Supreme Court of India Kartar Singh vs State Of Punjab on 11 March, 1994 Equivalent citations: 1994 SCC (3) 569, JT 1994 (2) 423 Author: R Sahai Bench: Sahai, R.M. (J) PETITIONER: KARTAR SINGH

Vs.

RESPONDENT: STATE OF PUNJAB

DATE OF JUDGMENT11/03/1994

BENCH: SAHAI, R.M. (J) BENCH: SAHAI, R.M. (J) PANDIAN, S.R. (J) PANDIAN, S.R. (J) PUNCHHI, M.M. RAMASWAMY, K. AGRAWAL, S.C. (J)

CITATION: 1994 SCC (3) 569 JT 1994 (2) 423 1994 SCALE 1

ACT:

HEADNOTE:

JUDGMENT: The Judgments of the Court were delivered by S. RATNAVEL PANDIAN, J. (on behalf of himself, Punchhi, J., K. Ramaswamy, J., Agrawal, J. and Sahai, J.). The above batch of matters consisting of a number of writ petitions, criminal appeals and SLPs are filed challenging the vires of the Terrorist Affected Areas (Special Courts) Act (No. 61 of 1984), the Terrorists and Disruptive Activities (Prevention) Act (No. 31 of 1985) and the Terrorists and Disruptive Activities (Prevention) Act, 1987 (No. 28 of 1987) commonly known as TADA Acts (hereinafter referred to as the Act of 1984, Act of 1985 and Act of 1987 respectively) and challenging the constitutional validity of Section 9 of the Code of Criminal Procedure (U.P. Amendment) Act, 1976 (U.P. Act No. 16 of 1976) by which the Legislative Assembly of Uttar Pradesh has deleted Section 438 of the Code of Criminal Procedure as applicable to the State of Uttar Pradesh. Though originally, a number of other matters falling under various Acts such as the U.P. Gangsters and Anti-social Activities (Prevention) Act, 1986 (U.P. Act 7 of 1986), the Prevention of Illicit Traffic Ed.: For clarification see Editor's Introductory Note at the beginning of the head note. of Narcotics 'Drugs and Psychotropic Substances Act, 1988 and some provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA), were listed for hearing, we have fully and conclusively heard only the matters pertaining to the Act of 1984, Act of 1985 and Act of 1987 and U.P. Act 16 of 1976. 2. Therefore, we are now rendering a common judgment pertaining to the vires of these three Acts and Section 9 of U.P. Act 16 of 1976. At the same time, we make it clear that the merits of the individual cases will have to be decided separately after the validity of these three Acts is decided. 3. Before going to the question of the validity of these three Acts, we feel that a factual and archival account and exposition of the three relevant Acts may be summarised. Prefatory Note of the Three Acts (A) THE TERRORIST AFFECTED AREAS (SPECIAL COURTS) ACT, 1984 (ACT 61 OF 1984) 4. The above Act 61 of 1984, applicable to the whole of India except the State of Jammu and Kashmir received the assent of the President

on August 31, 1984 replacing Ordinance No. 9 of 1984 promulgated on July 14, 1984, the object of which is to provide for the speedy trial of certain offenses in terrorist affected areas and for matters connected therewith. Section 2(1) of this Act defines the expression "terrorist affected area" as an area declared as a "terrorist affected area" under Section 3 which provision empowers the Central Government by notification to declare any area to be "terrorist affected area" and constitute such area into a single judicial zone or into as many judicial zones as it may deem fit provided in its opinion the offenses of the nature specified in the Schedule appended to that Act are being committed in any area by terrorists on such a scale and in such a manner that it is expedient for the purpose of coping with such terrorists to have recourse to the provisions of the Act. The notification issued under Section 3(1) in respect of an area should specify the period during which the area shall for the purpose of this Act be a "terrorist affected area". As per Section 3(2) a notification under Section 3(1) in respect of an area specifying the period during which the area shall for the purpose of this Act, be a terrorist affected area, and where the Central Government is of the opinion that the terrorists had been committing in that area from the date earlier than the date of issue of the notification, offenses of the nature specified in the Schedule on such a scale and in such a manner that it is expedient to commence the period specified in the notification from such earlier date, the period specified in the notification may commence from that date subject to the proviso thereto. 5. This Act contains 21 sections relating to the establishment of special courts, their composition, jurisdiction and appointment of judges and provision for an appeal as a matter of right from any judgment, sentence or order (not being an interlocutory order) of a special court to the Supreme Court both on facts and law. 6. Though in the original Schedule to this Act qua the definition of the expression 'Scheduled Offence' [vide Section 2(1)(f)], various enactments including 58 sections under the Indian Penal Code of which 23 are bailable were specified, the Legislature by the Amendment Act 45 of 1985, published in the Gazette of India, dated August 26, 1985, retained only Sections 121, 121-A, 122 and 123 of the Indian Penal Code and Sections 4 and 5 of the Anti-Hijacking Act, 1982 and deleted the rest from the original schedule. 7. It has been brought to our notice by Mr K.T.S. Tulsi, the learned Additional Solicitor General that the Central Government established judicial zones in Jullundur, Patiala, Ferozepur and Chandigarh but abolished them by Notification Nos. S.O. 692, S.O. 693, S.O. 694 and S.O. 695 dated September 25, 1985 and transferred the cases pending before those courts to ordinary courts. Two additional courts were constituted by the Government of India for trial of hijacking cases and Golden Temple case at Ajmer and Jodhpur but these two courts were also abolished by the Government vide Notification Nos. S.O. 655(E) and S.O. 722(E) dated August 24, 1990 and September 28, 1993 respectively. However, this Act is not repealed, but is in operation. (B) THE TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT, 1985 (ACT 31 OF 1985) 8. This Act which received the assent of the President on May 23, 1985 and was published in the Gazette of India, Extra., Part II, Section 1, dated May 23, 1985, came into force on May 24, 1985 in whole of India for a

period of two years. Though originally the proviso to sub-section (2) to Section 1 was added reading, "Provided so much of this Act as relates to terrorist acts shall not apply to the State of Jammu and Kashmir", this proviso was omitted by Act 46 of 1985. The provisions of this Act were made applicable to the State of Jammu and Kashmir w.e.f. June 5, 1985. The preamble of this Act read that the special provisions of this Act were made "for the prevention of, and for coping with, terrorist and disruptive activities and for matters connected therewith or incidental thereto". The Statement of Objects and Reasons of this Act read as follows: "Prefatory Note Statement of Objects and Reasons.- Terrorists had been indulging in wanton killings, arson, looting of properties' and other heinous crimes mostly in Punjab and Chandigarh. Since the 10th May, 1985, the terrorists have expanded their activities to other parts of the country, i.e. Delhi, Haryana, Uttar Pradesh and Rajasthan as a result of which several innocent lives have been lost and many suffered serious injuries. In planting of explosive devices in trains, buses and public places, the object to terrorise, to create fear and panic in the minds of citizens and to disrupt communal peace and harmony is clearly discernible. This is a new and overt phase of terrorism which requires to be taken serious note of and dealt with effectively and expeditiously. The alarming increase in disruptive activities is also a matter of serious concern." 9. The Bill as introduced sought to make provisions for combating the menace of terrorists and disruptionists, inter alia, to- (a) provide for deterrent punishment for terrorist acts and disruptive activities; (b) confer on the Central Government adequate powers to make such rules as may be necessary or expedient for the prevention of, and for coping with, terrorist acts and disruptive activities; and (c) provide for the constitution of Designated Courts for the speedy and expeditious trial of offenses under the proposed legislation. 10. In Section 2, clauses (c) and (f) the expressions 'disruptive activity' and 'terrorist act' are defined. This Act in all contains 24 sections which are segregated into four parts i.e. Part 1 (Sections 1 to 2), Part 11 (Sections 3 to 6), Part III (Sections 7 to 16) and Part IV (Sections 17 to 24), dealing with punishment for, and measures for coping with, terrorist and disruptive activities, constitution of Designated Courts constituted under Section 7 of the Act, its jurisdiction and powers, the procedure to be followed, production of witnesses, appointment of Public Prosecutors and the provision for appeal as a matter of right from any judgment, sentence or order, not being an interlocutory order, of the court direct to the Supreme Court both on facts and law (vide Sections 7 to 16) and other miscellaneous provisions regarding the modified application of certain provisions of the Code' of Criminal Procedure, 1973, competence of Central Government to exercise powers of State Government and delegation of powers, power of the Supreme Court of India to make rules etc. (C) THE TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT, 1987 (ACT 28 OF 1987) 11. Act 28 of 1987 was enacted as Act 31 of 1985 was due to expire on May 23, 1987 and as it was felt that in order to combat and cope with terrorist and disruptive activities effectively, it was not only necessary to continue the said law but also to strengthen it further. Since both the Houses of Parliament were not in session and it was necessary to take immediate action,

the President promulgated the Terrorist and Disruptive Activities (Prevention) Ordinance, 1987 (2 of 1987) on May 23, 1987 which came into force w.e.f. May 24, 1987. However, this Act repealing the Ordinance, received the assent of the President of India on September 3, 1987 and was published in the Gazette of India, Extra., Part II, Section 1, dated September 3, 1987. The scheme of Act 31 of 1985 and Act 28 of 1987 as reflected from their preambles is the same. The scheme of the special provisions of these two Acts were/are "for the prevention of, and for coping with, terrorist and disruptive activities and for matters connected therewith or incidental thereto". 12. As per sub-section (1) of Section 1, Sections 5, 15, 21 and 22 came into force at once and the remaining provisions of this Act were deemed to have come into force on 24th day of May 1987. According to sub-section (4) of Section 1, this Act was to remain in force for a period of two years from May 24, 1987 but subsequently sub-section (4) was amended by virtue of the Amendment Act 16 of 1989 whereby for the words "two years", the words "four years" were substituted and the validity of this Act was extended for a further period of two years. Resultantly, the Act was to expire on May 23, 1991. Thereafter as it was felt that the Act should continue, the President promulgated an Ordinance whereby for the words "four years", "six years" were substituted in sub-section (4) of Section 1. Subsequently, this Ordinance was repealed by Act 35 of 1991 thus extending the life of the Act 28 of 1987 to six years. As the Act even by the extended period of six years was to expire on May 23, 1993, another Amendment Act 43 of 1993 which received the assent of President on May 22, 1993, was enacted extending the life of the Act for eight years instead of six years. 13. Incidentally, it may be stated that some insertions, substitutions and omissions to some of the sections of this Act have been made. This Act contains 30 sections grouped under four parts i.e. Part 1 (Sections 1 and 2), Part 11 (Sections 3 to 8), Part III (Sections 9 to 19) and Part IV (Sections 20 to 30). Part 11 of the Act deals with punishment for, and measures for coping with terrorists and disruptive activities. Part III deals with constitution of Designated Courts, their jurisdiction, powers, and the procedure to be adopted. It also provides provisions for appeal to the Supreme Court both on facts and law as in the case of other Acts. The provisions under Part IV under the heading "Miscellaneous" deal with the modified application of certain provisions of the Code, presumption as to offenses under Section 3, identification of accused, power of the Supreme Court to make rules etc. 14. We give the following table of some of the provisions which are similar in the Act of 1985 and the Act of 1987: The Terrorist and Disruptive The Terrorist and Disruptive Activities Prevention Activities (Prevention) Act, 1985 Act,1987 Section 7 = Section 9 Section 8 = Section 10 Section 9(2) = Section 11(2) Section 13 = Section 16 Section 16 = Section 19 Section 17(2) = Section 20(4) Section 17(4) = Section 20(7) Section 17(5) = Section 20(8) 15. A galaxy of senior lawyers, namely, M/s V.M. Tarzan, Ram Jethmalani, M.S. Gujral, Rajinder Sachar, Hardev Singh, M.R. Sharma, A.K. Sen, Balwant Singh assisted by a team of lawyers, M/s R.S. Sodhi, S. Bisaria, D.B. Vohra, K. Rajendra Chowdhary, A.K. Srivastava, Shiv Pujan Singh, Ujjal Singh, Mohan Pandey all appearing for the petitioners/appellants made the most virulent fusillade against

