁰ TADA, section 20(7). Section 49(5) of POTA and section 43D(4) of UAPA state, ‘Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person accused of having committed an offence punishable under this Act.’

²⁹¹ (1997) 1 SCC 416, para 35.

²⁹² *State (NCT of Delhi) v Navjot Sandhu*, (2005) 11 SCC 600, 720-22 (paras 158 and 160) (*Parliament Attack* case).

²⁹³ *Parliament Attack* case, para 160.

²⁹⁴ *Parliament Attack* case, para 180: ‘The non- invocation of POTA in the first instance cannot become a lever to deny the safeguards envisaged by Section 52 when such safeguards could still

POTA is evident from its pronouncement that a person in custody must be offered a reasonable facility of establishing contact with a lawyer. Thus, if the arrested person is unable to avail of a lawyer's services her/himself, s/he is entitled to seek free legal aid either through the Court or the police or the concerned Legal Services Authority. Even if the police should not indefinitely postpone investigation until the arrestee obtains legal representation, they are required to immediately take note of the request and initiate steps to expedite the process of contacting a lawyer.²⁹⁵

The dictum in the *Parliament Attack* case, evidently a seminal judgment on the rights of the accused, was followed in subsequent years by various High Courts.²⁹⁶ It was even relied on by the Supreme Court in the recent judgment in the *Akshardham Attack* case.²⁹⁷

(b) UAPA

The repeal of POTA in 2004 was followed by amendments to the UAPA in 2004. Although a provision akin to section 52 of POTA cannot be seen in UAPA even after its amendments in 2008 and 2013, these duties of the police are now incorporated in general criminal law - the CrPC- as sections 41B and 41D. Nevertheless, while the CrPC amendments to sections 41 and 41A-D have made arrest provisions more stringent, section 43A of the UAPA, inserted in 2008, stipulates that any officer of the Designated Authority may arrest a person on the basis of belief "*from personal knowledge*" or information furnished by another person, or "*from any document, article or any other thing which may furnish evidence of the commission*" of an offence under the Act. Thus, in many cases, arrests will be made under the UAPA instead of the CrPC, confounding the situation even further. In the absence of provisions to the contrary in the UAPA, however, these CrPC provisions continue to apply even in investigations of terrorism cases.²⁹⁸

be extended to the arrested person. The expression 'the person arrested' does not exclude person initially arrested for offences other than POTA and continued under arrest when POTA was invoked. The 'person arrested' includes the person whose arrest continues for the investigation of offences under POTA as well. It is not possible to give a truncated interpretation to the expression 'person arrested' especially when such interpretation has the effect of denying an arrested person the wholesome safeguards laid down in Section 52.'

²⁹⁵ *Parliament Attack* case, para 160.

²⁹⁶ *Mohd. Pervez Abdul Kayuum Shaikh and Ors v State of Gujarat*, 2011 SCC OnLine Guj 4708 (Gujarat High Court); *Sayeed Mohd. Hanif Abdul Rahim, Ashrat @ Arshad Shafiq Ahmed Ansari and Fehmida w/o Sayyed Mohd. Hanif v State of Maharashtra*, 2012 SCC OnLine Bom 193 (Bombay High Court) (Mumbai car bombing case of 2003); *Zafar Umar Khan @ Jafar Umar v State (NCT) of Delhi*, Criminal Appeal No. 1143/2011, decided on 13 March 2013 (Delhi High Court); *Raees-Uz-Zama and Anr. v State (NCT) of Delhi*, 206 (2014) DLT 578 (Delhi High Court).

²⁹⁷ *Akshardham* case, para 89.

²⁹⁸ UAPA, section 43C.

3. Pre-charge Detention

Section 57 of the CrPC mandates that a person arrested without warrant is not to be detained for more than twenty-four hours without order of a magistrate as specified in section 167. Section 167 of the CrPC defines the procedure to be followed in case the police cannot complete its investigation within twenty-four hours. It permits detention in police custody beyond twenty-four hours, for a certain number of days, on fulfilment of certain conditions. Terrorism laws have modified application of section 167 and extended the permissible number of days of detention, most controversially going as far as allowing detention up to 180 days, on fulfilment of certain requirements.²⁹⁹ Such provisions, though appearing to be in conflict with the right against arbitrary detention under Article 22 of the Constitution, can be said to be examples of exceptions carved out by Parliament as permitted under Article 22(7).

(a) *POTA*

Provisions for extended periods of detention pending investigation were first introduced in TADA³⁰⁰ and did not die out after TADA's repeal, continuing instead in the same form in POTA.³⁰¹ This modification of section 167(2) of CrPC entailed that if investigation could not be completed within 90 days and if the Court was satisfied with the report of the Public Prosecutor indicating the progress of the investigation and specific reasons for detaining the accused beyond the period of 90 days, it could extend the said period up to 180 days. Thus, the custody of an accused could be directed for a total period of 180 days, until filing of the chargesheet. Only thereafter, if the chargesheet was not filed within 180 days, the accused had a right to be released on bail.³⁰² As clarified in the *Godhra* case,

‘the acceptance of application for police custody when an accused is in judicial custody is not a matter of course. Section 49(2)(b) provides inbuilt safeguards against its misuse by mandating filing of an affidavit by the investigating officer to justify the prayer and in an appropriate case the reason for delayed motion.’³⁰³

The contention that there is likelihood of misuse of this provision was rejected without further explanation, although the effectiveness of the inbuilt safeguards offered by the investigation officer, and accepted by the Court, is unclear.

This position was reaffirmed, though not explicitly, in the *Mulund Blasts* case a year later.³⁰⁴ Here, the Supreme Court attempted to balance considerations of national security and rights of accused. It stated that although in cases involving serious offences, such as those under TADA

²⁹⁹ POTA, section 49(2)(b); UAPA, section 43D(2)(b).

³⁰⁰ TADA, section 20(4).

³⁰¹ POTA, section 49(2).

³⁰² POTA, section 49(2), read with CrPC, section 167(2), see also *Sayed Mohd Ahmed Kazmi v State, GNCTD and Ors*, 2012 (10) SCALE 487.

³⁰³ *Maulvi Umarji v State of Gujarat*, (2004) 6 SCC 672 (*Godhra* case), para 25.

³⁰⁴ *Ateef Nasir Mulla v State of Maharashtra*, (2005) 7 SCC 29 (*Mulund Blast* case).

and POTA, some latitude was given to the investigating machinery by providing for extension of time to complete investigation, this extension was not to be granted as a matter of course, but only subject to conditions enumerated in the Act. Unless the enumerated conditions were satisfied, the Court should refuse to extend the period of detention.³⁰⁵ The Court noted:

The report of the Public Prosecutor must satisfy the Court that the Investigating Agency had acted diligently and though there had been progress of the investigation, yet it was not possible for reasons disclosed to complete the investigation within the period of 90 days. In such cases, having regard to the progress of the investigation and the specific reason for grant of extension of time, the Court, may, extend the period for completion of the investigation thereby enabling the Court to remand the accused to custody during the extended period. These are compulsions which arise in extra-ordinary situations. [...] It is only with great difficulty that the investigating agency is able to unearth the well planned and deep-rooted conspiracy involving a large number of persons functioning from different places. It is even more difficult to apprehend the members of the conspiracy. The investigation is further delayed on account of the reluctance on the part of the witnesses to depose in such cases. It is only after giving them full assurance of safety that the police is able to obtain their statement. Thus, while law enjoins upon the investigating agency an obligation to conduct the investigation with a sense of urgency and with promptitude, there are cases in which the period of 90 days may not be sufficient for the purpose. Hence, the legislature, subject to certain safeguards, has empowered the Court concerned to extend the period for the completion of the investigation and to remand the accused to custody during the extended period.³⁰⁶

Further judicial inclusion of safeguards in the pre-charge detention period includes the requirement of giving notice to the accused and of an application for extension of detention period, so that s/he may oppose the application if s/he so wishes. The production of the accused at that time in the court and informing her/him that the question of extension of the period for completing the investigation is being considered has alone been held to be sufficient for the purpose.³⁰⁷ In *Sanjay Dutt's* case, decided under TADA,³⁰⁸ the Supreme Court took the view that requirement of such a notice was necessary to be read into the provision, in the interests of fair play and principles of natural justice, which was quoted with approval in the *Mulund Blasts* case.

The Court in this case further relied on the above TADA case to affirm that detention in police custody should only be extended on the report of the public prosecutor and that cannot be substituted by the request of an investigating officer. In the absence of such a report, the accused must be released on bail. This is not merely a question of form but one of substance.

³⁰⁵ *Mulund Blast* case, para 12.

³⁰⁶ *Mulund Blast* case, para 13.

³⁰⁷ *Mulund Blast* case, para 14, relying on *Sanjay Dutt v State through CBI, Bombay* (1994) 5 SCC 410, para 53 (*Sanjay Dutt's* case).

³⁰⁸ *Sanjay Dutt's* case, para 53, reading down *Hitendra Vishnu Thakur*.

Only on sufficient justification, to be found in the public prosecutor's report, can the Court order further detention of the accused.³⁰⁹

(b) UAPA

The repeal of POTA did not see disappearance of the pre-charge detention provisions found in section 49(2) of POTA. Section 43D(2) of UAPA, introduced *vide* the 2008 amendment, is identical to section 49(2) of POTA. There has been sufficient occasion for courts to interpret this provision, in the short period since 2008.

As under POTA, the requirement of notice and opportunity for hearing to the accused regarding application for extension of detention has been reiterated under the UAPA. However, in this context, it has also been noted that due to the combined effect of the NIAA and the UAPA, the Court of Session can alone deal with the accused during requests for extension of remand, and not the Magistrate, who ordered remand in the first instance.³¹⁰ The Court of Session must take its decision based on a report of the Public Prosecutor (or Additional Public Prosecutor), and not an Assistant Public Prosecutor. This Public Prosecutor may be one appointed under CrPC or under the NIAA.³¹¹

Separate reports have to be filed in respect of each and every accused and the progress of the investigation and specific reasons for extending the detention of each and every accused have to be indicated in the report.³¹²

However, in a case where none of the above requirements had been adhered to and the Magistrate passing the order was without jurisdiction to do so, the Kerala High Court in *Ashruff v State of Kerala* echoed the sentiments of the Supreme Court in the *Mulund Blasts* case. Instead of ordering release of the accused who had been detained without due procedure beyond a period of 90 days, the High Court directed the appropriate Court of Session to consider relevant reports under UAPA and take appropriate action. This was because 'the offences alleged against the Petitioners are very grave offences involving terrorist activity'.³¹³ Such sentiments are not uncommon and are expressed in many terrorism cases, such as in *Bhullar v NCT*,³¹⁴ where the Supreme Court rejected the delay in deciding the mercy petition as a ground for the commutation of the death sentence on the ground that '*long delay may be one of the grounds for commutation of the sentence of death into life imprisonment [but] cannot be invoked in cases where a person is convicted for offence under TADA or similar statutes. Such cases stand on an altogether different plane.*' Such sentiments thus lead to questions about the

³⁰⁹ *Mulund Blast* case, para 14, relying on *Sanjay Dutt's* case, para 53.

³¹⁰ *Ashruff v State of Kerala*, 2010 (3) KLJ 572, para 7.

³¹¹ *Ashruff v State of Kerala*, 2010 (3) KLJ 572, para 7; *Kamarudheen v SHO Muvattupuzha Police Station*, 2011 (1) KLJ 385, para 14.

³¹² *Ashruff v State of Kerala*, 2010 (3) KLJ 572, para 7.

³¹³ *Ashruff v State of Kerala*, 2010 (3) KLJ 572, para 11.

³¹⁴ (2013) 6 SCC 195.

efficacy of the ‘inbuilt safeguards’ against the extension of the pre-charge detention period to 180 days. However, the Supreme Court later reversed its stance on this issue in the case of *Shatrughan Chauhan & Anr. v Union of India & Ors.*,³¹⁵ declaring the ratio in *Bhullar v NCT* as ‘per incuriam’. The Court noted that since death penalty could in any case be given only in the most extraordinary (rarest of the rare) cases, the Court cannot create a further class of heinous cases within such cases that require more stringent treatment. The Court stated that ‘[t]here is no good reason to disqualify all TADA cases as a class from relief on account of delay in execution of death sentence. Each case requires consideration on its own facts.’³¹⁶

High Courts have also stressed on the stringent requirements for releasing a person detained beyond 180 days under section 43D(2).³¹⁷ Even if the investigation is not complete and the accused is in detention in custody and he furnishes bail, he cannot be detained further and must be released on bail. The merits of the case are completely irrelevant to a case under section 43D(2) of the UAPA. In coming to these conclusions, the courts have relied on the Supreme Court’s jurisprudence under section 167(2) of the CrPC.³¹⁸ Nevertheless, such cases do not consider Explanation I to section 167(2) of the CrPC, which states that regardless of the expiry of the 60/90 day period (and in the case of UAPA the 90/180 day period), an accused shall be detained in custody so long as they do not furnish bail. Thus, if the accused is poor or unable to meet the terms of the bail bond (which often require sureties), there is no safeguard in the UAPA for them to be released on bail, and they will continue to languish in pre-trial detention.

It is important to note that, as clearly enunciated by the Supreme Court,³¹⁹ when an accused has applied for statutory bail under section 43D(2) of UAPA after his custody was held to be illegal and application for extension of investigation and detention has been made subsequently, the period of detention cannot be extended retrospectively, defeating the statutory right of the accused that arose on expiry of the period of 90 days. This right to bail is only extinguished after the chargesheet has been filed.

(c) MCOCA

Cases relating to terrorism have often been decided under MCOCA³²⁰ and it appears that section 21(2) of MCOCA, which is largely similar to section 43D(2) of UAPA, has been interpreted in the

³¹⁵ (2014) 3 SCC 1.

³¹⁶ *Ibid*, para 64.

³¹⁷ *Abdul Halim v State*, 2010 (2) KLJ 813, para 19; *BK Lala v Chhattisgarh*, 2012 Cri LJ 1629 (Chhattisgarh High Court), para 17.

³¹⁸ *Rajnikant Jivanlal v Intelligence Officer, Narcotic Control Bureau, New Delhi*, (1989) 3 SCC 532; *Union of India v Thamisharasi*, (1995) 4 SCC 190.

³¹⁹ *Sayed Mohd. Ahmed Kazmi v State (Govt of NCT of Delhi and Ors)*, (2012) 12 SCC 1, para 25.

³²⁰ *Ashok Gyanchand Vohra v State of Maharashtra*, 2005 SCC OnLine Bom 1493; *Lt. Col. Prasad Shrikant Purohit v State of Maharashtra (through ATS, Mumbai)*, 2011 SCC OnLine Bom 1435; *Isharul Haq Abdul Hamid Shaikh v State of Gujarat*, (2009) 5 SCC 283.

same vein. In a case before the Bombay High Court, the Court ruled on a situation that had only been considered hypothetically but not addressed by the Supreme Court in an earlier case under UAPA.³²¹ In this case,³²² the application for statutory bail and application for extension of detention were before the court at the same time. Relying on the Supreme Court's judgment of *Hitendra Vishnu Thakur*,³²³ discussed above, the High Court ruled that the prayer for bail and the prayer for extension of period of detention are to be considered together, and if one is granted the other is to be rejected. If the judge finds sufficient cause for extending detention, then the bail application automatically fails.³²⁴ The Court rejected the notion that an indefeasible right to be released immediately arose once the prescribed period of detention had passed - if an application for extension of detention is presented before the Court at the same time as the bail application, the former would be decided upon first, and the latter would give way to it.

In conclusion, even though coupled with several procedural safeguards at the time of arrest, courts have consistently upheld the wide departures from established criminal law and undermined civil liberties, permitting pre-charge detention for up to 180 days on the ground that the law has provided for adequate safeguards. This is notwithstanding the fact that the 180 day period seems much more than the 28 day period for judicially-authorized pre-trial detention in the UK, seven days for aliens suspected of committing a terrorist act under the US Patriot Act, and 24 hours in Australia, excluding 'dead time' when the suspect is not being questioned.³²⁵ Another common theme is the scourge of terrorism and the justification of national security, often with lip service on the attempt to balance it with fundamental rights of the detainee. This is best reflected in cases such as the Kerala High Court's decision in *Ashruff v State of Kerala*, where even though procedural safeguards had not been adhered to, instead of ordering release of the accused, courts have instead ordered compliance with the requirements of the statute. However, the requirements of the statute are inadequate. Merely inquiring into the progress of the investigation, without examining the material evidence against the accused will allow investigating agencies to routinely extend the pre-charge detention period and possibly, even engage in torture/custodial violence. More importantly, with the latest amendments introducing vague standards such as the 'likelihood' and economic security test, investigating agencies are likely to favour detaining persons under such provisions instead of the CrPC. However, the higher courts have usually upheld the right to statutory bail on the expiry of the pre-charge detention period, although this excludes cases where the accused is unable to furnish bail.

³²¹ *Sayed Mohd. Ahmed Kazmi v State (Govt of NCT of Delhi and Ors)*, (2012) 12 SCC 1.

³²² *Wajid Abdul Wahid Shaikh v State of Maharashtra*, 2013 SCC OnLine Bom 1315 (Bombay High Court).

³²³ (1994) 4 SCC 602.

³²⁴ *Wajid Abdul Wahid Shaikh v State of Maharashtra*, 2013 SCC OnLine Bom 1315 (Bombay High Court), para 20.

³²⁵ Cited from Ravi Nair, n. 227.

C. Bail

Although bail jurisprudence is well-developed in ordinary criminal law, a different framework is applicable to offences that are related to terror attacks or terror financing. There have been several justifications provided for treating terror offences differently. This section of the report thus seeks to address the question of bail and anti-terror legislations in India.

As we shall see, these additional restrictions on the grant of bail under these special laws do not entirely bar the applicability of CrPC. It has been held that the power to grant bail in an offence under MCOCA is subject to limitations both under section 439 of CrPC and section 21(4) of MCOCA.³²⁶ Further, these restrictions cannot be extended to terrorism laws that do not contain explicit provisions to this effect. Therefore, since no such provision exists in the CVJSA, it was held that the general provisions of CrPC shall be applicable for the grant of bail for offences committed under this Act.³²⁷ We now discuss the bail provisions under POTA and the UAPA.

1. POTA and Bail

Bail provisions received widespread attention during the existence of POTA, due to allegations of misuse for political gains.³²⁸ Under section 49(7) of POTA, if the Public Prosecutor opposed the granting of bail to an accused, the Court could award bail only if it was satisfied that there were grounds for believing the accused was *not guilty*.³²⁹ Further, no bail could be granted to a foreign citizen illegally entering the country.³³⁰ The option of anticipatory bail was, of course, unavailable. Finally, section 34(4) of POTA allowed for an appeal against a bail order of the Special Court to the High Court.

Within a year of detention, bail could be granted only after hearing the Public Prosecutor based on a combined reading of sections 49(6) and (7).³³¹ The constitutional validity of the special bail provisions in POTA were challenged in *PUCL v Union of India*,³³² *inter alia*, raising the question whether bail could be granted within a year of detention.

³²⁶ *Chenna Boyanna Krishna Yadav v State of Maharashtra*, (2007) 1 SCC 242. See also *Vinayak Sen v State of Chhattisgarh*, 2007 Cri LJ 4736 (Chhattisgarh High Court).

³²⁷ *Vinayak Sen v State of Chhattisgarh*, 2007 Cri LJ 4736 (Chhattisgarh High Court).

³²⁸ Jayanth K Krishnan, 'India's "Patriot Act": POTA and the Impact on Civil Liberties in the World's Largest Democracy' (2004) *Faculty Publications Paper* 379
<<http://www.repository.law.indiana.edu/facpub/379>> accessed 20 August 2014, p 291.

³²⁹ POTA, section 49(7).

³³⁰ POTA, section 49(6) and (8).

³³¹ The proviso to section 49(7) of POTA stipulated that "after the expiry of a period of one year from the date of detention of the accused for an offence under this Act, the provisions of sub-section (6) of this section shall apply." Section 49(6) requires giving the Public Prosecutor an opportunity to be heard before releasing an accused on bail.

³³² (2004) 9 SCC 580.

The bench held that for up to a year of detention, bail could be granted by the Court after hearing the Public Prosecutor and determining that there were grounds for believing the accused was not guilty. After a year, the ordinary criminal procedure on bail would apply and the requirement of hearing the Prosecutor would be removed.³³³

The Court did not engage in much discussion of the merits of section 49(7) before it came to this conclusion, merely observing that the offences under POTA were more complex and required longer periods of investigation, thereby needing custody of the accused for longer periods of time. The implications of requiring that the accused be considered 'not guilty' before bail was granted was not considered, although it led to a position where the accused has the burden of proving the prosecution wrong at the stage of bail. Legal scholars have rightly noted the absurdity of such a construction.³³⁴ In spite of the Court's holding that bail may be granted in the first year, the requirements were so stringent that in effect bail was denied under POTA in the first year.³³⁵ Thus, POTA proved to be the first of many anti-terror laws that made such extraordinary provisions, which made it easier to deny bail, the norm.