the constitutional validity of all the Acts in general and the various provisions of those Acts in particular mainly on the grounds that (1) that the Central Legislature has no legislative competence to enact the legislations, and (2) these impugned Acts or some of the provisions of these Acts are in contravention of or ostensibly in violation of any of the fundamental rights specified in Part III of the Constitution; they also triggered off a volley of attacks against the validity of the provisions of these Acts/on some other grounds also. According to them, these Acts and the provisions thereto, which are in utter disregard and breach of humanitarian law and universal human rights, not only lack impartiality but also fail the basic test of justice and fairness which are well established and recognised principles of law. 16. After critically analysing a number of penal and procedural provisions relating to issue of arrest, investigation, bail, mode and methodology of trial, right of the accused during the trial etc. etc., the learned counsel have strenuously articulated that these Acts with which we are confronted, are Draconian, ugly, vicious and highly reprehensible, the brutality of which cannot and should not be minimised or ignored though this Court is not called upon to condone the penalised conduct of the real terrorists and disruptionists. Then they made a scathing attack seriously contending that the police by abusing and misusing their arbitrary and uncanalised power under the impugned Acts are doing a 'witch-hunt' against the innocent people and suspects stigmatizing them as potential criminals and hunt them all the time and overreact and thereby unleash a reign of terror as an institutionalised terror perpetrated by Nazis on Jews. 17. The above challenges have been countervailed by the learned Additional Solicitor General, Mr K.T.S. Tulsi assisted by Mr R.S. Suri appearing for the State of Punjab, the learned Additional Solicitor General, Mr Altaf Ahmed assisted by Ms A. Subhashini appearing for the Union of India, Mr V.R. Reddy, the learned Additional Solicitor General assisted by Mr K.V. Venkataraman and Mr 1. Subramaniam for the State of Tamil Nadu, Mr S.K. Dholakia for the State of Gujarat and Mr N.M. Ghatate for the State of U.P. contending that all the veiled attacks challenging the validity of the Acts and the provisions thereto are mainly due to the unjustifiable hostility and sentiments and souring of respect for those Acts. According to them, the events of the past and the continuous long term threats of terrorism and disruption unleashed by a team of seasoned criminals by spreading their wings and sharpening their claws have forced the legislature to respond to this menace without sacrificing the national values and to combat the terrorism by extending and expanding the legal powers of the State and taking steps/measures in a legalised way and that the outcome of such response is the enactment of these Acts after a prolonged debate in both Houses of Parliament as the Legislature has felt that the ordinary criminal laws both penal and procedural are quite inadequate to meet the challenges especially when the incidents of terrorists' and disruptionists' activities have increased astronomically. It has been submitted that it was only in the above background, the Parliament in its wisdom thought that the enactment of these Acts (TADA) is the only solution for all the ills, besetting the nation and accordingly enacted these Acts under challenge in order to put down the terrorism and the impending danger in a legalised manner and a

comprehensive survey of the anatomy of the entire Acts and a dispassionate examination of them would unmistakably show that these Acts cannot be said to be, in any way, contravening any of the fundamental rights of our Constitution or suffering from lack of legislative competence. 18. Supplementing the above submission, it has been very seriously contended by Mr K.T.S. Tulsi that the terrorists are resorting to a mix of specific terrorist operations including armed attacks in a very cruel, unusual and inhumane manner for a variety of reasons, some of which being (1) to instill (a) a sense of fear and helplessness among civilians either to alienate them from the Government duly established or to make them lose faith in the Government's ability to protect them, (b) a sense of impotence among government officials or to intimidate them as a means of neutralizing their active opposition to the terrorists groups; (2) to undermine the national economy by discouraging foreign investment, dissuading foreign tourists from visiting the country and spurring capital flight by domestic investors; and (3) to provoke harsh governmental reprisals to gain sympathy of the population or to create an international incident to publicise their political cause and so on. He further states that all their violent activities are designed to get maximum media coverage of their demands including political demands and of publicity and that many times the targets or the victims of the most inhumane physical attacks are the innocent persons whether they are individuals or group of persons. 19. Notwithstanding the merits and demerits of the submissions and counter-submissions, irrefutably the talented lawyers and learned Additional Solicitors General using their formidable legal skill, extensive scholarly knowledge and vast and rich practical experience in criminal proceedings and trials analysed the various provisions of the Acts under separate heads in the light of the well- recognised principles of criminal jurisprudence with reference to human rights, but sometimes with occasional outbursts and caustic exchanges. In support of their respective contentions advanced during their expanded arguments, they cited a long line of decisions of not only this Court and the High Courts of this country but also foreign decisions and legislations. 20. Before we make an in-depth examination of the challenges canvassed which are manifestly and pristinely legal, with regard to the impugned Acts and some of their provisions with a comprehensive and exclusive survey, it has become inevitable for us to give a brief sketch of the historical background and the circumstances which forced the legislature to enact these laws, as gathered from the parliamentary debates, Statement of Objects and Reasons and prefatory notes of the impugned Acts, etc., etc. 21. From the recent past, in many parts of the world, terrorism and disruption are spearheading for one reason or another and resultantly great leaders have been assassinated by suicide bombers and many dastardly murders have been committed. Deplorably, determined youths lured by hardcore criminals and underground extremists and attracted by the ideology of terrorism are indulging in committing serious crimes against the humanity. In spite of the drastic actions taken and intense vigilance activated, the terrorists and militants do not desist from triggering lawlessness if it suits their purpose. In short, they are waging a domestic war against the sovereignty of their respective nations or against a race or community in order

to create an embryonic imbalance and nervous disorder in the society either on being stimulated or instigated by the national, transnational or international hard-core criminals or secessionists etc. Resultantly, the security and integrity of the countries concerned are at peril and the law and order in many countries is disrupted. To say differently, the logic of the cult of the bullet is hovering the globe completely robbing off the reasons and rhymes. Therefore, every country has now felt the need to strengthen vigilance against the spurt in the illegal and criminal activities of the militants and terrorists so that the danger to its sovereignty is averted and the community is protected. 22. Thus, terrorism and disruptive activities are a worldwide phenomenon and India is not an exception. Unfortunately in the recent past this country has fallen in the firm grip of spiraling terrorists' violence and is caught between the deadly pangs of disruptive activities. As seen from the Objects and Reasons of the Act 31 of 1985, "Terrorists had been indulging in wanton killings, arson, looting of properties and other heinous crimes mostly in Punjab and Chandigarh" and then slowly they expanded their activities to other parts of the country i.e. Delhi, Haryana, U.P. and Rajasthan. At present they have outstretched their activities by spreading their wings far and wide almost bringing the major part of the country under the extreme violence and terrorism by letting loose unprecedented and unprovoked repression and disruption unmindful of the security of the nation, personal liberty and right, inclusive of the right to live with human dignity of the innocent citizens of this country and destroying the image of many glitzy cities like Chandigarh, Srinagar, Delhi and Bombay by strangulating the normal life of the citizens. Apart from many skirmishes in various parts of the country, there were countless serious and horrendous events engulfing many cities with blood-bath, firing, looting, mad killing even without sparing women and children and reducing those areas into a graveyard, which brutal atrocities have rocked and shocked the whole nation. 23. Everyday, there are jarring pieces of information through electronic and print media that many innocent, defenseless people particularly poor, politicians, statesmen, government officials, police officials, army personnel inclusive of the jawans belonging to Border Security Force have been mercilessly gunned down. No one can deny these stark facts and naked truth by adopting an ostrich like attitude completely ignoring the impending danger. Whatever may be the reasons, indeed there is none to deny that. 24. The speeches made by the then Home Minister, the then Minister of State for Home Affairs and many Members of Parliament during the debates at the time of the introduction of the Act of 1987 and at the subsequent stage of its extension and modification, would unfold the magnitude and seriousness of the terrorist and disruptive activities and their consequent dangerous impact on the security of the nation. 25. On April 8, 1988, the then Home Minister in his speech before the Lok Sabha stated thus: "As I told in the beginning, the forces working to destabilize the country are bein g encouraged from outside as well as inside of the country ... According to the information received, it appears that its master mind is somewhere else and it is also inside." 26. The then Minister of State for Home Affairs gave an extensive speech with regard to the commission of heinous crimes on a large scale not only threatening the security

and territorial integrity of the nation but also extremely affecting the normal life of the people and stressed the importance of the enactment of law providing the special procedure and speedy trial of those offenses. 27. One of the Members of Parliament (Shri Kamal Chaudhary) expressing his view during the discussion on the Bill on the Terrorists and Disruptive Activities (Prevention) Act, 1987 stated: ... Punjab is burning. The legend goes that in the rivers of Punjab milk used to flow but they are now drenched with blood. There is hatred all over. What is a democratic solution for Punjab. ... How many women are beating their breasts every night? We feel the pinch only when our near and dear ones get killed." Yet another Member of Parliament (Shri Anoopchand Shah) speaking on the Bill presented before the House said: "Today terrorism has not remained confined to Punjab only. It has rather spread to every corner of the country. The same terrorism which exists in Punjab is making its presence felt in Delhi and Maharashtra also..... Another Member of Parliament (Shri Jagan Nath Kaushal) taking part in the debate on the Act of 1987 spoke thus: ."... The Hon. Members know that we are not dealing with normal peaceful times. We are dealing with extraordinary times. Shri Satyendra Narayan Singh has said that not only for Punjab but do something for Bihar also because in the garb of political party etc. greater terrorism is prevailing there also." 28. We feel that it is not necessary to swell this judgment by reproducing the entire speeches made by the then Home Minister, the Minister of State for Home Affairs and some Members of Parliament on the atrocities committed by terrorists and disruptionists and on the necessity of bringing the Acts (TADA) to effectively prevent the consequent violence. But suffice to give the compelling reasons as shown in the Statements of Objects and Reasons for enacting the Acts of 1985 and Objects and Reasons for enacting the Acts of 1985 and 1987 which are to the effect that the terrorists and disruptionists by their expanded activities have created dreadful fear and panic in the minds of the citizens and disrupted communal peace and harmony; that their activities are on an escalation in many parts of the country; that it has been felt that in order to combat and cope with such activities effectively, it had become necessary to take appropriate legal steps effectively and expeditiously so that the alarming increase of these activities which are a matter of serious concern, could be prevented and severely dealt with. 29. The totality of the speeches made by the Ministers, Members of the Parliament during the debates in the Parliament, the Statement of Objects and Reasons, the submissions made by the learned Additional Solicitors General converge to the following conclusions: (1) From mid-eighties, the prevailing conditions have been surcharged with the terrorism and disruption posing a serious threat to the sovereignty and integrity of India as well as creating panic and sense of insecurity in the minds of the people. Added to that the brutality of terrorism let loose, by the secessionists and anti-nationals in the highly vulnerable area of Indian territory, (prejudicial to the defence of India), is causing grave concern even about the chances of survival of the democratic polity and process; (2) there were also continuous commission of heinous offenses such as gruesome mass killings of defenseless innocent people including women, children and bystanders, disturbing the peace, tranquility and security; (3) the

existing ordinary criminal laws are found to be inadequate to sternly deal with such activities perpetrated on humanity. 30. It was only in the above prevailing circumstances, the Legislature has been compelled to bring forth these Acts (TADA) to prevent and deal with the peril of the erupting terrorism and the consequent potential disorder among others disrupting the law and order and to sternly deal with many groups lurking beneath the murky surface, aiding, abetting, nourishing and fomenting terrorism besides giving financial support and supplying sophisticated automatic lethal arms and ammunitions both from inside and outside of India. It may not be out of place to mention that the facts of the cases appealed against and set out in the writ petitions and SLP, if accepted in their entirety, reveal the multiple acts of violence let loose; and the acts of savage revenge perpetrated against individuals, group of persons or any particular community or religious sects show that the violent threat which has manifested itself is not evidently going to vanish with such inexplicable suddenness as would seem to have been visually presumed. 31. In this context, a question may arise as to whether judges can take notice of matters of common knowledge and authenticated report. This question has been examined by a Full Bench of the High Court of Punjab and Haryana in Sukhdev Singh v. Union Territory, Chandigarh'. M.M. Punchhi, J. (as he then was) speaking for the majority observed: "I know that in order to sustain the presumption of constitutionality of a legislative measure, the court can take into consideration matters of common knowledge, matters of common report, the history of the times and also assume every state of facts which can be conceived existing at the time of the legislation." 32. To redress all the multiple dimensions of crimes whether of national or transnational or international committed by individual or group of criminals, is of course a very difficult task because the crimes and criminals do not respect frontiers and the field of operation of the activities of the criminals know no territorial limits. 33. The Parliament, evidently, taking note of the gravity of terrorism committed by terrorists either with an intention 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 and the consequent widespread apparent danger to the nation, has felt the need of not only continuing but also further strengthening the provisions of TADA Act (Act 31 of 1985) in order to cope with the menace of terrorism, enacted Act 28 of 1987 bringing drastic changes with regard to the admissibility of confessions made to police officials prescribing special procedures and providing consign punishments etc., leave apart the question with regard to the validity of these provisions to be tested on the touchstone of the Constitution. 34. Keeping in view the above historical background, we shall unbiasedly and without any preconceived notion, examine the various legal problems presented inclusive of the constitutional validity of the three Acts (TADA) in general and of the various provisions in particular of those Acts on the touchstone of the Constitution of India. 35. While so testing the vires of these Acts, we shall also scrupulously analyse the various penal and the procedural provisions embodied in those Acts relating to the issues of definition of certain terms, arrest, investigation, bail,