As a result of this clarification by the Supreme Court, subsequent decisions have gone extensively into the merits of the case while determining questions of bail. The question of bail under POTA was tested in the cases relating to the Godhra incident. In most of these cases, bail was denied. While the Gujarat High Court in one set of appeals said that it would not be appropriate to express opinions on the reliability of the evidence, it nonetheless relied on police statements to hold that there was sufficient evidence to indicate that there was a conspiracy that resulted in the Godhra burnings, and that bail should not be allowed.³³⁶ In *Juned Faruq Hayat v Gujarat*,³³⁷ where a similar set of appeals relating to Godhra were heard, the Gujarat High Court even went on to say 'In such a criminal case of exceptional barbarity and magnitude, mere passage of time and likelihood of the trial taking years to be completed cannot be a ground for enlarging the accused persons on bail.' This is in direct contrast to the Bombay High Court decision in 2010, *Adnan Bilal Mulla v Maharashtra*,³³⁸ where the court held that in spite of the existing evidence against the accused, the fact that there was inordinate delay in the

³³³ *PUCL*, para 67: In applying this interpretation, the Court held that there has been an accidental omission of the word 'not' from the proviso to section 49(7), which had rendered this provision meaningless.

³³⁴ Jayanth K Krishnan, 'India's "Patriot Act": POTA and the Impact on Civil Liberties in the World's Largest Democracy' (2004) *Faculty Publications Paper 379*
<<http://www.repository.law.indiana.edu/facpub/379>> accessed 20 August 2014, p 277.

³³⁵ Ujjwal Kumar Singh, *The State Democracy and Anti-Terror Laws in India* (Sage Publications, New Delhi 2007) 40.

³³⁶ *Yamohmed Shafimohmed Chakda and Ors v State of Gujarat*, Criminal Appeal No 600 of 2004, decided on 30 October 2004 (Gujarat High Court).

³³⁷ 2006 GLH (26) 475, para 5.1.

³³⁸ 2010 Cri LJ 1990.

commencement of trial, resulting in incarceration of more than seven years, meant that this was a fit case for the granting of bail.

The POTA cases from the North East make for an interesting study, as there is no instance of bail being granted in any of the reported decisions since the enactment of the law. Most of the cases, which are in the trial stage, are regarding terror financing, where the maximum available evidence has been that either the accused were found in possession of the cash or were linked to the amount in some manner. In one case, the accused was initially arrested because she was the wife of the insurgent leader. Later the charges were quashed.³³⁹ It must also be noted in the case of North East and Kashmir, the available data regarding cases and bail petitions are hard to obtain, as most of the arrests made are not followed by the formal framing of charges.³⁴⁰

2. UAPA and Bail

The 2008 amendments to the UAPA introduced section 43D, similar to the POTA provision on bail. While the necessity of hearing the Public Prosecutor is still present, the Court shall now deny bail if on the perusal of the chargesheet there are reasonable grounds for believing that the accusations are *prima facie* true. A bare reading of the sections indicate that the burden of proof has shifted from the accused to the prosecution in bail matters. Other special conditions have also been carried over from POTA. The State organised crimes Acts have similar provisions on bail.

While there is no provision for anticipatory bail and the necessity of hearing the Public Prosecutor remains, the standard for granting bail is now not that the accused in ‘not guilty’, but rather that ‘there are reasonable grounds for believing that the accusations are not *prima facie* true’. In the discussion of the UAPA Amendment Bill in 2008 in Parliament, the mover of the Bill said the following:

Then, we say under what circumstances bail cannot be granted. This is one provision that I would like to draw your kind attention. We are saying that if on a perusal of the case diary or the report under Section 173 -that is the final report or what we call the challan- the court is of the opinion that there are reasonable grounds for believing that the accusation against a person is *prima facie* true, then and then alone can bail be refused. *Please remember that in POTA and other Acts, it was the other way round.* The court must come to the conclusion that the accused person is not guilty of the offence and that he is not likely to commit any other offence while in bail, which really meant prejudging the case. So, what we have said is, you can refuse bail only under one circumstance, namely, if on a perusal of the case diary or the report under Section 173 you come to the conclusion that there are reasonable grounds to believe that the accusations against the accused are *prima facie* true, only then the Court can decline bail. Again, the High Courts and the Supreme Court have ample powers and this does

³³⁹ *Londhoni Devi v NIA*, 2011 (3) GLT 805 (Gauhati High Court).

³⁴⁰ Parvez Imroz, et al, ‘Alleged Perpetrators - Stories of Impunity in Jammu and Kashmir’ (International Peoples’ Tribunal on Human Rights and Justice in Indian-Administered Kashmir [IPTK], December 2012) <http://kashmirprocess.org/reports/alleged_Perpetrators.pdf> accessed 20 August 2014.

not, in any way, bind the High Courts and the Supreme Courts. This will apply mainly to the trial Court.³⁴¹ (Emphasis supplied)

Thus, we now analyse how that distinction between POTA and UAPA has played out in courts.

While courts have not explicitly gone into the question of whether the standard has altered with the changed language in the UAPA, in *Jayanta Kumar Ghosh v State of Assam*,³⁴² the division bench of the Gauhati High Court went into a detailed discussion of what ‘*prima facie* true’ meant. It held that the Court should determine whether the accusations were ‘inherently improbable or wholly unbelievable’. It could do this only by a bare perusal of the material collected during the investigation. The standard of ‘*prima facie* true’ was therefore lower (making it easier to deny bail) than the standard of ‘reasonable grounds’ for believing in the guilt of a person, which is currently ground for rejecting bail under section 437 of the CrPC.³⁴³

It seems unlikely that, at the stage of granting or denying bail, with no evidence to rebut the accusations, the Court would find accusations in the chargesheet ‘inherently improbable or wholly unbelievable’. Therefore, unfortunately, a very high bar has been placed on the granting of bail under the UAPA. In most of the cases decided under the new section 43D(5), bail has been refused on the grounds that the accusations were *prima facie* true.³⁴⁴ The approach of Courts in deciding bail applications under the UAPA maybe best summed up in the words of the Kerala High Court in *Abdul Sathar v Superintendent of Police*:

It is true that the freedom of movement of a citizen is a precious fundamental right. The freedom of movement and the right to live peacefully of the citizens of the country in general are also precious rights. The law imposes certain restrictions on the rights of persons who indulge in certain criminal acts which would have impact on the fundamental, statutory and civil rights of the citizens at large. *When pitted against the rights of the citizens at large, the individual right of a citizen is of less importance.* That is why a provision like sub-section (6) of section 43D was introduced in the Unlawful Activities (Prevention) Act, by Act 35/2008. It is not the number of days that a person stays in jail which becomes relevant for the purpose of considering whether he is entitled to bail. It is magnitude of the offence and the impact of granting bail to him that matters.³⁴⁵ (Emphasis supplied)

³⁴¹ Lok Sabha Debate, ‘Combined discussion on the motion for consideration of the National Investigation Agency Bill, 2008 and the Unlawful Activities (Prevention) Amendment Bill, 2008 (17 December 2008) <<http://164.100.47.132/LssNew/psearch/result14.aspx?dbsl=10813>> accessed 12 August 2014.

³⁴² 2010 (4) GLT 1 (Gauhati High Court).

³⁴³ *Jayanta Kumar Ghosh v State of Assam*, 2010 (4) GLT 1 (Gauhati High Court), para 78.

³⁴⁴ *Golan Daulagupu v NIA*, 2012 (5) GLT 739 (Gauhati High Court); *Ashringdaw Warisa @ Partha Warisa v NIA and Ors*, 2013 (2) GLT 1 (Gauhati High Court); *Oinam Moniton Singha v NIA*, 2013 (2) GLT 980; *Malsawmkimi and Anr v NIA*, 2014 (1) GLT 158 (Gauhati High Court); *Mohammed Nainar and Ors v State of Kerala and Ors*, 2011 Cri LJ 1729.

³⁴⁵ *Abdul Sathar @ Manzoor v Superintendent of Police and Ors*, 2014 (1) KLJ 666, para 8.

One of the few cases where bail has been allowed, on appeal, in the post-2008 UAPA indicates the standard of proof demanded by the Court. In one of the bail appeals connected to an incident in Kerala where a student attacked and chopped off the hand of a Professor, the Court said that there was only a single piece of evidence presented against the accused, which was not sufficient to support the accusations under section 43D(5) of the UAPA.³⁴⁶

Another question on section 43D(5) was whether it bound High Courts and the Supreme Court in hearing bail appeals, or whether it only applied to a Sessions Court or Special Court constituted under the NIA. In *Jayanta Kumar Ghosh v NIA*,³⁴⁷ the Court held that when there is a special enactment in force, relating to the manner of the investigation, enquiry or otherwise dealing with such offence, the other powers of the Code, including the power to grant bail, should be subjected to the provisions of the special enactment. Therefore, even if the High Court is granting bail under the provisions of section 439 of the Code, it is subject to the conditions which the proviso to section 43D(5) of the UAPA imposes. This seems in contradiction to the speech in Parliament during the introduction of the Bill, where it was said that the provisions would apply 'mainly' to the trial courts, not the higher judiciary. Further, the stringency of this provision is evident from a subsequent Gauhati High Court judgment in *Redaul Hussain*,³⁴⁸ where the Court confirmed that the proviso to section 43D(5) only requires "the mere formulation of opinion by the court on the basis of the material placed before it" and not a "positive satisfaction" that the case against the accused is true.

From a study of cases of bail under both POTA and the UAPA, it seems clear that, notwithstanding the change in language, the effect remains the same. Bail is granted in extremely rare cases in trials of terror cases, the Courts regarding the magnitude of the accusation as sufficient cause to deny bail without requiring much further by way of proof of guilt. As the Kerala High Court decision in *Abdul Satar* demonstrates, in cases of terrorism, courts are reluctant to give preference to individual rights when faced with 'public interest' considerations. Section 43D of the UAPA additionally turns the concept of a bail hearing on its head, because it shifts the focus from the CrPC's considerations of the possibility of the accused absconding or tampering evidence or intimidating witnesses to a consideration of the guilt or innocence of the accused. In doing so, it undermines individual civil liberties on which our entire criminal justice system is premised. The provisions on pre-charge detention and bail discussed above are especially dangerous when we consider that they often shift the burden on the accused, facilitate easy arrests and extended incarceration, even if the accused is eventually acquitted for a lack of evidence.