mode of trial, jurisdiction of the Designated Courts, the permissible legal rights of the accused guaranteed under the Constitution, etc., etc. in the light of the constitutional provisions as well as the legal provisions of the existing procedural law with the spectrum of experience so far we have gained in the field of implementation of these impugned Acts. When Law ends, Tyranny begins; 1 AIR 1987 P & H 5: 1986 Cri LJ 1757: (1986) 90 Punj LR 109 Legislation begins where Evil begins. The function of the Judiciary begins when the function of the Legislature ends, because the law is, what the judges say it is since the power to interpret the law vests in the judges. 36. Law is made not to be broken but to be obeyed and the respect for law is not retained by demonstration of strength but by better appreciation of the reasons, better understanding of its reality and implicit obedience. It goes without saying that the achievements of law in the past are considerable, its protection in the present is imperative and its potential for the future is immense. It is very unfortunate that on account of lack of respect, lack of understanding, lack of effectiveness, lack of vision and lack of proper application in the present day affairs, law sometimes falls in crisis. 37. Where all traditional law enforcement institutions are under suspicious scrutiny, only rational application of the functions of law and a thorough understanding of its complexities and limitations can protect the integrity and survival of legal order. 38. But it is certainly true that the problem has received a new intensity and a new range as the law extends and variegates the range of its concerns and application and as the interests and modes of articulation of those ministering to the law become more and more specialised and technical. 39. Needless to stress that the life of man in a society would be a continuing disaster if not regulated. The principal means for such regulation is the law which serves as the measure of a society's balance of order and compassion and instrument of social welfare rooted in human rights, liberty and dignity. 40. Emphasising the importance and potentiality of the law, Lord Chancellor Sankey once remarked: "Amidst the cross currents and shifting sands of public life the law is like a great ark upon which a man may set his foot and be safe." 41. C.G. Weeramantry in The Law in Crisis Bridges of Understanding emphasising the importance of 'Rule of Law' in achieving social interest has stated thus: "The protections the citizens enjoy under the Rule of Law are the quintessence of twenty centuries of human struggle. It is not commonly realised how easily these may be lost. There is no known method of retaining them but eternal vigilance. There is no known authority to which this duty can be delegated but the community itself. There is no known means of stimulating this vigilance but education of the community towards an enlightened interest in its legal system, its achievements and its problems." 42. Harking back to the Acts with which we are concerned, Act 31 of 1985 and Act 28 of 1987 have been enacted by Parliament as a piece of emergency legislation for a certain length of time which period has been extended periodically by the Parliament on revision and they have been extended to the whole of India and made applicable to citizens of India even outside India, to persons in the service of the Government, wherever they may be; and to persons on ships and aircraft registered in India, wherever they may be. 43. With the above brief introduction, we shall now proceed to deal with the submissions made by the learned

counsel for the parties with reference to the main questions, firstly whether the Acts suffer from lack of legislative competence and secondly, whether the Acts or any of the provisions thereof contravene any fundamental right specified in Part III of the Constitution, as well as other cognate questions. 44. It has been seriously contended by Mr Balwant Singh Malik, Senior Counsel that Act 28 of 1987 (TADA) is ultra vires since the Central Legislature, namely, the Parliament, lacked legislative competence under Article 246 read with the topics of legislation enumerated in List I (Union List) and List III (Concurrent List) of the Seventh Schedule to the Constitution, to enact the TADA Act and that the subject-matter of the impugned Acts in fact fell within the legislative field assigned to the States under Entry of List II (State List), namely, 'Public Order' which is a most comprehensive term with widest import encompassing every activity which leads to violence or disturbs public tranquility. 45. According to him, the subject-matter of the Act (TADA) is not referable to any of the matters enumerated in List I of the Seventh Schedule and the presumptive attempt of the Union of India to rely upon Entry 1 of List III for the competency of the Parliament to enact the TADA Act cannot find favour. Entry I of List III reads: "Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offenses against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power." 46. According to him, the above entry is left with only 'offenses against laws' with respect to matters specified in subsequent entries of the Concurrent List. As the TADA Act cannot be held to be referable to any other topic in the Concurrent List, its subject-matter could not, on that basis be held to fall under Entry of that list. It has been further submitted that the contents of the heading 'Criminal law' in Entry 1 of List III are derivative in' nature and carry no meaning of their own because the criminal law comprising 'offenses against laws' are with respect to the matters in the three lists. He continued to urge that the subject-matter of the TADA Act which deals with the 'security of the State' and 'public safety' involving violence even of the highest degree tending to cause grave public disorder is plainly covered under Entry of List II and that the individual States under Entry 64 of List II alone are competent to legislate with respect to offenses against public order. 47. After drawing our attention to some of the laws enacted by various States with respect to maintenance of public order, such as- (1) Assam Disturbed Areas Act (19 of 1955); (2) The Punjab Security of State Act, 1949; (3) The Bihar Maintenance of Public Order Act, 1949; (4) The West Bengal (Prevention of Violent Activities) Act, 1970; (5) The U.P. Gangsters and Anti-social Activities (Prevention) Act (7 of 1986); (6) The J. & K. Enemy, Agents Ordinance No. VIII of San 2005; (7) The Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers and Drug Offenders Act, 198 1; (8) The Karnataka Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Goondas, Gamblers, Immoral Traffic and Slum Grabbers Act, 1985 it has been said that all those laws fall within the ambit of 'public order' appearing in Entry of List II. Mr Balwant Singh Malik, in support of his contention, cited the following decisions declaring competency

of the Provinces/States of the Federation/Union to make laws under 'public order': (1) Lakhi Naravan Das v. Province of Bihar2, (2) Romesh Thappar v. State of MadraS3, (3) Rev. Stainislaus v. State of M.P.4 and (4) Ashok Kumar Dixit v. State of U. P. 5 48. Though, according to him, the individual States are legislatively competent to provide for the maintenance of public order by creating new offenses and by taking other measures within the States, if a situation with regard to the maintenance of public order concerns more than one State or the country as a whole, then it may be necessary for the Parliament to step in under Articles 249, 250 and 252 of the Constitution (which provisions have, however, not been relied upon when enacting the TADA Act) and enact the law. However, this will not justify giving any other meaning to Entry 1 of List III, namely, 'Criminal law' and Entry in List II, namely, 'Public order' read with Entry 64 and Entry 65 of that list. 49. Elaborating some of the entries of List II, it has been urged that the legislative power of the State to enact laws under 'Public order' is contained in Entry I of List II and the power of the State to create the police investigating agency is under Entry 2 of List II and the legislative power to vest jurisdiction and confer powers on courts to try such State offenses calls under Entry 65 of List II and that a combined reading of the excluding clause of Entry I of List III and Entry 93 of List I and Entry 64 of List II completely exempts offenses relating to 'Public order' from the heading, Criminal law' under Entry I of List III. 2 AIR 1950 FC 59: 51 Cri LI 921: 1949 FCR 693 3 1950 SCR 594: AIR 1950 SC 124: 51 Cri LJ 1514 4 (1977) 1 SCC 677: 1977 SCC (Cri) 147: (1977) 2 SCR 611 5 AIR 1987 All 235: 1987 All Cri R 236: 1987 All LJ 806 (FB) 50. It has been further urged that the legislative power of the Parliament under Articles 245 and 246(1) and (2) read with List I and List III of the Seventh Schedule to the Constitution in regard to creating offenses, under Entry 93 of List I extends only to matters enumerated in that list and under Entry 1 of List III in regard to matters in subsequent entries of that list. 51. Supplementing the above arguments, Mr Ram Jethmalani, Senior Counsel advanced the other facet of the argument stating that this Act (28 of 1987) in 'pith and substance' relates to 'Public order' as reflected from its preamble itself declaring the Act to be an Act to make special provisions for the prevention of and for coping with terrorist and disruptive activities and for matters connected therewith or incidental thereto. The 'pith and substance' of the Act, according to him, is in Sections 3, 4, 5 and 6 to which the rest of the sections are merely incidental to or necessary for the implementation of the paramount purpose of the statute and that if the 'pith and substance' of the legislation is covered by a particular entry, any incidental encroachment on some other entry does not change the character of the Act. The amendments brought under Act 28 of 1987 creating special courts called Designated Courts, prescribing new procedure and inserting some provisions with regard to the admission of evidence in trials before the Designated Courts, would justify that these amendments fall within Entry 2 and Entry 12 of List III whilst the Act remains as one failing under Entry I of List II. 52. In support of his submission with regard to the doctrine of 'pith and substance', he referred to the decisions in (1) Prafulla Kumar Mukherjee v. Bank of Commerce Ltd.6, (2)

Ram Krishna Ramnath Agarwal v. Secretary, Municipal Committee7, and (3) Kerala State Electricity Board v. Indian Aluminum Co.8 The learned counsel also cited two other decisions with regard to the scope of Entry 2 (sic 1) of List II, those being, (1) Romesh Thappar3 wherein the Court after approving a passage from Stephen's Criminal Law of England has held that unlawful assemblies, riots, insurrections, rebellions etc. are all offenses against public order, the difference among them being only a difference of degree, and (2) Superintendent, Central Prison v. Dr Ram Manohar Lohia9. 53. Mr Hardev Singh in his written arguments in Writ Petition No 15432 of 1984 which have been filed by the petitioner, Mr Amrinder Singh as a public interest litigant challenging the constitutional validity of Act 61 of 1984 raised a similar contention that the Terrorist Affected Areas (Special Courts) Act, 1984 is unconstitutional for want of legislative competence. 54. Mr K.T.S. Tulsi, the learned Additional Solicitor General in hi: attempt to expose the fallacy of the above submissions stated that the highly 6 AIR 1947 PC 60: 74 IA 23: 51 CWN 599 7 1950 SCR 15: AIR 1950 SC 11 8 (1976) 1 SCC 466: (1976) 1 SCR 552 3 1950 SCR 594: AIR 1950 SC 124: 51 Cri LJ 1514 9 (1960) 2 SCR 821: AIR 1960 SC 633: 1960 Cri LJ 1002 classified and strictly confidential information collected by and received from the Intelligence Organisation, which information is not to be disclosed in public interest, unmistakably unfolds that the secessionists' forces working to destabilize the sovereignty of India and its integrity are being encouraged by the neighboring countries and that there are many training camps on the borders of India where training is imparted to militants and terrorists not only in the use of sophisticated and heavy weapons including rocket launchers, machine guns, mines, explosives and wireless, communications but also to indulge in illicit trafficking of narcotic drugs, and psychotropic substances which unassailable facts are a matter of common knowledge and which can be taken into consideration by way of judicial notice. Many countries across the borders, according to him, are supplying deadly arms and ammunitions and are providing sanctuary to the extremist elements as a base for their training and doctrination. 55. In view of the above outrageous and volcanic circumstances and situations, in pith and substance, the Act is not related to 'Public order' falling under Entry 1 of List II but relates to the 'Defence of India' falling under Entry 1, as well as Entries 2 and 2-A of List I read with Entries 1 and 2 of List III. 56. According to Mr Tulsi, the submissions of the other side that the subject of the impugned Act falls under Entry 1 of List II, namely, 'Public order' is incorrect and fallacious. 57. We shall now carefully examine the submissions made by the respective parties in the light of the import and intendment of the Acts under challenge and find out as to whether this Act (TADA) falls under Entry 1 of List II, namely, 'Public order' or under Entry 1 of List I, namely, 'Defence of India' as well as Entries 2 and 2-A of List I read with Entries I (Criminal law) and 2 (Criminal procedure) of List III. But before we do so, we would briefly take note of the constitutional scheme relating to distribution of legislative powers between the Union and the States. 58. Under clause (1) of Article 246, notwithstanding anything in clauses (2) and (3) of the said article, Parliament has exclusive power to make laws with respect to any of the 97 subjects enumerated in List I of the