³⁴⁶ *Abdul Latheef v SI, Muvattupuzha Police Station*, 2012 SCC OnLine Ker 2059.

³⁴⁷ 2014 (1) GLT 1, para 95.

³⁴⁸ *Redaul Hussain Khan v NIA*, (2012) SCC OnLine Gau 341, para 79.

D. Evidence

In terms of the method of acquiring evidence, the admissibility of evidence, and presumptions as to certain offences, laws made to combat terrorism have been said to deviate from ordinary criminal law. On the other hand, the laws have also made an attempt to shield witnesses who could be the key to the prosecution's case in several matters. Thus, in this Part we examine (1) the admissibility of confessions made to police officers; (2) the police officer's power to direct for samples from the body of an accused person; (3) admissibility of evidence collected through interception of communication; (4) adverse presumptions as to certain offences; and (5) procedures for protection of witnesses.

1. Confessions before Police Officers

An important issue in the context of evidence is the confession of an accused while in police custody. While admissibility of such evidence was removed from Central statutes with the repeal of POTA, its remnants are still visible in the MCOCA, which extends to both Maharashtra and Delhi, and is freely applied in the case of terrorist trials.

Section 25 of the Indian Evidence Act, 1872 makes confessional statements of the accused before police officers inadmissible as evidence in court,³⁴⁹ recognising the stark reality of the accused being enveloped in a state of fear, panic, anxiety, and despair while in police custody.³⁵⁰ Unfortunately, there had been a notable departure from this safeguard against police excesses in terrorism statutes. First introduced in section 15 of TADA, the provision admitting confessions made to police was declared constitutional by the Supreme Court in *Kartar Singh*, although it laid down certain guidelines.³⁵¹ This was followed by the introduction of section 18 of MCOCA. Finally, a modified version of this section could be found in section 32 of POTA, which tempered the ill-effects of the erstwhile TADA, although as will be explained below, it differed in certain notable respects from POTA.³⁵² It was also held to be constitutionally valid in the *PUCL* case.³⁵³ After the repeal of POTA and three rounds of amendments to the UAPA, the only vestiges of this provision today can be found in the organised crime laws of the States.

(a) *POTA*

POTA was repealed in 2004, although trials under its provisions are continuing till date. POTA was repealed for the gross violation of human rights of the accused persons, occasioned by the abuse by the police of its powers. This was in the mind of the judges while deciding the

³⁴⁹ See also *Ram Singh v Central Bureau of Narcotics*, (2011) 11 SCC 347 and CrPC, section 162.

³⁵⁰ *State v Navjot Sandhu*, (2005) 11 SCC 600, para 27.

³⁵¹ *Kartar Singh*, para 260.

³⁵² See part (c) below.

³⁵³ *PUCL*, para 64.

Akshardham case and hence, they began by stating that they were conscious and wary of the abuse the provisions of the Act (POTA) might bring.³⁵⁴

Apart from the mandate that confessions to police officers shall be admissible in trial, section 32 of POTA contained several conditions, incorporated from the Court's guidelines on section 15 of TADA in *Kartar Singh*, under which such confessions may be considered. Compliance with these procedural safeguards was 'not a mechanical formality'.³⁵⁵ Like TADA, only an officer at or above the rank of a Superintendent of Police could record the confession.³⁵⁶ However, unlike TADA, section 32(4)-(5) of POTA additionally provided that such accused shall be produced before the Chief Metropolitan or Judicial Magistrate along with the original statement of confession within forty-eight hours, and the statement will be recorded in writing by the Magistrate. Any allegations of torture will be referred for medical examination, after which the accused 'shall' be sent to judicial custody.

Section 32 of POTA had its seeds in section 15 of TADA, though it has been suitably modified subsequent to the Supreme Court's decision in *Kartar Singh*. The Court in this case refrained from declaring unconstitutional section 15 of TADA, despite recognising in para 251 the frequency of cases where 'overzealous police officers resort to inhuman, barbaric, archaic and drastic method of treating the suspects in their anxiety to collect evidence by hook or by crook'. Consequently, it laid down certain guidelines to ensure that

'the confession obtained in the pre-indictment interrogation by a police officer not lower in rank than a Superintendent of Police is not tainted with any vice but is in strict conformity with the well-recognised and accepted aesthetic principles and fundamental fairness'.³⁵⁷

Sub-sections (3), (4) and (5) of section 32 of POTA are thus a consequence of the decision in *Kartar Singh*, as recognised in *PUCL*.³⁵⁸ In *Kartar Singh*, the constitutionality of this exceptional section 15 was upheld on the exceptional nature of terrorism with the Court:

having regard to the legal competence of the legislature to make the law prescribing a different mode of proof, the meaningful purpose and object of the legislation, the gravity of terrorism unleashed by the terrorists and disruptionists endangering not only the sovereignty and integrity of the country but also the normal life of the citizens, and the reluctance of even the victims as well as the public in coming forward, at the risk of their life, to give evidence hold that the impugned section cannot be said to be suffering from any vice of unconstitutionality. *In fact, if the exigencies of certain situations warrant such a legislation then it is constitutionally permissible as ruled in a number of decisions of this Court, provided none of the fundamental rights under Chapter III of the Constitution is infringed.* (Emphasis supplied)

³⁵⁴ *Akshardham* case, para 73.

³⁵⁵ *Akshardham* case, para 87.

³⁵⁶ POTA, section 32(1).

³⁵⁷ *Kartar Singh*, para 263.

³⁵⁸ *PUCL*, para 64.

Thus, in *PUCL*, as in *Kartar Singh*, the Court justified this special exception to the Evidence Act by making a special case for terrorism and related cases and holding that the safeguards incorporated in section 32(3)-32(5) of POTA from *Kartar Singh* were adequate to prevent misuse, especially since ‘judicial wisdom will surely prevail over irregularity, if any in the process of recording confessional statement of the provision.’³⁵⁹

However, it is pertinent to note certain observations of the Court in the *Parliament Attack* case:

It is perhaps too late in the day to seek reconsideration of the view taken by the majority of the Judges in the Constitution Bench. But as we see Section 32, a formidable doubt lingers in our minds despite the pronouncement in *Kartar Singh's* case [...] In *People's Union for Civil Liberties* case, a two Judge Bench of this Court upheld the constitutional validity of Section 32 following the pronouncement in *Kartar Singh's* case. The learned Judges particularly noted the ‘additional safeguards’ envisaged by sub-Sections (4) and (5) of Section 32. The court referred to the contention that there was really no need to empower the police officer to record the confession since the accused has to be in any case produced before the Magistrate and in that case the Magistrate himself could record the confession. This argument was not dealt with by their Lordships. However, we refrain from saying anything contrary to the legal position settled by *Kartar Singh* and *People's Union for Civil Liberties*. We do no more than expressing certain doubts and let the matter rest there.³⁶⁰

These observations of the Court may have played a role in the deliberations of the legislators while amending the UAPA later, which, though reintroduced some POTA sections through amendment in 2008, did not again render admissible extra-judicial confessions as in POTA.

(b) MCOCA

As stated earlier, section 18 of MCOCA embodies the remnants of section 15 of TADA and section 32 of POTA. The wording of the provision demonstrates that it is a combination of both the TADA and POTA provisions. Although incorporating the POTA safeguards as laid down in *Kartar Singh*, section 18(1) retains the wording of section 15(1) of TADA, thereby extending admissibility of a confession under this section to the co-accused, abettor, or conspirator.

In the *Mumbai Train Blast* case,³⁶¹ the Supreme Court held that, as an exception to sections 25 and 26 of the Evidence Act, the non-obstante clause in section 18 of MCOCA would have to be interpreted strictly and limited to the confessions by an accused or co-accused (abettor/conspirator). Neither the Supreme Court nor the High Court prior to it³⁶² ventured into a discussion of the similar TADA or POTA provisions and the jurisprudence emanating from them.

³⁵⁹ *PUCL*, para 64.

³⁶⁰ *Parliament Attack* case, para 54.

³⁶¹ *State of Maharashtra v Kamal Ahmed Mohammed Wakil Ansari*, (2013) 12 SCC 17 (‘Mumbai Train Blast case’), para 82.

³⁶² *Kamal Ahmed Mohammed Wakil Ansari v State of Maharashtra*, 2013 (2) Bom CR (Cri) 548 (Bombay High Court).

(c) *UAPA: Post POTA and the position of law today*

At the time of the 2008 Mumbai terror attack, POTA stood repealed and the UAPA applied to acts of terrorism. However, as in 2008, so also today, there is no provision in the UAPA similar to section 32 or section 52 of POTA. Thus, we see that in the 2008 Mumbai terror attack case, though Kasab was charged with several sections of UAPA, he confessed before a Magistrate and section 164 of CrPC was applicable to this confession.³⁶³ The Supreme Court rejected the appellant's contention that even in such confessions the procedural safeguards in sections 32 and 52 of POTA must be applied. It held:

‘to say that any failure to provide legal aid to the accused at the beginning, or before his confession is recorded under Section 164 Code of Criminal Procedure, would inevitably render the trial illegal is stretching the point to unacceptable extremes.’³⁶⁴

The true test of the admissibility of confession in this context is whether or not the confession is voluntary, and not whether the accused would ‘have made the statement had he been sufficiently scared by the lawyer regarding the consequences of the confession.’ Only in the event of doubts as to the voluntary nature of this confession, notwithstanding the safeguards stipulated in section 164 of CrPC, can the confession be disregarded.³⁶⁵ Such a test undermines the purpose of introducing safeguards while admitting confessions as evidence, given that the emphasis on the ‘voluntariness’ of a confession should be related to whether the accused willingly made the confession, knowing fully its consequences.

In conclusion, although it withstood constitutional challenge in the *PUCI* case, section 32 of POTA rightly faced criticism obtusely from the Supreme Court (in the *Parliament Attack* case) and from civil society.³⁶⁶ Permitting the ‘exceptionality’ of terrorism, as expressed in *Kartar Singh*, to overturn a century old established rule by admitting confessions made to the police demonstrates a misplaced faith on the procedural safeguards in POTA, as evidenced in the acquittal of all the accused in the *Akshardham* case on charges of torture and other rights’ violations of the accused. This part has demonstrated the multiple instances of purely notional

³⁶³ Kasab High Court case; *Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid v State of Maharashtra*, (2012) 9 SCC 234. (‘Kasab Supreme Court case’)

³⁶⁴ Parliament Attack case, cited in Kasab Supreme Court case, para 454.