Seventh Schedule. Under clause (3) of the said article, the State Legislatures have exclusive powers to make laws with respect to 66 items enumerated in List II. The powers in respect of the 47 items enumerated in List III are concurrent i.e. both Parliament and the Legislature of any State, subject to clause (1) have power to make laws. With regard to a law made in respect of matters enumerated in the Concurrent List provision has been made in Article 254 which gives overriding effect to a law made by Parliament in the event of there being any repugnancy between the said law and the law made by the Legislature of a State and the State law would prevail over a law made by Parliament only if such State law was enacted after the law made by Parliament and has received the assent of the President. While examining the question of legislative competence of Parliament to make a law, the proper approach is to determine whether the subject-matter of the legislation falls in the State List which Parliament cannot enter. 59. If the law does not fall in the State List, Parliament would have the legislative competence to pass the law by virtue of the residuary powers under Article 248 read with Entry 97 of the Union List and it would not be necessary to go into the question whether it falls under any entry in the Union List or Concurrent List [See (i) Union of India v. H.S. Dhillon10 (SCC at pp. 799, 803; SCR at pp. 61 and 67- 68), (ii) S.P. Mittal v. Union of India' 1 (SCC at p. 82, paras 70 and 72; SCR at pp. 769-770), and (iii) Khandelwal Metal and Engg. Works v. Union of India12 SCC at p. 641, para 42]. It is, therefore, necessary to examine whether the Act falls within the ambit of Entry 1 read with Entry 64 of the State List as contended by the learned counsel for the petitioners. But before we do so we may briefly indicate the principles that are applied for construing the entries in the legislative lists. It has been laid. down that the entries must not be construed in a narrow and pedantic sense and that widest amplitude must be given to the language of these entries. Sometimes the entries in different lists or the same list may be found to overlap or to be in direct conflict with each other. In that event it is the duty of the court to find out its true intent and purpose and to examine the particular legislation in its 'pith and substance' to determine whether it fits in one or other of the lists. [See : Synthetics and Chemicals Ltd. v. State of U.p.13 (SCC at pp. 150-51, para 67; SCR at p. 673); India Cement Ltd. v. State of T.N. 14 (SCC at p. 22, para 18; SCR at p. 705)]. 60. This doctrine of 'pith and substance' is applied when the legislative competence of a legislature with regard to a particular enactment is challenged with reference to the entries in the various lists i.e. a law dealing with the subject in one list is also touching on a subject in another list. In such a case, what has to be ascertained is the pith and substance of the enactment. On a scrutiny of the Act in question, if found, that the legislation is in substance one on a matter assigned to the legislature enacting that statute, then that Act as a whole must be held to be valid notwithstanding any incidental trenching upon matters beyond its competence i.e. on a matter included in the list belonging to the other legislature. To say differently, incidental encroachment is not altogether forbidden. 61. Lord Porter speaking for the Judicial Committee of the Privy Council in Prafulla Kumar Mukherjee v. Bank of Commerce Ltd., Khulna6 quoted with approval the observations of Sir Maurice Gwyer, C.J. in

10 (1971) 2 SCC 779: (1972) 2 SCR 33 11 (1983) 1 SCC 51 : (1983) 1 SCR 729 12 (1985) 3 SCC 620: 1985 SCC (Tax) 466: 1985 Supp 1 SCR 750,775 13 (1990) 1 SCC 109: 1989 Supp 1 SCR 623 14 (1990) 1 SCC 12: 1989 Supp 1 SCR 692 6 AIR 1947 PC 60: 74 IA 23: 51 CWN 599 Subrahmanyan Chettiar v. Muttuswami Goundan15 to the effect: (IA at p. 43) "It must inevitably happen from time to time that legislation though purporting to deal with a subject in one list, touches also upon a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee, whereby the impugned statute is examined to ascertain its pith and substance or its true nature and character for the purpose of determining whether it is legislation with respect to matters in this list or in that." Thereafter, their Lordship of the Privy Council held: (IA at p. 43) "Subjects must still overlap and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found. If these questions could not be asked, much beneficent legislation would be stifled at birth, and many of the subjects entrusted to Provincial Legislation could never effectively be dealt with. Thirdly, the extent of the invasion by the Provinces into subjects enumerated in the Federal List has to be considered. No doubt it is an important matter, not, as their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith an d substance of the impugned Act. Its provisions may advance so far into federal territory as to show that its true nature is not concerned with provincial matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money-lending but promissory notes or banking? Once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content." See also (1) The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act No. XIV of 1938, In re16, (2) Governor-General in Council v. Province of Madrasl7, (3) Union of India v. H.S. Dhillon10, and (4) State of J&K v. M.S. Farooqi18 wherein the dictum laid down in Subrahmanyan Chettiar15 has been referred to. 62. Reference may now be made to the relevant entries, namely Entries 1 and 64 of State List which are as under: 15 1940 FCR 188: AIR 1941 FC 47 16 AIR 1939 FC 1 :(1939) 1 MLJ Supp 1 17 AIR 1945 PC 98: 72 IA 91: 1945 FCR 179 10 (1971) 2 SCC 779: (1972) 2 SCR 33 18 (1972) 1 SCC 872: (1972) 3 SCR 881 " 1. Public order (but not including the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power). 64. Offenses against laws with respect to any of the matters in this List." 63. Under the Government of India Act, 1935, the Provincial Legislature had been conferred the power to enact laws in respect of matters enumerated in the Provincial List and Item I of the Provincial List

covered the field of " public order (but not including the use of His Majesty's naval, military or air forces in aid of the civil power)". 64. In Lakhi Narayan Das v. Province of Bihar2 the expression"public order" has been described as a 'most comprehensive term' and it has been held that "maintenance of public order within a province is primarily the concern of that province". It has also been further observed that if the legislature has not exceeded its powers, it is not for the courts to criticise the wisdom or policy of the legislature. In Romesh Thappar v. State of Madras3 while holding that "public order" is an expression of wide connotation and signifies that state of tranquility which prevails among the members of a political society as a result of the internal regulations enforced by the Government which they have established, the Court has drawn a distinction between "public order" and security of a State. After referring to Entry 3 of the Concurrent List, the Court has observed: "The Constitution thus requires a line to be drawn in the field of public order or tranquility marking off, may be, roughly, the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance, treating for this purpose differences in degree as if they were differences in kind." 65. In Ram Manohar Lohia (Dr) v. State of Bihar' 9, Hidayatullah, J. (as the leaned Chief Justice then was) has brought out the distinction between "law and order", "public order" and "security of the State" in the following observation: "It will thus appear that just as 'public order' in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting"security of State","law and order" also comprehends disorders of less gravity than those affecting "public order". One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State." 2 AIR 1950 FC 59: 51 Cri LJ 921: 1949 FCR 693 3 1950 SCR 594: AIR 1950 SC 124: 51 Cri LJ 1514 19 (1966) 1 SCR 709: AIR 1966 SC 740: 1966 Cri LJ 608 66. Having regard to the limitation placed by Article 245(1) on the legislative power of the Legislature of the State in the matter of enactment of laws having application within the territorial limits of the State only, the ambit of the field of legislation with respect to "public order" under Entry 1 in the State List has to be confined to disorders of lesser gravity having an impact within the boundaries of the State. Activities of a more serious nature which threaten the security and integrity of the country as a whole would not be within the legislative field assigned to the States under Entry 1 of the State List but would fall 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. The petitioners can succeed in their challenge to the validity of the Act with regard to the legislative competence of Parliament, only if it can be said that the Act deals with activities relating to public order which are confined to the territories of a particular State. 67. In order to ascertain the pith and substance of the impugned enactments, the preamble,

Statement of Objects and Reasons, the legal significance and the intendment of the provisions of these Acts, their scope and the nexus with the object that these Acts seek to subserve must be objectively examined in the background of the totality of the series of events due to the unleashing of terrorism, waves after waves, leading to the series of bomb blasts causing extensive damage to the properties, killing of hundreds of people, the blood-curdling incidents during which the blood of the sons of the soil had been spilled over the soil of their motherland itself, the ruthless massacre of the defenseless and innocent people especially of poor as if they were all 'marked for death' or for 'human sacrifice' and the sudden outbreak of violence, mass killing of army personnel, jawans of Border Security Force, government officials, politicians, statesmen, heads of religious sects by using bombs and sophisticated lethal weapons thereby injecting a sense of insecurity in the minds of the people, with the intention of destabilizing the sovereignty or overthrowing the Government as established by law. The way in which the alleged violent crimes is shown to have been perpetrated, the manner in which they have been cruelly executed, the vulnerable territorial frontiers which form part of the scene of unprecedented and unprovoked occurrences, lead to an inescapable illation and conclusion that the activities of the terrorists and disruptionists pose a serious challenge to the very existence of sovereignty as well as to the security of India notwithstanding the fact whether such threats or challenges come by way of external aggression or internal disturbance. 68. The terrorism, the Act (TADA) contemplates, cannot be classified as mere disturbance of 'public order' disturbing the "even tempo of the life of community of any specified locality" in the words of Hidayatullah, C.J. in Arun Ghosh v. State of W.B.20 but it is much more, rather a grave emergent situation created either by external forces particularly at the 20 (1970) 1 SCC 98: 1970 SCC (Cri) 67: (1970) 3 SCR 288 frontiers of this country or by anti-nationals throwing a challenge to the very existence and sovereignty of the country in its democratic polity. 69. The above view gets strengthened from the very definition of the expression 'terrorist act' as defined in Section 2(1)(h) of the Act 28 of 1987 stating that the said expression "has the meaning assigned to it in sub-section (1) of Section 3" according to which the intention to commit any offence or offenses specified therein should be for one or more clearly defined objectives as expressly mentioned in Section 3(1) reading: "3. (1) 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 harmon y amongst different sections of the people does any act or thing..... 70. Similarly, the expression 'disruptive activity' as defined under Section 2(1)(d) has the meaning assigned to it in Section 4. Section 4(1) prescribes only the quantum of punishment for disruptive activities. Section 4(2) gives the meaning of that expression thus:"4. (2) For the purposes of sub-section (1), 'disruptive activity' means any action taken, whether by act or by speech or through any other media or in any other manner whatsoever,- (i) which questions, disrupts or is intended to disrupt, whether directly or indirectly, the sovereignty and territorial integrity of India; or (ii) which is intended to bring about or supports any claim, whether directly or indirectly, for the

cession of any part of India or the secession of any part of India from the Union. Explanation.- For this purposes of this sub- section,- (a) 'cession' includes the admission of any claim of any foreign country to any part of India, and (b) 'secession' includes the assertion of any claim to determine whether a part of India will remain within the Union." 71. The above definitions, would themselves make it clear that the expression "Terrorist and Disruptive Activities" deployed in the preamble of the Act (28 of 1987 TADA) contemplates the commission of any specified offence or offenses with a specific intention one of which being "to overawe the Government as by law established" [vide Section 3(1)] and "any action taken, whether by act or by speech or through any other media or in any other manner whatsoever, which questions, disrupts or is intended to disrupt, whether directly or indirectly, the sovereignty and territorial integrity of India; or which is intended to bring about or supports any claim, whether directly or indirectly, for the cession of any part of India or the secession of any part of India from the Union". [Vide Section 4(2).] 72. Therefore, the submission made by Mr Jethmalani that the preamble of the Act gives a clue that the terrorist and disruptive activities only mean a virulent form of the disruption of public order is inconceivable and unacceptable. 73. In our view, the impugned legislation does not fall under Entry 1 of List II, namely, 'Public order'. No other Entry of List II has been invoked. The impugned Act, therefore, falls within the legislative competence of Parliament in view of Article 248 read with Entry 97 of List I and it is not necessary to consider whether it falls under any of the entries in List I or List III. We are, however, of the opinion that the impugned Act could fall within the ambit of Entry 1 of List I, namely, 'Defence of India'. 74. Mr Hardev Singh in his written arguments also challenged the vires of Act 61 of 1984 on many grounds (about which we shall deal separately while examining the various provisions of TADA Act, one of which being the legislative competence). The learned counsel has questioned the.legal competence of the impugned Act on the same line of arguments as advanced by Mr Balwant Singh Malik. In support of his contention, he cited Ram Manohar Lohia (Dr) v. State of Biharl9 wherein this Court while dealing with Rule 30(1)(b) of the Defence of India Rules, 1962 had explained the difference between 'public order', 'law and order' and 'security of India'. 75. In Act 61 of 1984, the expression 'terrorist affected area' is defined in Section 2(1)(i) as meaning an area declared as a terrorist affected area under Section 3. Section 3(1) reads thus: "3. (1) If the Central Government is of the opinion that offenses of the nature specified in the Schedule are being committed in any area by terrorists on such a scale and in such a manner that it is expedient for the purpose of coping with the activities of such terrorists to have recourse to the provisions of this Act, it may, by notification,- (a)declare such area to be a terrorist affected area; and (b)..... 76. The word 'terrorist' is defined in Section 2(1)(h) as follows:"2. (1)(h) 'terrorist' means a person who indulges in wanton killing of persons or in violence or in the disruption of services or means of communications essential to the community or in damaging property with a view to- (i) putting the public or any section of the public in fear; or (ii) affecting adversely the harmony between different religious, racial, language or regional groups or castes or communities;