³⁶⁵ Kasab Supreme Court case, paras 457 and 467.

³⁶⁶ Nirmalanshu Mukherji, ‘A Parliament Adjourned’ (2001) 36(52) EPW
<<http://www.epw.in/commentary/parliament-adjourned.html>> accessed 21 August 2014; Ajit Sahi and Rana Ayyub, ‘One Flew Over the Cuckoo’s Nest’
<http://archive.tehelka.com/story_main43.asp?filename=Ne160110coverstory.asp> accessed 21 August 2014; V Venkatesan, ‘POTA Prospects’ (2002) 19(7) Frontline
<<http://www.frontline.in/static/html/fl1907/19070220.htm>> accessed 21 August 2014; Colin Gonsalves, ‘Confession at Gun Point’
<http://archive.tehelka.com/story_main.asp?filename=op032704confession.asp&id=1> accessed 21 August 2014.

compliance with these safeguards, and thus it is laudable that a provision open to much abuse has thus not found its way back into the Central statutes on terrorism after POTA's repeal, even though it remains firmly in place in a State law applicable in Maharashtra and Delhi.

2. Power to Direct for Samples

Section 27 of POTA contained a provision which is closely linked to section 53 in the CrPC. While the CrPC makes it lawful for a police officer (not below the rank of a sub-inspector) to request a medical examination of an accused by a registered medical practitioner, under POTA the police officer was required to request for samples³⁶⁷ from the accused in writing from the Chief Judicial or Metropolitan Magistrate. Section 27(2) further provided that on the refusal of the accused to provide such samples, the Court 'shall' draw an adverse inference against him.

The Supreme Court upheld the constitutional validity of this section of POTA, based on the reasoning that the Court was not necessarily required to grant permission on a request made by the police officer.³⁶⁸ Thus, the matter was within the Court's discretion, and it was free to refuse permission, after recording reasons for the same, for instance, if it was of the opinion that the request was based on a wrong premise.³⁶⁹

Addressing the argument that section 27 violates the fundamental right against self-incrimination,³⁷⁰ the Court relied on its previous judgment,³⁷¹ which held that giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression 'to be a witness'.³⁷² In light of this, unsurprisingly, it further held that section 27 was only a step in aid of further investigation and the samples so obtained could never be considered as conclusive proof for conviction.³⁷³ It did not address the issue of adverse inference on refusal to provide samples.

Section 27 of POTA did not find its way into the UAPA, after POTA was repealed. However, under section 53 of CrPC, the registered medical practitioner examining the accused is permitted to use reasonable force necessary to ascertain facts, which may afford evidence against the accused. Moreover, 'examination' in this context³⁷⁴ has a seemingly broader ambit,

³⁶⁷ Under POTA section 27(1), 'samples' mean samples of handwriting, finger-prints, foot-prints, photographs, blood, saliva, semen, hair, or voice of the accused.

³⁶⁸ *PUCL*, paras 52 and 53.

³⁶⁹ *PUCL*, para 52.

³⁷⁰ Constitution of India, Article 20(3).

³⁷¹ *State of Bombay v Kathi Kalu Ojadh*, (1961) Cri LJ 856.

³⁷² 'To be a witness' means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in Court or otherwise.

³⁷³ *PUCL*, para 53.

³⁷⁴ The explanation was added by amendment in 2005, after POTA was repealed.

including DNA profiling, use of modern and scientific techniques, and such other tests that a medical practitioner may think necessary. In the absence of specific provisions in the UAPA, this provision of the CrPC would be applicable, and, for the same reasons that POTA section 27 was upheld, would surely stand the test of constitutionality.

At the same time, however, it is important to keep in mind that the POTA provision gave greater powers to the Court to obtain samples from an accused, powers which under general law vest with the police. Thus, even though confessions to police officers are no longer admissible as evidence in a trial under UAPA, the police have wide powers, even powers to use force, to direct examination of, and obtain samples from, the accused.

3. Admissibility of Evidence Collected through Interception of Communication

A peculiar situation has arisen in context of evidence obtained through interception of communication and admissibility of such evidence. This is due to the contrasting yet similar positions in the general law of evidence and specialised laws relating to terrorism.

(a) *General Law under the Indian Telegraph Act*

The Indian Telegraph Act, 1885 empowers the government to order interception of messages under certain circumstances of public emergency.³⁷⁵ However, the Act does not address the issue of admissibility of such intercepted communication as evidence in a trial. Nevertheless, the Supreme Court has held intercepted recorded telephone conversations to be admissible as *res gestae*³⁷⁶ under section 8 of the Evidence Act, provided that the conversation is relevant to the matters in issue, the voice is identifiable, and the accuracy of the recorded conversation is proved by eliminating the possibility of erasing the tape record.³⁷⁷

That these provisions were mentioned in passing, without much discussion in the *Kasab* judgment, demonstrate that the law is well-settled on this point.³⁷⁸

³⁷⁵ Indian Telegraph Act, 1885, section 5(2), read with Indian Telegraph Rules, 1951, rule 419A (introduce by amendment in 1999).

³⁷⁶ Sudipto Sarkar, *Law of Evidence* (18th edn, LexisNexis 2014) 284: 'The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible.'

³⁷⁷ *RM Malkani v State of Maharashtra*, (1973) 1 SCC 471 para 23.

³⁷⁸ *Kasab* Supreme Court case, para 353: 'In normal circumstances, a telephone interception can only be done after getting sanction from the Government but in an emergency, interception is permissible with the approval of the immediate superior who, in this case, was the officer in-charge of the ATS.'

Kasab High Court case, para 75: 'It is the prosecution case that interception of telephone conversation was approved by the competent authority and ex-post facto permission was granted under Section 5(2) of the Telegraph Act, 1885 and Rules made thereunder.'

(b) *MCOCA*

MCOCA was the first enactment in India with a stated objective of intercepting communications to obtain evidence of crime. Its statement of objects and reasons noted that:

The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission would be an indispensable aid to law enforcement and the administration of justice. [...] Government, therefore, decided to enact a special law with stringent and deterrent provisions including in certain circumstances power to intercept wire, electronic or oral communication to control the menace of the organised crime.³⁷⁹

Sections 14 to 16 of MCOCA authorise interception of wire, electronic or oral communication,³⁸⁰ render such intercepted communication admissible as evidence against the accused in a trial,³⁸¹ require a review committee to review every order passed by the authority competent to authorise such interception,³⁸² and impose certain restrictions on the interception.³⁸³ Section 14 empowers a police officer not below the rank of the Superintendent of Police supervising the investigation of an organised crime under MCOCA to submit an application in writing to the competent authority for an order authorising or approving interception of wire, electronic or oral communication by the investigating officer, when such interception may provide or has provided evidence of any offence involving an organised crime. Section 14(2) - (13) lay down the detailed procedure for conducting such interception as also the requirements to be fulfilled before approval is granted. Section 16 prohibits interception and disclosure of wire, electronic, or oral communication by any police officer except as otherwise specifically provided, and makes any violation of the provision punishable.

In a decision that upheld the constitutional validity of MCOCA, the Supreme Court held that the fundamental right to privacy can be curtailed in accordance with procedure established by law, as long as the procedure is fair, just, and reasonable, and not arbitrary, fanciful, or oppressive.³⁸⁴ By the Court's reading of the provisions of MCOCA as well as its stated objectives, sections 14 to 16 contained sufficient procedural and other safeguards to ensure that there was a reasonable restriction on the right to privacy and did not violate Article 21 of the Constitution.³⁸⁵

³⁷⁹ MCOCA, Statement of Objects and Reasons.

³⁸⁰ MCOCA, section 14.

³⁸¹ MCOCA, section 14(13).

³⁸² MCOCA, section 15.

³⁸³ MCOCA, section 16.

³⁸⁴ *State of Maharashtra v Bharat Shantilal Shah*, (2008) 13 SCC 5, para 60.

³⁸⁵ *State of Maharashtra v Bharat Shantilal Shah*, (2008) 13 SCC 5, para 61.

(c) *POTA*

Chapter V of POTA³⁸⁶ deals with interception of communications and provides for a competent authority not below the specified rank, i.e. Joint Secretary in the Centre and Secretary in a State to grant sanction for interception and, when so granting, to satisfy her/himself that section 39(1) warrants an interception. The order granting sanction shall specify the details provided in section 39(2) and shall be reviewed by a review committee.³⁸⁷ Section 43 provides for interception in case of emergency, and Section 45 lays down rules governing admissibility of evidence collected through such interception.

Largely similar to corresponding provisions of MCOCA, undoubtedly the safeguards provided for in Chapter V³⁸⁸ are most important. In the *Parliament Attack* case, compliance with these safeguards was bypassed since POTA offences had not been included in the FIR or relevant documents when the interception in question took place.³⁸⁹ The Supreme Court held that non-inclusion of these offences was not deliberate and thus tested the admissibility of the intercepted communication in context of general evidence law and the Indian Telegraph Act. However, as outlined above, the Telegraph Act or its Rules do not lay down procedural safeguards as POTA or MCOCA do. This made it easy to admit the intercepted conversations as evidence in the *Parliament Attack* case.³⁹⁰ The Court even went as far as to state that non-compliance or inadequate compliance with the provisions of the Telegraph Act did not per se affect the admissibility, since recorded conversations even obtained illegally are admissible as evidence.³⁹¹

Interestingly, the Delhi High Court in one of its *Parliament Attack* judgments held that section 43 of POTA (dealing with interception in emergency situations) and rule 419A of the Telegraph Rules were 'virtually the same'. Thus, 'no prejudice would be caused if POTA provision were added or not, qua the right of the accused pertaining to interception'.³⁹² Section 43 of POTA specifically provides that the application for approval of interception must be made within 48 hours of the beginning/occurrence of interception and the same must be stopped if approval is not granted. Similarly, the Telegraph Rules state that the interception may be authorised 'subject to its confirmation from the concerned competent officer within a period of fifteen days'. This could be interpreted to imply that if the approval is not granted within 15 days then the interception must cease, but it is ambiguous, as Rule 419A(5) also provides that a direction for interception shall remain in force for ninety days (which may be extended to 180)

³⁸⁶ POTA, sections 36-48.

³⁸⁷ POTA, section 40.

³⁸⁸ POTA, section 45, proviso.

³⁸⁹ *Parliament Attack* case (SC), para 155.

³⁹⁰ *Parliament Attack* case (SC), para 153.

³⁹¹ *Parliament Attack* case (SC), para 154, quoting *RM Malkani*.

³⁹² *State v Mohd Afzal*, 107 (2003) DLT 385, para 166 (Delhi High Court).

unless revoked earlier. There are also different definitions of ‘emergency’ under each of these provisions. Thus, it is difficult to see how these provisions are ‘virtually the same’. Furthermore, as alluded to by the Supreme Court, section 45 of POTA was in question here, and not section 43 - which is even more different from Rule 419A of the Telegraph Rules.

As we have demonstrated earlier, the multiplicity of statutes affords the investigating agencies with vast discretion to apply the more stringent statute, wherever applicable. Thus, unsurprisingly, when greater safeguards on the right to privacy were found in anti-terrorism legislations, the investigating authority did not bring these provisions into play in the beginning, applying the general law with less onerous requirements. This is just another instance demonstrating the pointlessness of drafting laws with stringent safeguards, if a subsequent or previous law easily undermines the same in the name of national security and public interest.

(d) UAPA

After the repeal of POTA, the UAPA did not replicate its provisions on interception of communication. Instead, section 46 of the UAPA refers to the Telegraph Act as well as the Information Technology Act, 2000, rendering admissible any evidence collected through interception under those statutes. At the same time, however, it includes safeguards that were present in the proviso to section 45 of POTA, except that the accused is only required to be provided with a copy of the order of the competent authority,³⁹³ and not the accompanying application as the proviso in POTA provided and the proviso to section 14(13) MCOCA provides.

Thus, it is still possible for the investigating agency to intercept communication under general law (the Telegraph Act), without adhering to the required safeguards under the MCOCA or UAPA, as long as it introduces charges of terrorism in the FIR at a later date. This has made it very simple to circumvent the safeguards present in section 46 of the UAPA or section 14 of MCOCA, while intercepting communications of any person, later charged with acts of terrorism. This demonstrates yet again, the unintended consequence of multiple laws with diverse provisions.

4. Presumption as to Certain Offences

A significant departure from settled principles of evidence regarding the presumption of innocence can be found in MCOCA, POTA, and UAPA, though our analysis of case-law did not reveal any substantive discussion of these provisions. The Supreme Court has held on occasion that:

presumption of innocence is a human right. Article 21 in view of its expansive meaning not only protects life and liberty but also envisaged a fair procedure. Liberty of a person should not ordinarily be interfered with unless there exist cogent grounds therefor.³⁹⁴

However, certain provisions of MCOCA,³⁹⁵ POTA,³⁹⁶ and UAPA³⁹⁷ require the court to draw an adverse inference and presume guilt against the accused, unless the contrary is proved. Even

³⁹³ UAPA, section 46, proviso.

³⁹⁴ *Ranjitsing Brahmajetsing Sharma v State of Maharashtra*, (2005) 5 SCC 294, para 35.

³⁹⁵ MCOCA, section 22.

the landmark *PUCL* judgment, where the Supreme Court discussed individual sections of POTA, did not go into a discussion of section 53, upholding it anyway.³⁹⁸ However, more relevant for our purposes, is the transition from the relatively liberal ‘adverse inference’ presumption for the possession of arms or explosives or evidence of finger-prints of the accused under section 53 of POTA to the direct presumption of guilt for terrorism offences under section 43E of the UAPA, including if evidence of finger-prints ‘or any other definitive evidence suggesting the involvement of the accused’ were found, which is more stringent and vaguely worded.

Though there has been much criticism of this reversal of the rule of presumption,³⁹⁹ parallels with these provisions may be found under several existing laws,⁴⁰⁰ on diverse subjects. The POTA and UAPA provisions have been applied in various cases, with High Court and Special Court judgments applying these adverse presumption rules without discussion.⁴⁰¹ This just demonstrates the ease with which civil liberties of persons accused of terrorism offences are disregarded, without so much as a debate and the increasing normality of extraordinary laws.

5. Protection of Witnesses

Provisions for witness protection are found in every major legislation under discussion,⁴⁰² including other terrorism-related legislation such as the KCOCA,⁴⁰³ the Terrorist Affected Areas (Special Courts) Act,⁴⁰⁴ and the UP Gangsters Act,⁴⁰⁵ and several other statutes on diverse

³⁹⁶ POTA, sections 27(2), 53.

³⁹⁷ UAPA, section 43E.

³⁹⁸ *PUCL*, para 80.

³⁹⁹ Anil Kalhan et al, ‘Colonial Continuities: Human Rights, Terrorism, and Security Laws in India’ (2006) 20:1 Colum J Asian L 93, 168; Justice VS Malimath, et al, *Report of the Committee on Reform of the Criminal Justice System* (Government of India, Ministry of Home Affairs 2003) p 6.

⁴⁰⁰ See, e.g., Indian Evidence Act, 1872, sections 111A, 113A, 113B, 114B; Protection of Children from Sexual Offences Act, 2012, section 12; Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, section 8; Delhi Excise Act, 2009, section 52; Prevention of Cruelty to Animals Act, 1990, sections 7B, 30.

⁴⁰¹ *Mohammed Gayasuddin v State of Maharashtra*, 2003 Bom CR (Cri) 1727 (a POTA case); *State of Maharashtra v Ravi Dhiren Ghosh*, Sessions Case No.674 of 2009 (NIA) (presumption under section 43E of the UAPA was attracted because of a recovery of fake Indian currency notes from the accused); *Satender Pal Singh v State*, ILR (2009) Supp. (7) Delhi 96 (the presumption under section 22 of MCOCA was attracted because of a recovery of arms from the accused and his associate at the time of arrest).

⁴⁰² MCOCA section 19, POTA section 30, UAPA section 44, NIA section 17.

⁴⁰³ Karnataka Control of Organised Crime Act, section 20.

⁴⁰⁴ Terrorist Affected Areas (Special Courts) Act, section 12.

⁴⁰⁵ Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, section 11.

subject matters.⁴⁰⁶ Here, we have analysed judicial discussions of witness protection provisions under MCOCA, central terrorism statutes, and general criminal law.

(a) MCOCA

Identical to section 16 of TADA,⁴⁰⁷ section 19(1) of the MCOCA permits the Court to order *in camera* proceedings if it so wishes, while section 19(2)-(3) empowers the Court to take any measures it deems fit for protecting the identity and location of any witness. Contravention of the Court's orders may attract imprisonment of up to a year and fine of only up to Rs. 1,000.⁴⁰⁸ These wide powers and 'stringent' provisions have been justified because the Act:

deals with such incorrigible organised criminals whose activities cannot be controlled and it is not ordinarily possible to bring them to books by the ordinary law of the land.⁴⁰⁹

Thus, we again see a continuation of the trend of upholding more stringent provisions in anti-terrorism legislation, with the justification that they were dealing with a special kind of crime.

(b) Central Anti-terrorism Statutes: POTA, UAPA and NIAA

Section 30(1) of POTA was a step backward from the above provisions, in the sense that there were greater restrictions on the Courts while making orders protecting witnesses, since the Court was required to record the reasons in writing for holding in camera trials. The Court was also required to be satisfied that a witness's life was in danger and take measures of protection only after recording reasons therefor in writing.⁴¹⁰ This is similar to the corresponding section 44 of the UAPA, although imprisonment for contravention of the UAPA is extendable to three years, and the amount of fine remains unspecified.⁴¹¹ The NIAA has followed the UAPA, though the amount of fine remains capped at one thousand rupees,⁴¹² as with the other statutes.

Justifying the provisions of section 30 of POTA, the Punjab and Haryana High Court reasoned that the provision is only intended to provide a sense of security to the witness and not to deny a fair opportunity to the accused.⁴¹³ The Court justified this on the basis of the safeguards built into the provisions - of recording reasons and being satisfied of a danger to the life of the

⁴⁰⁶ Public Interest Disclosure (Protection of Informers) Act, 2007, section 12; Whistle Blowers Protection Act, 2011, section 12; Tripura Police Act, 2007, section 67; Meghalaya Police Act, 2010, section 81.

⁴⁰⁷ The constitutional validity of this provision was upheld in *Kartar Singh*.

⁴⁰⁸ MCOCA, section 19(4).

⁴⁰⁹ *Mohamed Shakil Mohamed Shafi Jariwala v State of Maharashtra*, 2000 Cri LJ 3606, para 9.

⁴¹⁰ POTA, section 30(2).

⁴¹¹ UAPA, section 44(4).

⁴¹² NIAA, section 17(4).

⁴¹³ *Simranjit Singh Mann v Union of India*, 2002 Cri LJ 3368 (P&H HC), para 57.

witness, which were meant to guarantee that the witness could depose without fear of retribution at the hands of terrorists.

The Supreme Court, too, upheld the constitutional validity of this provision in *PUCL*.⁴¹⁴ The section was assailed on the ground that the accused was denied a right to know the identities of witnesses before trial, the right to cross-examine, and was thus denied the right to fair trial. The Court held that the right to cross-examine *per se* was not taken away by section 30; rather, the court only has the discretion to protect the identity of the witness if the witness's life was in danger.⁴¹⁵ This provision was an incentive to witnesses, who were otherwise in fear for their lives, to come forward and testify. Moreover, anonymity of the witness was the exception rather than the general rule here. Suggesting further safeguards to protect rights of the accused, the Supreme Court was of the opinion that, apart from providing 'weighty' reasons for keeping a witness's identity secret, a mechanism could be evolved whereby the 'court is obligated to satisfy itself about the truthfulness and reliability of the statement or disposition of the witness whose identity is sought to be protected'.⁴¹⁶

The general tone of the judgment was the balancing of rights of the accused with larger public interest, along with upholding the right to life and liberty of the witness and their family, especially in the context of the heinous nature of offences such as terrorist acts. An important point made by the Court was that effective prosecution of terrorist offences required witnesses to come forward and testify, thus without adequate State support for such witnesses, the purpose of the entire statute may be frustrated.⁴¹⁷

(c) *The Supreme Court's observations on witness protection in the country*

The Supreme Court in its observations in the case of *NHRC v State of Gujarat*⁴¹⁸ lamented that 'no law has yet been enacted for giving protection to witnesses'. In both the *Best Bakery* judgments⁴¹⁹ it observed that certain anti-terrorism legislations had only 'taken note' of the problems surrounding safety of witnesses, and noted:

Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings

⁴¹⁴ *PUCL*, para 61.

⁴¹⁵ *PUCL*, paras 55 and 56.