or (iii) coercing or overawing the Government established by law; or (iv) endangering the sovereignty and integrity of India." 77. The above definition also requires more or less the intention as required under Section 3(1) of TADA Act, namely, Act 28 of 1987, and also the motive for commission of the terrorist acts is akin to that of Section 4 of 19 (1966) 1 SCR 709: AIR 1966 SC 740: 1966 Cri LJ 608 the TADA Act of 1987, i.e., one of the motives being to endanger the sovereignty and integrity of India. In short, the definition of the expressions 'terrorist act' and 'disruptive activity' under Section 2(1)(h) and (d) of Act 28 of 1987 (TADA) respectively are conjointly brought under the definition of the word 'terrorist act' in Act 61 of 1984. Therefore, the Act of 1984 also cannot be said to have contemplated only 'Public order' but envisages a more grave situation threatening the sovereignty and integrity of India. 78. For all the reasons stated above, we hold that the contention that the Acts 61 of 1984, 31 of 1985 and 28 of 1987 are ultra vires on the ground of suffering from lack of legislative competence and as such the entire Acts are liable to be struck down, is to be rejected and accordingly that contention is rejected as devoid of any merit. 79. The next spinal issue arises for our deepest probe, and scrutiny is whether the impugned Acts in general or any of the provisions thereof in particular contravene any other fundamental right specified in Part III of the Constitution. All the learned counsel who have challenged the vires of these Acts and the provisions thereof have advanced their legal arguments both topic-wise as well as with reference to the individual provisions of the Acts. 80. To begin with their polemics, it was with reference to the proposition of speedy trial which is the main objective of these Acts under challenge. It was the submission of the learned counsel that though the professed object of Act 61 of 1984 (Special Courts Act) and of TADA Acts (Acts 31 of 1985 and 28 of 1987) is for speedy trial of the scheduled offenses committed within the Terrorist Affected Areas (Special Courts) Act, 1984 and of the offenses falling within the definition of "terrorist act" and "disruptive activity" under the TADA Acts, in reality these Acts make not only a drastic departure from the prevalent procedure in respect of the trial of similar offenses in regular courts, but also serious inroads in the substantive rights in many respects causing irreparable erosion of the independence of judiciary and totally undermining both the constitutional precepts and lex scripta (statute law). According to them the procedural provisions of those Acts under the guise of speedy trial violate the venerated basic principles of fair trial, held dear all along, namely, that every person will be presumed innocent till his guilt is proved beyond reasonable doubt, "according to the procedure established by law". 81. The procedure prescribed under these Acts does not meet the requirements implicit in Article 21 of the Constitution because the said procedure is the antithesis of a just, fair and reasonable procedure. Under the guise of providing speedy trial not only the procedural safeguards have been completely denied to the accused who are subjected to trial by Special Courts under 1984 Act or by the Designated Courts under the TADA Acts, but also the Acts have been substantially altered to the prejudice of the accused. Therefore, the procedure prescribed by the Acts which falls foul of Article 21 should be held to be arbitrary, unfair, oppressive or unreasonable. In support

of the above argument, they drew our attention to Maneka Gandhi v.Union of India21 wherein it has been held that any law which deprives a person of his life and liberty must be just and reasonable. To borrow the words of Krishna Iyer, J. in that case (SCC p. 338, para 85) " 'procedure' in Article 21 means fair, not formal procedure. 'Law' is reasonable law, not any enacted piece." 82. The preamble of Terrorist Affected Areas (Special Courts) Act, 1984 (61 of 1984) reads that it is "An Act to provide for the speedy trial of certain offenses in terrorist affected areas and for matters connected therewith". The object of the preamble is manifested in Sections 3(1) and 4(1) of that Act reading "For the purpose of providing for speedy trial of scheduled offenses committed in a judicial zone, the Central Government may establish, by notification, a Special Court..... Though there is no explicit manifestation of such expression, 'speedy trial' found either in the preamble or in any of the provisions of the TADA Acts as in the Terrorist Affected Areas (Special Courts) Act, 1984, the scope and intendment of the various provisions of these TADA Acts perceivably convey that the TADA Acts also contemplate speedy trial of cases. In fact, the 'Statement of Objects and Reasons' of Act 31 of 1985 reading,"This is a new and overt phase of terrorism which requires to be taken serious note of and dealt with effectively and expeditiously" makes it clear that the constitution of Designated Courts was for the speedy and expeditious trial of offenses under the impugned legislation. 83. Now let us examine the principle of speedy trial underlying in Act 28 of 1987 (TADA). The constitution of one or more Designated Courts either by the Central Government or the State Government by notification in the Official Gazette for notified area/areas to try specified cases or class or group of cases (vide Section 9 of Act 28 of 1987); the procedure prescribed for disposal of cases by making every offence punishable under the Act or any rule made thereunder to be a cognizable offence within the meaning of clause (c) of Section 2 of the Code of Criminal Procedure (vide Section 20); the dispensation of the committal proceedings [vide Section 14(1)1; the vesting of jurisdiction on the Designated Courts to try all offenses under the Act by giving precedence over the trial of any other case against the accused in any other court (not being a Designated Court) notwithstanding anything contained in the Code or any other law (vide Section 17); the conferment of power on Designated Courts to try the offenses triable by them punishable with imprisonment for a term not exceeding 3 years or with fine or with both in a summary way in accordance with the procedure prescribed in the Code notwithstanding anything contained in sub-section (1) of Section 260 or 262 of the Code and also as far as may be by applying the provisions of Sections 263 to 265 [vide Section 14(2)] and the vesting powers of a Court of Session on the Designated Courts for the purpose of trial of any offence [vide Section 14(3)] and the empowerment of authority on the Designated Courts to proceed with the trial even in the absence of accused or pleader for the 21 (1978) 1 SCC 248: (1978) 2 SCR 621 reasons to be recorded by it, but subject to the right of accused to recall witnesses for cross-examination [vide Section 14(5)]; the right of appeal straight to the Supreme Court as a matter of right against any judgment, sentence or order not being an interlocutory order [vide Section 19(1)] etc. all postulate the concept of speedy

trial in spirit under TADA Acts. Speedy Trial 84. The right to a speedy trial is a derivation from a provision of Magna Carta. This principle has also been incorporated into the Virginia Declaration of Rights of 1776 and from there into the Sixth Amendment of the Constitution of United States of America which reads, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial..... It may be pointed out, in this connection, that there is a Federal Act of 1974 called 'Speedy Trial Act' establishing a set of time-limits for carrying out the major events, e.g., information, indictment, arraignment, in the prosecution of criminal cases. See Black's Law Dictionary, 6th Edn. p. 1400. 85. The right to a speedy trial is not only an important safeguard to prevent undue and oppressive incarceration, to minimise anxiety and concern accompanying the accusation and to limit the possibility of impairing the ability of an accused to defend himself but also there is a societal interest in providing a speedy trial. This right has been actuated in the recent past and the courts have laid down a series of decisions opening up new vistas of fundamental rights. In fact, lot of cases are coming before the courts for quashing of proceedings on the ground of inordinate and undue delay stating that the invocation of this right even need not await formal indictment or charge. 86. The concept of speedy trial is read into Article 21 as an essential part of the fundamental right to life and liberty guaranteed and preserved under our Constitution. The right to speedy trial begins with the actual restraint imposed by arrest and consequent incarceration and continues at all stages, namely, the stage of investigation, inquiry, trial, appeal and revision so that any possible prejudice that may result from impermissible and avoidable delay from the time of the commission of the offence till it consummates into a finality, can be averted. In this context, it may be noted that the constitutional guarantee of speedy trial is properly reflected in Section 309 of the Code of Criminal Procedure. 87. This Court in Hussainara Khatoon (1) v. Home Secretary, State of Bihar22 while dealing with Article 21 of the Constitution of India has observed thus: (SCC p. 89, para 5)"No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 2 1. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of th e fundamental right to life and liberty enshrined in Article 21. The question which would, however, arise is as to what would be the 22 (1980) 1 SCC 81: 1980 SCC (Cri) 23: (1979) 3 SCR 169(1) consequence if a person accused of an offence is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long delayed trial in violation of his fundamental right under Article 21. Would he be entitled to be released unconditionally freed from the charge leveled against him on the ground that trying him after an unduly long period of time and convicting him after such trial would constitute violation of his fundamental right under Article 21." See also (1) Sunil Batra v. Delhi Administration (1)23, (2) Hussainara Khatoon (1) v. Home Secretary, State of Bihar22, (3) Hussainara Khatoon (IV) v. Home Secretary, State of Bihar, Patna24, (4) Hussainara Khatoon (VI) v. Home Secretary, State of Bihar, Govt. of Bihar, Patna25, (5) Kadra Pahadia v. State of Bihar (II)26, (6) T. V. Vatheeswaran v. State of T.N.27, and (7)

Abdul Rehman Antulay v. R. S. Nayak28. 88. Thus this Court by a line of judicial pronouncements has emphasised and re-emphasised that speedy trial is one of the facets of the fundamental right to life and liberty enshrined in Article 21 and the law must ensure reasonable, just and fair' procedure which has a creative connotation after the decision of this Court in Maneka Gandhi21. 89. It is appropriate to refer to two of the decisions of the Supreme Court of United States of America dealing with the scope of speedy trial which is a guaranteed fundamental right incorporated by the Sixth Amendment of the Constitution of United States. 90. In Beavers v. Haubert29 the Supreme Court of USA has observed thus: (US p. 87: L Ed p. 954) "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." 91. Recognising the right of an accused to approach the court for dismissal of a criminal proceeding on the ground of speedy trial, the US Supreme Court held in Strunk v. United States3O that the denial of an accused's right to speedy trial results in a decision to dismiss the indictment or in reversion of a conviction. See also United States v. MacDonald". 92. Of course, no length of time is per se too long to pass scrutiny under this principle nor the accused is called upon the show the actual prejudice by delay of disposal of cases. On the other hand, the court has to adopt a 23 (1978) 4 SCC 494: 1979 SCC (Cri) 155: (1979) 1 SCR 392 22 (1980) 1 SCC 81: 1980 SCC (Cri) 23: (1979) 3 SCR 169(1) 24 (1980) 1 SCC 98: 1980 SCC (Cri) 40: (1979) 3 SCR 532 (IV) 25 (1980) 1 SCC 115: 1980 SCC (Cri) 57: (1979) 3 SCR 1276 (VI) 26 (1983) 2 SCC 104: 1983 SCC (Cri) 361 27 (1983) 2 SCC 68: 1983 SCC (Cri) 342: (1983) 2 SCR 348 28 (1992) 1 SCC 225: 1992 SCC (Cri) 93 21 (1978) 1 SCC 248: (1978) 2 SCR 621 29 198 US 77, 87: 49 L Ed 950, 954 (1905) 30 412 US 434: 37 L Ed 2d 57 (1973) 31 435 US 850: 56 L Ed 2d 18 (1977) balancing approach by taking note of the possible prejudices and disadvantages to be suffered by the accused by avoidable delay and to determine whether the accused in a criminal proceeding has been deprived of his right of having speedy trial with unreasonable delay which could be identified by the factors (1) length of delay, (2) the justification for the delay, (3) the accused's assertion of his right to speedy trial, and (4) prejudice caused to the accused by such delay. However, the fact of delay is dependent on the circumstances of each case because reasons for delay will vary, such as delay in investigation on account of the widespread ramification of crimes and its designed network either nationally or internationally, the deliberate absence of witness or witnesses, crowded dockets on the file of the court etc. 93. When the issue under debate is examined in the light of the above briefly enunciated principle of speedy trial, the said principle, expressly contemplated in the Terrorist Affected Areas (Special Courts) Act, 1984 (61 of 1984) and manifested in the two TADA Acts under various provisions as pointed out supra, is evidently incorporated as the essential feature of those Acts. There can be no controversy or difference of opinion in invoking the speedy trial of cases under the impugned Acts but the question is whether the procedure prescribed violates any of the fundamental rights of the Constitution. 94. Yet another argument qua the just and fair trial read into Article 21 has been submitted firstly contending when

there is no proclamation of emergency in operation and when all the fundamental rights conferred by Part III of the Constitution are available for enforcement, the right to have a fair trial cannot be whittled down or militated against; and secondly even when a proclamation of emergency is in operation, the President under Article 359(1) of the Constitution of India can by order declare that the right to move any court for the enforcement of the fundamental rights conferred by Part III and all the proceedings in any court for the enforcement of such rights, shall remain suspended during the period of emergency but, not the rights conferred by Articles 20 and 21. To put in nutshell, the enforcement of the fundamental rights conferred under Articles 20 and 21 of the Constitution can be exercised and enforced even during emergency. To better understand, the legislative history with regard to the exemption of Articles 20 and 21 from operation even during emergency may be briefly recapitulated. 95. Prior to the enactment of the Constitution (Forty- fourth Amendment) Act, 1978 which came into force, w.e.f. June 20,, 1979, all the rights conferred by Part III including the rights under Articles 20 and 21 could be suspended during emergency. But the exemption was given by the above Amendment Act for the reasons spelt out in the 'Statement of Object and Reasons' of the Forty-fourth Amendment, which read thus:"Statement of Objects and Reasons.- Recent experience has shown that the fundamental rights, including those of life and liberty, granted to citizens by the Constitution are capable of being taken away by a transient majority. It is, therefore, necessary to provide adequate safeguards against the recurrence of such a contingency in the future and to ensure to the people themselves an effective voice in determining the form of government under which they are to live. This is one of the primary objects of this Bill. As a further check against the misuse of the Emergency provisions and to put the right to life and liberty on a secure footing, it would be provided that the power to suspend the right to move the court for the enforcement of a fundamental right cannot be exercised in respect of the fundamental right to life and liberty." To achieve the above objects, the Parliament by Forty-fourth Amendment Act, 1978 substituted the words "the rights conferred by Part III (except Articles 20 and 21)" in clause (1) and (1-A) of Article 359 for the words "the rights conferred by Part III". 96. Undeniably, when the three Acts under challenge were enacted, there was no emergency. Therefore, all the fundamental rights under Part III since the enactment of the Act of 1984 continued to be enforceable rights. But it is not the contention of the parties that the Acts impugned or any Act similar to them should not be enacted in the absence of proclamation of emergency. Needless to emphasise that it is for Parliament to enact any law without infringing any of the provisions of the Constitution and within its legislative competence depending upon the need for such enactment. 97. Now we shall examine the key questions (1) whether the procedure prescribed under the Acts of 1984 and 1987 is the antithesis of the just, fair and reasonable procedure; (2) whether the procedural safeguards to which the accused is entitled to, have been completely denied to the prejudice and disadvantage of the accused; (3) whether the Acts are tyrannical and despotical in character and discriminatory in application; and (4) whether the provisions of these Acts are violative of the fundamental rights

embodied under Articles 14, 19 and 2 1. 98. We shall now give a close scrutiny to all those above complicated questions of unrivaled complexity debated before us which caused considerable anxiety to the Court for reaching a satisfactory conclusion, under different topics with reference to the various provisions of the Acts by carefully scanning through the legal submissions eloquently articulated by both sides, and decide as to whether the provisions under challenge have to read them down or to read anything into them. Definition of the word "Abet" 99. It has been seriously contended that the definition of the word 'abet' in Section 2(1)(a) of 1987 Act is without any clarity and is an instance of the first kind of unfairness and also blissfully vague creating a state of tyranny and this imprecise definition helps even innocent persons who are totally free from any moral blameworthiness, to be arrested, detained and prosecuted. It is further stated that the word 'abet' is adequately defined in Section 107 of the Indian Penal Code to meet every legitimate need and purpose of criminal law, and that the definition of the word as given in the Act which smacks of arbitrariness is an instance of the first kind of unfairness within the dictum laid down in Maneka Gandhi21 and deserves to be struck down as being violative of Articles 14 and 21 of the Constitution. 100. The learned Additional Solicitor General countering the above arguments stated that the expanded definition of 'abet' is to fulfill the objects of the Act during the period when the terrorists activities on escalated scale continue unabated in any notified area and in such disturbed times it is difficult for the prosecution to prove 'mens rea' or 'intention' while proving the physical facts. In continuation he stated that the submission that the definition is vague, is unfounded as the said definition is merely inclusive and illustrative and the very nature of things could not have been exhaustive. He listed a number of various provisions of a number of enactments wherein the proof of the element of mens rea is excluded, namely, (1) Sections 7 and 16 of the Prevention of Food Adulteration Act of 1954; (2) Sections 8(1) and 23(1)(a) of the Foreign Exchange Regulation Act; (3) Section 178-A of the Sea Customs Act, 1878; (4) Section 123(7) of the Representation of the People Act. He also placed reliance on a number of decisions in support of the above submission, namely, (1) Sarjoo Prasad v. State of U.P.32 (SCR at p. 327), (2) Pukhraj v. D.R. Kohli33 (SCR at p. 872), (3) Nathulal v. State of M.P.34, (4) Y.S. Parmar (Dr) v. Hira Singh Paul35, (5) State of Maharashtra v. Mayer Hans George36, (6) Jagdish Prasad v. State of W.B.37, and (7) Collector of Customs v. Chetty Nathela Sampathu38. 101. The definition of the word 'abet' as defined under Section 2(1)(a) of 1987 Act is as follows: "2. (1) In this Act, unless the context otherwise requires,- (a) 'abet' with its grammatical variations and cognate expressions, includes- (i) the communication or association with any person or class of persons who is engaged in assisting in any manner terrorists or disruptionists; (ii) the passing on, or publication of, without any lawful authority, any information likely to assist the terrorists or disruptionists and the passing on, or publication of, or distribution of, any document or matter obtained from terrorists or disruptionists; 21 (1978) 1 SCC 248: (1978) 2 SCR 621 32 (1961) 3 SCR 324: AIR 1961 SC 631: (196 1) 1 Cri LJ 747 33 1962 Supp 3 SCR 866: AIR 1962 SC 1559 34 AIR 1966 SC 43: 1966 Cri LJ 71 35 1959 Supp 1 SCR 213: AIR

1959 SC 244: 16 ELR 483 36 (1965) 1 SCR 123: AIR 1965 SC 722: (1965) 1 Cri LJ 641 37 (1972) 1 SCC 326: 1972 SCC (Cri) 63: (1972) 2 SCR 845 38 (1962) 3 SCR 786: AIR 1962 SC 316: (1962) 1 Cri LJ 364 (iii)the rendering of any assistance, whether financial or otherwise,to terrorists or disruptionists." The above definitions an inclusive definition. The meaning of the word 'abet' which is a verb is that whoever is in communication or association with any person or class of persons engaged in assisting in any manner terrorists or disruptionists or passes on, or publishes without any lawful authority, any information likely to assist the terrorists or disruptionists or passes on or publishes or distributes any document or matter obtained from the terrorists or disruptionists and/or renders any assistance whether financial or otherwise to the terrorists and disruptionists. 102. In common parlance, the word 'abet' means assistance, cooperation and encouragement and includes wrongful purpose. 103. In Corpus Juris Secundum, Vol. I at page 306, the meaning of the word 'abet' is given as follows: "To abet has been defined as meaning to aid; to assist or to give aid; to command, to procure, or to counsel; to countenance; to encourage, counsel, induce, or assist; to encourage or to set another on to commit. Used with 'aid'. The word 'abet' is generally used with the word 'aid' and similar words." 104. Section 107 of Indian Penal Code defines the word, 'abetment' (which is a noun) as follows: "107. Abetment of a thing.- A person abets the doing of a thing, who- First.- Instigates any person to do that thing; or Secondly.- Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes places in pursuance of that conspiracy, and in order to the doing of that thing; or Thirdly.- Intentionally aids, by any act or illegal omission, the doing of that thing. 105. Section 108 of the Indian Penal Code defines the word, 'abettor' thus:" 108. Abettor.- A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor." The offence of 'abetment' is committed by a person either (1) by instigating a person to commit an offence; or (2) by engaging in a conspiracy to commit it; or (3) by intentionally aiding a person to commit it. 106. In order to bring a person abetting the doing of a thing, under any one of the clauses enumerated under Section 107, it is not only necessary to prove that the person who has abetted has taken part in the steps of the transactions but also in some way or other he has been connected with those steps of the transactions which are criminal. The offence of abetment depends upon the intention of the person who abets, and not upon the act which is actually done by the person whom he abets. 107. Section 3(1) of the General Clauses Act, 1897 gives the meaning of the word 'abet' thus: "3. (1) 'abet' with its grammatical variations and cognate expressions, shall have the same meaning as in the Indian Penal Code (45 of 1860);" 108. The lexicon meaning of the word 'abet' is given in Collins English Dictionary as "to assist or encourage, esp. in crime or wrong doing". 109. The learned counsel who critically attacked the definition of the word 'abet' stated that under the definition 2(1)(a) even a person who is entirely innocent of any terrorist or disruptive activities may be punished and subjected

to the prescribed minimum sentence of five years, and, therefore, in order to remedy the patent deficiency or defect in this definition, the principle of 'mens rea' should be injected and read into it. 110. The learned counsel in support of the above argument drew our attention to a decision of this Court in Inder Sain v. State of Punjab39 wherein this Court while disposing a criminal appeal in which the accused stood convicted under Section 9(a) of the Opium Act, 1878 on the allegations that the appellant was found in possession of a parcel which was on opening found to contain opium, held: (SCC p. 378, para 20) "Knowledge is an essential ingredient of the offence as the word possess' connotes, in the context of Section 9, possession with knowledge. The legislature could not have intended to make mere physical custody without knowledge an offence. A conviction under Section 9(a) would involve some stigma and it is only proper then to presume that the legislature intended that possession must be conscious possession." 111. On the strength of the dictum, laid down in the above decision, they submitted that 'mens rea' is an essential element in every offence and in the absence of proof 'mens rea' none can be mulcted with any criminality especially in cases where deterrent sentence is called for. 112. In support of their submission that the definition is very vague, our attention was drawn to a passage from the judgment of Chandrachud, C.J. in A.K. Roy v. Union of India4O which reads as follows : (SCR at p. 293: SCC p. 294, para 19) "The word 'established' is used in Article 21 in order to denote and ensure that the procedure prescribed by law must be defined with certainty in order that those who are deprived of their fundamental right to life or liberty must know the precise extent of such deprivation." (emphasis supplied) 39 (1973) 2 SCC 372: 1973 SCC (Cri) 813 40 (1992) 1 SCC 271: 1982 SCC (Cri) 152: (1982) 2 SCR 272 113. Though normally the plain ordinary grammatical meaning of an enactment affords the best guide and the object of interpreting a statute is to ascertain the intention of the legislature enacting it, other methods of extracting the meaning can be resorted to if the language is contradictory, ambiguous or leads really to absurd results so as to keep at the real sense and meaning. See (1) Salmond : Jurisprudence, 11th Edn. p. 152, (2) South Asia Industries (P) Ltd. v. S. Sarup Singh 41 (AIR at p. 348), and (3) S. Narayanaswami v. G. Panneerselvam42 (SCC at p. 720: AIR at p. 2285). 114. In a recent decision in Directorate of Enforcement v. Deepak Mahajan43 a Bench of this Court to which one of us (S. Ratnavel Pandian, J.) was a party has held that : (SCC p. 455, para 31 : JT p. 302) "It is permissible for courts to have functional approaches and look into the legislative intention and sometimes it may be even necessary to go behind the words and enactment and take other factors into consideration to give effect to the legislative intention and to the purpose and spirit of the enactment so that no absurdity or practical inconvenience may result..... 115. In a criminal action, the general conditions of penal liabilities are indicated in old maxim"actus non facit reum, nisi mens sit rea" i.e. the act alone does not amount to guilt, it must be accompanied by a guilty mind. But there are exceptions to this rule and the reasons for this is that the legislature, under certain situations and circumstances, in its wisdom may think it so important, in order to prevent a particular act from being committed, to forbid

or rule out the element of mens rea as a constituent part of a crime or of adequate proof of intention or actual knowledge. However, unless a statute either expressly or by necessary implication rules out 'mens rea' in cases of this kind, the element of 'mens rea' must be read into the provisions of the statute. The question is not what the word means but whether there are sufficient grounds for infer-ring that the Parliament intended to exclude the general rule that mens rea is an essential element for bringing any person under the definition of 'abet'. 116. There are judicial decisions to the effect that it is generally necessary to go behind the words of the enactment and take other factors into consideration as to whether the element of 'mens rea' or actual knowledge should be imported into the definition. See (1) Brand v. Wood44 (2) Sherras v. De Rutzen 45, (3) Nicholls v. Hall46 , and (4) Inder Sain v. State of Punjab 39. 41 AIR 1966 SC 346, 348: (1966) 3 SCR 829: (1968) Pun LR 108(D) 42 (1972) 3 SCC 717: AIR 1972 SC 2284 43 (1994) 3 SCC 440: JT (1994) 1 SC 290 44 62 TLR 462, 463 45 (1895) 1 QB 918: 11 TLR 369 46 LR (1873) 8 CP 322: 28 LT 473 39 (1973) 2 SCC 372: 1973 SCC (Cri) 813 117. This Court in State of Maharashtra v. M.H. George36 while examining a question as to whether mens rea or actual knowledge is an essential ingredient of the offence under Section 8(1) read with Section 23(1)(a) of the Foreign Exchange Regulation Act, 1947, when it was shown that the respondent (accused) in that case voluntarily brought gold in India without the permission of Reserve Bank, held by majority that the Foreign Exchange Regulation Act is designed to safeguarding and conserving foreign exchange which is essential to the economic life of a developing country and the provisions have therefore to be stringent aiming at eliminating smuggling. Hence, in the background of the object and purpose of the legislation, if the element of mens rea is not by necessary implication invoked, its effectiveness as an instrument for preventing smuggling would be entirely frustrated. 118. But Subba Rao, J. dissented and held thus : (SCR p. 139) "... the mere fact that the object of a statute is to promote welfare activities or to eradicate grave social evils is in itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of the offence. It is also necessary to enquire whether a statute by putting a person under strict liability helps him to assist the State in the enforcement of the law : can he do anything to promote the observance of the law? Mens rea by necessary implication can be excluded from a statute only where it is absolutely clear that the implementation of the object of a statute would otherwise be defeated and its exclusion enables those put under strict liability by their act or omission to assist the promotion of the law. The nature of mens rea that will be implied in a statute creating an offence depends upon the object of the Act and the provisions thereof." 119. Thereafter, a similar question arose in Nathulal v. State of M.p.34 as regards the exclusion of the element of mens rea in the absence of any specific provision of exclusion. Subba Rao, J. reiterated his earlier stand taken M.H. George36 and observed thus : (AIR p. 45) "Mens rea is an essential ingredient of a criminal offence. Doubtless a statute may exclude the element of mens rea, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence i n conformity with the