⁴¹⁶ *PUCL*, para 58. See also, para 60: 'The necessity to protect the identity of the witness is not a factor that can be determined by a general principle. It is dependent on several factors and circumstances arising in a case and, therefore, the Act has left the determination of such question to an appropriate case.'

⁴¹⁷ *PUCL v Union of India*, para 57.

⁴¹⁸ (2009) 6 SCC 342.

⁴¹⁹ *Zahira Habibulla Sheikh v State of Gujarat*, (2004) 4 SCC 158 ('Best Bakery (2004)'); *Zahira Habibulla Sheikh v State of Gujarat*, (2006) 3 SCC 374 ('Best Bakery (2006)').

before the Courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair, as noted above, to the needs of the society.⁴²⁰

It is important to keep in mind that in spite of these pronouncements by the Supreme Court, the only legislative progress has been an increase in punishment in the UAPA from that under POTA - imprisonment may now extend to three years with unspecified amount of fine, for violating an order of a court in furtherance of protection of witnesses.⁴²¹ The NIAA also provides for imprisonment up to three years, though the fine is still capped at one thousand rupees.⁴²²

The Supreme Court's laments thus imply that even though several provisions in anti-terrorist legislation tend to infringe the rights of the accused, perhaps in this one respect, while attempting to protect rights of accused, the legislature seems to have neglected a very important aspect at the opposite end of the spectrum. While the balance between the rights of the accused and the protection of witnesses is always difficult to draw, it is important to ensure that the legislative and judicial (*PUCL*) safeguards are strictly applied, to prevent the State from misusing these provisions in the name of national security to deny the accused a fair trial.

In general, procedural aspects in the UAPA pertaining to issues of evidence discussed here in some instances, such as the admissibility of confessions to police officers improve the pre-existing POTA regime; while in other instances, such as the presumption of guilt in case of certain offences, apply harsher provisions against the accused. However, in all cases, they depart from the normal criminal law based on public interest/national security. While this may be justifiable in certain contexts, departing from long-held and established norms of criminal procedure without much discussion or debate, especially in the legislative arena, is unjustifiable.

E. Sentencing

When it comes to sentencing in terror trials, the dominant issue is that of the imposition of capital punishment. A study of the reasoning behind death sentences in terror trials requires special and focussed attention, which is beyond the scope of this Report. In this section, therefore, only an overview has been given of the nature of sentences handed down in noted terror trials since 2001, which is aimed at providing context and specificity to the general debate on capital punishment and terror trials.

Major trials of cases of terrorism since 2001 are mostly still pending, with a few notable exceptions. The sentences awarded in the latter have been summarised in the Table below, with the highest sentence awarded to each accused detailed, along with the offence for which this sentence was awarded:

⁴²⁰ *Best Bakery* (2004), paras 41 and 42; *Best Bakery* (2006), paras 41 and 42.

⁴²¹ UAPA, section 44(4).

⁴²² NIAA, section 17(4).

	ACCUSED	TRIAL COURT VERDICT	HIGH COURT VERDICT	SUPREME COURT VERDICT	DATE OF INCIDENT	DATE TRIAL BEGAN	FINAL VERDICT
2001 Indian Parliament Attack: <i>State (NCT of Delhi) v Navjot Sandhu</i> , (2005) 11 SCC 600	Mohd. Afzal	Death sentence awarded for conviction under S. 120B r/w 302, IPC	Confirmed	Confirmed	13 December 2001	4 June 2002	4 August 2005.
	SAR Geelani	Death sentence awarded for conviction under S. 120B r/w 302, IPC	Acquitted of all charges	Upheld HC			
	Navjot Sandhu	Rigorous imprisonment of 5 years and fine for conviction under S. 123 IPC ⁴²³	Acquitted of all charges	Upheld HC			
	Shaukat Guru	Death sentence awarded for conviction under S. 120B r/w 302, IPC	Confirmed	123 - 10 years + fine			
2002 American Centre Attack: <i>Mohd. Jamiludin Nasir v State of West Bengal</i> , 2014 (7) SCALE 571	Mohd. Jamiludin Nasir	Death sentence awarded for conviction under S. 120B r/w 302, IPC	Confirmed	Modified to life sentence (minimum of 30 years) 2014(7)SCAL E571	22 January 2002	Trial court announced verdict in 2005	21 May 2014
	Adil Hassan,	Death sentence awarded for conviction under S. 120B r/w 302, IPC	Reversed and acquitted				5 Feb 2010
	Rehan Alam,	Death sentence	Reversed and acquitted				5 Feb, 2010

⁴²³ Concealing with intent to facilitate design to wage war.

		awarded for conviction under S. 120B r/w 302, IPC					
	Musarrat Hussain,	Death sentence awarded for conviction under S. 120B r/w 302, IPC	Acquitted of waging war, imposed lesser sentence	Pending			5 Feb 2010
	Nushrat Alak,	Death sentence awarded for conviction under S. 120B r/w 302, IPC	Acquitted of waging war, imposed lesser sentence	Pending			5 Feb 2010
	Aftab Ahmed Ansari	Death sentence awarded for conviction under S. 120B r/w 302, IPC	Confirmed	Modified to life (entirety of life) 2014 (7) SCALE 571			21 May 2014
	Shakir Akhtar	Death sentence awarded for conviction under S. 120B r/w 302, IPC	Acquitted of waging war, imposed lesser sentence	Pending			5 Feb 2010
	Mohd. Shakeel Mallick	Acquitted	Not challenged	NA			
	Patel Dilip Kumar Kantilal	Acquitted	Not challenged	NA			
2002 Godhra train burning: Sessions Case No. 69/2009; 86/2009; 04/2009	64 accused	Acquitted	Pending	-	27 Feb 2002	May 2009	February 2011
	11 accused	Death sentence awarded for	Pending	-			

		conviction under S. 120B r/w 302, IPC					
	20 accused	Life imprisonment for conviction under S. 120B r/w 302, IPC	Pending	-			
2002 Akshardham attack: <i>Adambhai Sulemanbhai Ajmeri & Ors. v State of Gujarat</i> , 2014 (7) SCALE 100.	Altaf Malek	Rigorous imprisonment of 5 years and fine for conviction under 22(1) of POTA	Affirmed	Set aside conviction	24 Sept 2002	18 Dec 2003	16 May 2014
	Adambhai Ajmeri	Death sentence awarded for conviction under S. 120B r/w 302, IPC	Confirmed	Acquitted			
	Mohammed Salim Hanif Sheikh	Life imprisonment and fine for conviction under S. 3(3) POTA,	Affirmed	Acquitted			
	Abdul Qaiyum Muftisaab Mohamed Bhai	Death sentence awarded for conviction under S. 120B r/w 302, IPC	Confirmed	Acquitted			
	Abdullamiya Yasinmiya	3(3) POTA, RI of 10 years + fine	Affirmed	Acquitted			
	Chand Khan	Death sentence awarded for conviction under S. 120B r/w 302, IPC	Confirmed	Acquitted			

2003 Mumbai Car Bombing case: <i>State of Maharashtra v Sayeed Mohd. Hanif Abdul Rahim</i> , 2012 SCC OnLine Bom 193	Ladoowala	Acquitted	Reversed acquittal - to be tried under IPC	Pending	25 August 2003	2 September 2004	HC verdict of 10 Feb 2012, saying that they will be tried under IPC	
	Batterywala	Acquitted	Reversed acquittal - to be tried under IPC	Pending				
	Ashrat Ansari	Death sentence awarded for conviction under S. 120B r/w 302, IPC	Confirmed	Pending				10 Feb 2012
	Hanif Sayed	Death sentence awarded for conviction under S. 120B r/w 302, IPC	Confirmed	Pending				10 Feb 2012
	Fehmida Sayed	Death sentence awarded for conviction under S. 120B r/w 302, IPC	Confirmed	Pending				10 Feb 2012
2008 Mumbai Attacks: <i>Mohammed Ajmal Mohammed Amir Kasab v State of Maharashtra</i> (2012) 9 SCC 234	Mohammed Ajmal Mohammed Amir Kasab	Death sentence awarded for conviction under S. 120B r/w 302, IPC	Confirmed	Upheld	26-9 November 2008	6 May 2009	29 August 2012	
	Fahim Ansari	Acquitted	Upheld	Upheld				
	Sabauddin Ahamed	Acquitted	Upheld	Upheld				

From this Table, it can be seen that of the 122 accused in major terror trials where a Trial Court has delivered a verdict, 70 (57%) have been acquitted by Trial Courts, 28 (23%) have been awarded death sentences and 21 (17%) have been sentenced to life imprisonment. Only 3 (2%) have been given lesser sentences, under offences like abetment to terrorist acts or fundraising

for terrorist acts. On conviction under section 120B r/w section 302 of the IPC (criminal conspiracy and murder), it is clear that Trial Courts have usually awarded the death sentence or life imprisonment.

Among these cases, of the 15 accused, whose cases have been heard and decided by the Supreme Court, 10 accused (66%) have been acquitted (either reversing conviction by the High Court or upholding acquittal by the High Court). In the remaining 5 cases, 2 accused (Ajmal Kasab and Mohd. Afzal) have been awarded the death sentences, while for 3 accused, death sentences have been commuted to life imprisonment.

Discussion of sentencing is limited in these cases. In the *American Centre Attack case*,⁴²⁴ Justice Fakkir Kalifula of the Supreme Court took into consideration that the appellant Nasir's role in the attack was slightly less than that of appellant Aftab, and for that reason, sentenced the former to life imprisonment up to 30 years but the latter to life imprisonment for the entirety of his natural life. On the question of leniency, in *State of Maharashtra v Ravi Dhiren Ghosh*,⁴²⁵ the NIA prosecuted the case against the accused, who were found guilty of manufacturing, smuggling, and distributing fake Indian currency notes. The accused sought leniency on the grounds of time already spent in prison and on having children and parents as dependents. The Court held that having been convicted of a terrorist offence under the UAPA, only the maximum punishment of life imprisonment could be prescribed to all six accused and nothing less, and that there was 'no question of leniency', although the Court permitted setting off the time already spent in prison.

Appeals in the majority of the cases studied have not yet been finally decided by the Supreme Court (including notably the Godhra trials). From a study of the available data, however, it seems clear that trial courts have frequently handed out death sentences in case of conviction - over half the persons convicted by trial courts have been awarded the death penalty. These mostly see a reversal or a commutation when it reaches the higher judiciary.