common law rather than against it unless the statute expressly or by necessary implication excluded mens rea. The mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is by itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of an offence. Mens rea by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated." 36 (1965) 1 SCR 123: AIR 1965 SC 722: (1965) 1 Cri LJ 641 34 AIR 1966 SC 43: 1966 Cri LJ 71 See also (1) Srinivas Mall Bairoliya v. King-Emperor47, (2) Ravula Hariprasada Rao v. State 48, and (3) Sarjoo Prasad v. State of U.P.32 120. In this connection, we would also like to make reference to a judgment of Bombay High Court in State v. Abdul Aziz49 wherein a Division Bench while dealing with Section 5 of the Imports and Exports (Control) Act, 1947 under which the respondent (accused) was prosecuted has held thus : "Section 5 of the Act of 1947 by itself makes no reference to mens rea. Abetment of the contravention of the order is coupled together with contravention itself in the same provision. It must, therefore, be treated as standing on the same footing. In our view, therefore, the offence of abetment also would not require any kind of mens rea." The above observation would be tantamount to saying that "when no mens rea is essential in the substantive offence, the same is also not necessary in the abetment thereof'. 121. We shall now go into the question as to whether the legislature has imported the essential ingredient of criminal offence, i.e., 'mens rea' in the substantive offenses of the Act of 1987. 122. True, the provisions of the TADA Acts are framed with very stringent provisions, of course, 'for the prevention of, and for coping with, terrorist and disruptive activities and for matters connected therewith or incidental thereto". The question may be whether effectiveness of this instrument would be entirely frustrated if the element of mens rea or the element of actual knowledge on the part of the offender is to be injected or read into the definition. 123. Generally, it is one of essential principles of criminal jurisprudence that a crime is not committed if the mind of a person doing the act in question, is innocent. Therefore, to constitute a crime, the intent and act must both concur. 124. In the backdrop of the above legal position, we shall deal with the submissions made by the learned counsel with reference to the substantive offence or offences specified under the main Act itself. 125. In the Act of 1984, the word 'abet' is not defined. But the definition of the word 'terrorist' in that Act requires the person indulging in the act of terrorism to be shown to have committed the terrorist act with a view of committing any of the offences enumerated under clauses (i) to (iv) of the definition of the word 'terrorist' given under Section 2(1)(h). The scheduled offences i.e. Sections 122 and 123 of the Indian Penal Code expressly require intention on the part of the person committing those offences, though intention is not required under Sections 121 and 121-A of the IPC and Sections 4 and 5 of the Anti- Hijacking Act, 1982 which are also scheduled offences in that Act. Under the note given to the Schedule, it is stated that 47 AIR 1947 PC 135: 49 Bom LR 688: (1947) 2 MLJ 328 48 1951 SCR 322: AIR 1951 SC 204: 52 Cri LJ 768 32 (1961) 3 SCR 324: AIR 1961 SC 631: (1961) 1 Cri LJ 747 49 AIR 1962 Bom 243: 64

Bom LJ 16: (1962) 2 Cri LJ 472 the offence of criminal conspiracy or attempt to commit, or abetment of, an offence specified in this Schedule shall be deemed to be a schedule offence. 126. Under the Act of 1985 also, the word 'abet' is not defined. Nonetheless Sections 3 and 4 of this Act which deal with punishments for the substantive offences of terrorism and disruption respectively make the abetment of both the substantive offences also as penal offences. The definition of the word 'abet' is given for the first time in the Act of 1987 (TADA). 127. Section 3(1) which gives the meaning of the expression 'terrorist' specifically requires the intention on the part of the offender committing a terrorist act. Similarly, Section 4(2)(i) and (ii) also requires that the person committing the disruptive act should be shown to have intended to do that act. The provisions of Sections 3 and 4 of the 1985 and 1987 Acts are identical. Thus, it is very clear that the substantive offences require intention on the part of the person committing the terrorist act or the disruptive act. The abetment of the commission of these two offences comes under Sections 3(3) and 4(1) of the Act of 1987. The word 'abets' does also appear under Section 6(2) which deals with 'enhanced penalties'. 128. Therefore, when the substantive provisions of the Act expressly require the intention as an essential ingredient to constitute an offence, can it be said that the ingredient of intention should be excluded on the part of the abettor who abets those substantive offences. In other words, can it be said that the abettor has abetted the substantive offence without any guilty mind (mens rea) or without actual knowledge as to what would be the consequence of his designed act. 129. Now turning to the definition in question, clauses (ii) and (iii) need not require any exposition since both the clauses themselves are selfexplanatory. As rightly pointed out, the definition of the word, 'abet' as given in Section 2(1)(i) is with wide flexibility rather than with meticulous specificity. Therefore, we have to explore its allowable meaning so that there may not be any uncertainty inevitably leading any person to much difficulty in understanding acts prohibited by law so that he may act accordingly. 130. It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasised that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen and also judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. More so uncertain and undefined words deployed inevitably lead citizens to"steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked". 131. Let us examine clause (i) of Section 2(1)(a). This section is shown to be blissfully and impermissibly vague and imprecise. As rightly pointed out by the learned counsel, even an innocent person who ingenuously and undefiledly communicates or associates without any knowledge or having no reason to believe or suspect that the person or class of persons with whom he has communicated or associated is engaged in assisting in any manner terrorists or disruptionists, can be arrested and prosecuted by abusing or misusing or

misapplying this definition. In ultimate consummation of the proceedings, perhaps that guiltless and innoxious innocent person may also be convicted. 132. The counter submission made by learned Additional Solicitor General justifying the exclusion of 'mens rea' or intention or knowledge on the part of the person who communicates or associates with any person who is engaged in assisting in any manner terrorists or disruptionists cannot be countenanced in view of the fact that the substantive offences require by express provisions the intention on the part of the abettor. The decisions relied upon by him cannot be of any assistance to support his plea for exclusion of intention in view of the various factors inclusive of the requirement of the intention for the substantive offences. 133. Therefore, in order to remove the anomaly in the vague and imprecise definition of the word, 'abet', we for the above mentioned reasons, are of the view that the person who is indicted of communicating or associating with any person or class of persons who is engaged in assisting in any manner terrorists or disruptionists should be shown to have actual knowledge or to have reason to believe that the person or class of persons with whom he is charged to have communicated or associated is engaged in assisting in any manner the terrorists and disruptionists. 134. To encapsulate, for the discussion above, the expressions 'communication' and 'association' deployed in the definition should be qualified so as to save the definition, in the sense that"actual knowledge or reason to believe" on the part of a person to be roped in with the aid of that definition should be read into it instead of reading it down and clause (i) of the definition 2(1)(a) should be read as meaning "the communication or association with any person or class of persons with the actual knowledge or having reason to believe that such person or class of persons is engaged in assisting in any manner terrorists or disruptionists" so that the object and purpose of that clause may not otherwise be defeated and frustrated. Section 3 of Special Courts Act, 1984 135. Challenging the validity of Section 3 of Act of 1984, it has been contended that the power vested under Section 3(1) on the Central Government to declare by notification any area as "terrorist affected area", and constitute such area into a single judicial zone or into as many judicial zones as it may deem fit, is not only vague but also without any guidance. 136. The prerequisite conditions which are sine qua non for declaring any area as "terrorists affected area" by the Central Government by virtue of the authority conferred on it under Section 3(1) of the Act of 1984 are: (1) The offenses of the nature committed in any area to be declared as "terrorists affected area" should be one or more specified in the Schedule; (2) The offenses being committed by terrorists should satisfy the definition of the nature of the offence mentioned in Section 2(1)(h), namely, indulging in wanton killing of persons or in violence or in the disruption of services or means of communications essential to the community or in damaging property with a view to commit any of the offenses enumerated under any of the clauses (i) to (iv) indicated under the definition of the word 'terrorist'; (3) The scheduled offenses committed by terrorists should be on such a scale and in such a manner that it is expedient for the purpose of coping with the activities of such terrorists to have recourse to the provisions of this Act." 137. Unless all the above three conditions are fully satisfied,

the Central Government cannot invoke the power under Section 3(1) to declare any area as "terrorist affected area". In other words, in the absence of any of the conditions, Section 3(1) cannot be invoked. Therefore, the contention that Section 3(1) suffers from vagueness and lacks guidance is unmerited. 138. In this regard, we would like to add that the learned Additional Solicitor General in his attempt to sustain the validity of Section 3 of the 1984 Act, submitted that the legislature considered it proper to prescribe a uniform procedure for serious offenses having a direct relationship with peace and tranquility of the area in the notified area after the notified date and that serious offenses which are likely to create terror and panic in the minds of the people were/are sought to be dealt with under the Act by prescribing a speedier trial so that disturbed situations could be brought under control without loss of time to prevent the situation from getting deteriorated and spreading to other areas. 139. We see some force in the above submission while negativing the contention of the counsel challenging the validity of Section 3 of the Act of 1984. Sections 3 and 4 of 1987 Act (TADA) 140. The legality and the efficaciousness of Sections 3 and 4 of 1987 Act have been assailed on the following grounds, namely,- (1) These two sections cover the acts which constitute offenses under ordinary laws like the Indian Penal Code, Arms Act and Explosive Substances Act; (2) There is no guiding principle laid down when the executive can proceed under the ordinary laws or under this impugned Act of 1987; and (3) This Act and the Sections 3 and 4 thereof should be struck down on the principle laid down in State of W.B. v. Anwar Ali Sarkar5O and followed in many other cases including A.R. Antulay v. Union of India51. Section 3 of the Act is as follows: 50 1952 SCR 284 : AIR 1952 SC 75 : 1952 Cri LJ 5 10 51 (1988) 2 SCC 764 "3. Punishment for terrorist acts.- (1) 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 firearms or other 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. (2) Whoever commits a terrorist act, shall,- (i) if such act has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to fine; (ii) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine. (3) Whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and

shall also be liable to fine. (4) Whoever harbours or conceals, or attempts to harbour or conceal, any terrorist shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine." 141. Since the Parliament has introduced two more sub- sections (5) and (6) to Section 3 of the Act of 1987 by the Terrorist and Disruptive Activities (Prevention) Amendment Act, 1993 (Act 43 of 1993) w.e.f. 22-5-1993, in order to have the full text of the section as amended, we reproduce those subsections hereunder: "(5) Any person who is a member of a terrorists gang or a terrorists organisation, which is involved in terrorist acts, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine. (6) Whoever holds any property derived or obtained from commission of any terrorist act or has been acquired through the terrorist funds shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine." Section 4 of the Act reads as follows: "4. Punishment for disruptive activities.- (1) Whoever commits or conspires or attempts to commit or abets, advocates, advises, or knowingly facilitates the commission of, an y disruptive activity or any act preparatory to a disruptive activity shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine. (2) For the purposes of sub-section (1), 'disruptive activity' means any action taken, whether by act or by speech or through any other media or in any other manner whatsoever,- (i) which questions, disrupts or is intended to disrupt, whether directly or indirectly, the sovereignty and territorial integrity of India; or (ii) which is intended to bring about or supports any claim, whether directly or indirectly, for the cession of any part of India or the secession of any part of India from the Union. Explanation.- For the purposes of this sub- section,- (a) 'cession' includes the admission of any claim of any foreign country to any part of India, and (b) 'secession' includes the assertion of any claim to determine whether a part of India will remain within the Union. (3) Without prejudice to the generality of the provisions of subsection (2), it is hereby declared that any action taken, whether by act or by speech or through any other media or in any other manner whatsoever, which- (a) advocates, advises, suggests or incites; or (b) predicts, prophesies or pronounces or otherwise expresses, in such manner as to incite, advise, suggest or prompt, the killing or the destruction of any person bound by oath under the Constitution to uphold the sovereignty and integrity of India or any public servant shall be deemed to be a disruptive activity within the meaning of this section. (4) Whoever harbours or conceals, or attempts to harbour or conceal, any disruptionist shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine." 142. True, the offenses arising out of the acts enumerated in Sections 3 and 4 may be similar to the offenses falling under the ordinary penal laws. In other words, various offenses arising out of the terrorist or disruptive activities may overlap some of the offenses covered by the other ordinary penal laws. It is not in dispute that