Thus, this section demonstrates the following facts. *First*, most cases are inordinately delayed, from the commencement of trial to the disposal of appeal in the Supreme Court. This is particularly egregious in terrorism cases because the investigating agencies often use the stringent provisions under these anti-terror laws to arrest and detain the accused, keep them in pre-charge detention till the expiry of the extended 180 day period, deny bail, impute presumptions of guilt in certain cases, and deny fair trial rights, including the right to legal counsel. Thus, delayed acquittals seriously undermine the civil liberties and human rights of innocent persons who have wrongfully been accused of such heinous acts, apart from the extended socio-economic and health impact of such extended detention. This is even more egregious when one considers that India does not have a suitable compensation framework, as enshrined in Article 5(3) of the European Convention of Human Rights.

Second, despite having wide discretion in deciding the quantum of sentence, as evidenced in *State of Maharashtra v Ravi Dhiren Ghosh*, the Supreme Court can rely on the heinous nature of

⁴²⁴ *Mohd. Jamiluddin Nasir v State of West Bengal*, 2014 (7) SCALE 571.

⁴²⁵ *State of Maharashtra v Ravi Dhiren & Ors.*, Sessions Case No.674 of 2009 (NIA).

terror acts to refuse to exercise its discretion and instead award the maximum punishment; thereby, treating even unlike cases as like.

Finally, despite being required to do so, courts more often than not, fail to delve into the contested aspects of sentencing or the theory relied upon.

CONCLUSIONS

Commonly held opinion about the state of terrorism prosecution in India is that it is riddled with problems. Both investigation and trial face significant delay, and there are frequent examples of lack of co-ordination and resultant inefficiencies. A survey of literature on this issue reveals that while some experts attribute this to political factors, others deny that terrorism prosecution suffers from any intrinsic issues, and attribute low prosecutions to the general problems of the criminal justice system. A third perspective asserts that terrorism is a special case in criminal law, where it is difficult to find eyewitnesses, establish motive and so on, such that when it is treated as an ordinary criminal case it results in low convictions.⁴²⁶ Because of these issues and more, the Eighth Report of the 2nd Administrative Reforms Commission (ARC), on Combating Terrorism felt that anti-terrorist legislation in the country has not kept pace with the development of cross-border terrorism.

In this Report, we have attempted to determine, through a study of relevant laws and judicial decisions, the extent to which to which these characterisations are true. At the very outset, one fact became clear - anti-terror laws in India have repeatedly been introduced in haste, and without much legislative discussion or outside consultation, lending significant credence to the statement of the 2nd ARC. This has had three consequences - *first*, the basic statutory approach to terrorism has not changed since TADA, resulting in the language and structure of subsequent statutes largely being based on this law formulated in the 1980s. This is in spite of the fact that the nature of terrorism, and counter-terrorism efforts have undergone significant changes in the supervening decades.

Second, this haste has led to a significant amount of incoherence, without substantial thought being given to the (un)intended consequences of the slight tweaks in language. Thus, we see the omission of a crucial word in the bail provisions of POTA, (see Chapter IV-C), which contributed to a great deal of confusion on whether bail was allowable under POTA in the first year of detention. Incoherence is further demonstrable in the newly amended provision on terrorism financing, which throws into doubt the requirement of knowledge that such funds are to be used in terrorist acts (see Chapter III-E). Problems in the language of the statutes contribute to delay in the disposition of terrorism trials, which is not in the interests of either the government or the accused.

Third, and most importantly, subsequent laws, seem to have been made without studying the (mis)use and impact of TADA and POTA. For instance, as discussed above, three Review Committees set up under the POTA Repealing Act found that there was no *prima facie* evidence against two-thirds of the accused in cases pending at the time of its repeal of the Act, demonstrating the unnecessary regularity with which investigating agencies charged persons under anti-terror offences. Thus, the recent amendments to the UAPA only serve to increase the

⁴²⁶ Ujjwal Kumar Singh, *The State Democracy and Anti-Terror Laws in India* (Sage Publications, New Delhi 2007); Hari Kumar, 'Why Are Few Terrorists Executed in India?' *The New York Times*, *India Ink*, <<http://india.blogs.nytimes.com/2012/11/22/why-are-few-terrorists-executed-in-india>>.

chances of such misuse. Similarly, Special Courts set up under various anti-terror laws have been unable to expedite the trial of those accused under these laws, and in many cases, have instead undermine due process and fair trial.

Counter-terrorism efforts have also often had to negotiate the tricky terrain of Indian federalism. Challenges to Central or State counter-terror efforts are a reflection of the fundamental difficulties faced in characterising terrorism. Are acts of terrorism more akin to a law and order problem, which is the domain of States? Or is it better characterised as criminal law where both Centre and State are competent? Or are the cross-border and defence aspects of terrorism dominant, so as to place it squarely in the Centre's domain? Issues of this nature have led to multiple challenges to the legislative competence in enacting anti-terror laws, and tussles between Centre and State in the investigation and trial of cases of terrorism. It has also led to the introduction of multiple Centre and State laws seeking to legislate on this issue, and numerous decisions on the sphere of operation of laws such as MCOCA vis-à-vis the UAPA. As we saw in Chapter II, developments such as the setting up of the NIA, and the introduction of terrorism provision in State laws on organised crime represent competing assertions of the Centre and States, including their investigating agencies and local police, in tackling terrorism that have been resolved very clumsily. It has resulted in multiple and overlapping laws that define terrorist acts or unlawful activities in slightly different ways, thus creating a scenario where the safeguards in one law may not apply due to the investigating agency applying a similar provision in another law.

While dilemmas of this nature are meant to be resolved politically, in most cases courts have had to decide on the validity of anti-terror legislation challenged on the grounds of legislative competence. In most cases, courts have found a way of upholding both Central and State laws, and resolving any repugnancy that may arise. This is in keeping with the court's largely deferential approach to national security laws, challenges to which have rarely succeeded. The TADA, POTA, and UAPA have on multiple occasions been upheld by courts, with little reasoning beyond the assertion that terrorism is an extraordinary crime requiring extraordinary laws. While this may work as a general principle, it does not assist us in understanding the many deviations that anti-terror laws take from ordinary criminal law and procedure on matters such as arrest, detention, bail, and evidence. Neither does it help elucidate the nature of the balance between civil liberties and national security that the criminal justice system seeks to uphold. Worse still, such bald assertions can be used to justify any deviation from established principles of criminal law, without considering the impact on individual freedoms and rights, and the actual efficacy of the deterrent and retributive effect of such laws.

There are, of course, welcome exceptions. The trio of judgements delivered by the Supreme Court on the offence of membership to a terrorist organisation, for example, extensively explore these issues. Neither is the attitude of the judiciary always deferential - the 2014 *Akshardham* decision being notable in this regard. On the whole, however, the 'extraordinariness' of anti-terror laws has been insufficiently explored in judicial reasoning in India and has resulted in a situation where the undermining of civil liberties is slowly becoming the norm, instead of the exception.

APPENDIX: List of Terrorist Organisations and Unlawful Associations

List of Terrorist Organisations in the Schedule of Unlawful Activities (Prevention) Act, 1967⁴²⁷

1. Babbar Khalsa International
2. Khalistan Commando Force
3. Khalistan Zindabad Force
4. International Sikh Youth Federation
5. Lashkar-E-Taiba/Pasban-E-Ahle Hadis
6. Jaish-E-Mohammed/Tahrik-E-Furqan
7. Harkat-UL-Mujahideen/Harkat-UL-Ansar/Harkat-UL-Jehad-E-Islami
8. Hizb-UL-Mujahideen/ Hizb-UL-Mujahideen Pir Panjal Regiment
9. Al-Umar-Mujahideen
10. Jammu and Kashmir Islamic Front
11. United Liberation Front of Assam (ULFA)
12. National Democratic Front of Bodoland (NDFB) in Assam
13. People's Liberation Army (PLA)
14. United National Liberation Front (UNLF)
15. People's Revolutionary Party of Kangleipak (PREPAK)
16. Kangleipak Communist Party (KCP)
17. Kanglei Yaol Kanba Lup (KYKL)
18. Manipur People's Liberation Front (MPLF)
19. All Tripura Tiger Force
20. National Liberation Front of Tripura
21. Liberation Tigers of Tamil Eelam (LTTE)
22. Students Islamic Movement of India
23. Deendar Anjuman
24. Communist Party of India (Marxist-Leninist) -- People's War, all its formations and front organisations
25. Maoist Communist Centre (MCC), all its formations and Front Organisations
26. Al Badr
27. Jamiat-ul-Mujahideen
28. Al-Qaida
29. Dukhtaran-E-Millat (DEM)
30. Tamil Nadu Liberation Army (TNLA)

⁴²⁷L.S.US.Q.No. 3981 for 18.02.2014, Annexure-I.

31. Tamil National Retrieval Troops (TNRT)
32. Akhil Bharat Nepali Ekta Samaj (ABNES)
33. Organisations listed in the Schedule to the U.N. Prevention and Suppression of Terrorism (Implementation of Security Council Resolutions) Order, 2007 made under section 2 of the United Nations (Security Council) Act, 1947 and amended from time to time.
34. Communist Party of India (Maoist) all its formations and front organisations.
35. Indian Mujahideen, all its formations and front organisations.
36. Garo National Liberation Army (GNLA), all its formations and front organisations.
37. Kamatapur Liberation Organization, all its formations and front organizations.
38. Islamic State/Islamic State of Iraq and Levant /Islamic State of Iraq and Syria/Daish, and all its Manifestations

List of Unlawful Associations under Unlawful Activities (Prevention) Act, 1967⁴²⁸

1. Students Islamic Movement of India (SIMI)
2. United Liberation Front of Assam (ULFA)
3. National Democratic Front of Bodoland (NDFB)
4. Dima Haram Daogah (Joel) DHD(J)
5. Meitei Extremist Organisation consisting the following:-
 - (a) Peoples' Liberation Army (PLA)
 - (b) United National Liberation Front (UNLF)
 - (c) Peoples' Revolutionary Party of Kangleipak (PREPAK)
 - (d) Kangleipak Communist Party (KCP)
 - (e) Kanglei Yaol Kanba Lup (KYKL)
 - (f) Manipur People's Liberation Front (MPLF)
 - (g) Revolutionary Peoples' Front (RPF)
6. All Tripura Tiger Force (ATTF)
7. National Liberation Front of Tripura (NLFT)
8. Hynniewtre National Liberation Council (HNLC)
9. Liberation Tigers of Tamil Eelam.

⁴²⁸ L.S.US.Q.No. 3981 for 18.02.2014, Annexure-II.