the above provisions which define the expressions 'terrorist act' and 'disruptive activities' provide severe punishment and also prescribe minimum sentence for some acts constituting offenses falling within the two provisions. Section 6 of the Act of 1987 provides 'Enhanced penalties' for a person who with intent to aid any terrorist or disruptionist, contravenes any provision of, or any rule made under, the Arms Act, 1959 (54 of 1959), the Explosives Act, 1884 (4 of 1884), the Explosive Substances Act, 1908 (6 of 1908) or the Inflammable Substances Act, 1952 (20 of 1952) of not less than five years but which may extend to imprisonment for life and with fine, notwithstanding anything contained in the Acts or the rules made under the respective Acts. 143. Section 6(2) reads: "For the purposes of this section, any person who attempts to contravene or abets, or attempts to abet, or does any act preparatory to the contravention of any provision of any law, rule or order, shall be deemed to have contravened that provision, and the provisions of subsection (1) shall, in relation to such person, have effect subject to the modification that the reference to 'imprisonment for life' shall be construed as a reference to 'imprisonment for ten years'." 144. Part III of the Act creates a special machinery for trying the terrorists and disruptionists charged with the commission of any offence under the Act, namely, constitution of Designated Courts, its jurisdiction, power, of trial with respect to other offenses and to transfer cases to regular courts, procedure to be followed etc. 145. As we have indicated above, the Act tends to be very harsh and drastic containing the stringent provisions and provides minimum punishments and to some other offenses enhanced penalties also. The provisions prescribing special procedures aiming at speedy disposal of cases, departing from the procedures prescribed under the ordinary procedural law are evidently for the reasons that the prevalent ordinary procedural law was found to be inadequate and not sufficiently effective to deal with the offenders indulging in terrorist and disruptive activities, secondly that the incensed offenses are arising out of the activities of the terrorists and disruptionists which disrupt or are intended to disrupt even the sovereignty and territorial integrity of India or which may bring about or support any claim for the cession of any part of India or the secession of any part of India from the Union, and which create terror and a sense of insecurity in the minds of the people. Further the Legislature being aware of the aggravated nature of the offenses have brought this drastic change in the procedure under this law so that the object of the legislation may not be defeated and nullified. 146. As pointed out by Ahmadi, J. in Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya52 the statutes which impose a term of imprisonment for a criminal action under that law must be strictly construed. 52 (1990) 4 SCC 76: 1991 SCC (Cri) 47 In fact, this Court in Usmanbhai Dawoodbhai Memon v. State of Gujarat53 has observed as under: (SCC p. 284, para 15) "The Act is an extreme measure to be resorted to when the police cannot tackle the situation under the ordinary penal law. The intendment is to provide special machinery to combat the growing menace of terrorism in different parts of the country." 147. Agreeing with the above view in Usmanbhai case53, Ahmadi, J. in Niranjan case52 stated thus: (SCC p. 86, para 8) "While invoking a criminal statute, such as the Act, the prosecution is

duty bound to show from the record of the case and the documents collected in the course of investigation that facts emerging therefrom prima facie constitute an offence within the letter of the law. When a statute provides special or enhanced punishments as compared to the punishments prescribed for similar offenses under the ordinary penal laws of the country, a higher responsibility and duty is cast on the Judges to make sure there exists prima facie evidence for supporting the charge leveled by the prosecution. Therefore, when a law visits a person with serious penal consequences extra care must be taken to ensure that those whom the legislature did not intend to be covered by the express language of the statute are not roped in by stretching the language of the law. But that does not mean that the judicial officer called upon to decide whether or not a case for framing a charge under the Act is made out should adopt a negative attitude. He should frame a charge if the prosecution shows that the material placed on record and the documents relied on give rise to a strong suspicion of the accused having committed the crime alleged against him." 148. Therefore, having regard to the object and purpose of the Act of 1987 as reflected from the preamble and the Statement of Objects and Reasons of the Act, the submission made questioning the legality and efficaciousness of Sections 3 and 4 on the grounds (1) and (2) mentioned above cannot be countenanced. So far as the ground (3) is concerned since we intend to deal with the principle laid down in Anwar Ali50 with reference to Article 14 of the Constitution while dealing with issues of the class or classes of offences and 'test of equality' before law, in the later part of this judgment in detail, for the present we may say that the validity of these two provisions cannot be challenged under the third ground also as we do not find any discrimination in view of the separate machinery provided for the trial of the cases under this Act to achieve the object of it. Section 8 of 1987 Act 149. Mr V.M. Tarkunde attacks this provision which provides for forfeiture of property of certain persons convicted by the Designated Court of any offence punishable under this Act or any rule made thereunder, contending that this section is violative of Articles 21 and 14 on the grounds 53 (1988) 2 SCC 271 : 1988 SCC (Cri) 318 52 (1990) 4 SCC 76: 1991 SCC (Cri) 47 50 1952 SCR 284: AIR 1952 SC 75 : 1952 Cri LJ 5 10 that (1) no guidelines have been provided for when the property of a convicted person should or should not be forfeited; and (2) forfeiture to Government 'free from all encumbrances' may amount in many cases to unmerited punishment of third parties who have no concern whatsoever with the offence with which the person under this provision has been convicted and who have got interest by advancing money on the security of the forfeited property. 150. This argument is resisted by the learned Additional Solicitor General contending that Section 8 only vests the property or interest of the 'terrorist' in the State and does not forfeit the third party's interest and that the third party can always enforce its rights against the 'terrorists' in respect of its interest in the forfeited property according to law notwithstanding the forfeiture. 151. Section 8(1) of the Act gives discretionary power to the Designated Court while awarding any punishment on conviction of an offence under the Act or any rule made thereunder, to pass an order in writing, declaring that any property whether movable or immovable or both,

specified in the order belonging to the convicted person, shall stand forfeited to the Government free from all encumbrances. 152. Sub-section (2) of Section 8 states that it is open to the Designated Court trying an accused for any offence under the Act or any rule made thereunder to pass an order attaching all or any of the properties belonging to the accused during the period of his trial and in case the trial ends in conviction, the property will stand forfeited to the Government free from all encumbrances. 153. Sub-section (3)(a), (b) and (c) of Section 8 gives discretionary authority to the Designated Court to attach the property of an absconding accused and also the power to the Designated Court to apply Sections 83 to 85 of the Code of Criminal Procedure to such attachment as if the attachment was made under the Code of Criminal Procedure. 154. Section 82 of the Code deals with proclamation of persons absconding. Section 83 deals with attachment of property of persons absconding. Section 84 deals with the claims and objections to attachment. Sub-section (1) of Section 84 envisages that if any claim is preferred to, or objection made to the attachment of, any property attached under Section 83, within six months from the date of such attachment, by any person other than the proclaimed person on the ground that the claimant or objector has an interest in such property and that such interest is not liable to attachment under Section 83, the claim or objection shall be inquired into, and may be allowed in whole or in part. 155. We are not very much concerned about sub-sections (3) and (4) of Section 8 of the TADA Act but only with regard to sub-sections (1) and (2) of Section 8. 156. The discretionary power given to the Designated Court under Section 8(1) and (2) is to be exercised under strict contingencies, namely that (1) there must be an order of forfeiture and that order must be in writing; (2) the property either movable or immovable or both must belong to the accused convicted of any offence of TADA Act or rule thereunder; (3) the property should be specified in the order; (4) even though attachment can be made under Section 8(2) during the trial of the case, the forfeiture can be ordered only in case of conviction and not otherwise. 157. The very fact that the order should be in writing implies that the Designated Court must give reasons for such an order even though the section does not specifically require the Designated Court to record its reasons for so doing, because the word 'order' even according to the lexicon meaning is that it is a decision or direction either interlocutory or preliminary or final by the court trying the offence. Secondly, under Section 19 of the Act, an appeal lies straight to the Supreme Court as a matter of right from any order not being interlocutory order both on facts and law. For the above reasons, this contention fails. Section 9 of Act of 1987 158. The validity of this section, which deals with the constitution of one or more Designated Courts for such area or areas, or for such case or class or group of cases specified in the notification issued by the Central Government or a State Government, is assailed firstly on the ground that it is violative of Entry 65, List II of the Seventh Schedule and Articles 233, 234 and 235 of the Constitution, and secondly that sub-section (7) of Section 9 is opposed to the principle of fair trial enshrined in Article 21 of the Constitution. 159. We shall now deal with the first contention. We have elaborately discussed about the legislative competence of the Parliament in legislating this law and

rendered our finding that the Parliament is competent to enact the law (TADA) under residuary power under Article 248 of the Constitution read with Entry 97 of List I as well as Entry 1 of List I, namely, 'Defence of India' but not under Entry 1 of List II, namely, 'Public order'. Entry 95 of List I reads "Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List;..... 160. As we have now found this impugned Act is enacted under Entry 1 of List I, the constitution of the Designated Courts by the Central Government cannot be said to be in violation of Entry 65 of List II which empower the State Legislature to constitute the courts. Under Section 9 of the Act, both the Central Government and the State Governments are authorised to constitute Designated Courts by notification under sub-section (2) of Section 9. It is made clear that the courts constituted by the Central Government either before or after the issue of the notification constituting the Designated Courts by the State Government shall have jurisdiction to try any offence committed in that area or areas and the Designated Courts constituted by the State Government shall not have any jurisdiction to try any offence committed in that area or areas. 161. In addition, sub-section (3) of the impugned section states that where any question arises as to the jurisdiction of any Designated Court, the decision taken by the Central Government in that regard will be final. 162. For the foregoing discussion, we see no substance in the contention that Section 9 is violative of Entry 65, List II of the Seventh Schedule and Articles 233, 234 and 235 of the Constitution. 163. Now let us proceed to consider the second attack on the validity of sub-section (7) of Section 9. 164. Under Section 9(1), the Central Government or a State Government may constitute one or more Designated Courts for such area or areas, or for such case or class or group of cases as may be specified in the notification. Sub-section (2) of the section deals with the jurisdiction of the Designated Court constituted by the Central Government and the preferential jurisdiction of the Designated Court constituted by the Central Government qua the Designated Court constituted by a State Government. Sub-section (3) deals with the decision to be taken by the Central Government in case of any question of dispute whatsoever with regard to the jurisdiction of any Designated Court as earlier pointed out. Sub-sections (4) and (5) speak of the appointment of Judges to the Designated Court while sub- section (6) speaks of the qualification of the Judge to be appointed. 165. Sub-section (7) of Section 9 which speaks of the continuance of the service of the Judge is challenged on the ground that the continuance of a Judge of a Designated Court even after attainment of the age of superannuation is a regressive provision because a Judge who is permitted to hold the office, hitherto held, after superannuation will not be having his judicial independence; but on the other hand his, holding the office on the pleasure of the executive, will be subversive since there is nothing to prevent the executive from terminating his appointment as and when it likes. This legal sanction of continuance in the service, according to the learned counsel, will not serve the purpose of just and fair trial and it would be violating the principle enshrined in Article 21. For sustaining the above submission, reliance was placed on Special Courts Bill, 1978, In re54. 166. In that case, reference was made by the President under Article

143(1) of the Constitution for consideration of the question whether the Special Courts Bill, 1978 or any of its provisions if enacted would be constitutionally invalid. Clause (7) of the Bill provided that a Special Court shall be presided over by a sitting Judge of a High Court in India or a person who has held the office as a Judge in a High Court in India and nominated by the Central Government in consultation with the Chief Justice of India. (As we are concerned only with the question of the continuance of a Judge holding the office even on attaining the age of superannuation, we are not concerned about the other provisions or clauses of the Special Courts Bill.) 167. Chandrachud, C.J. speaking for the majority answered this question holding thus: (SCC p. 435, para 96)"We are, therefore, of the opinion that clause (7) of the Bill violates Article 21 of the Constitution to the extent that a person who has held 54 (1979) 1 SCC 380: (1979) 2 SCR 476 office as a Judge of the High Court can be appointed to preside over a Special Court, merely in consultation with the Chief Justice of India." On carefully going through the decision, we are of the view that the observation of this Court with reference to clause (7) of the Special Courts Bill cannot be strictly applied to the situation of the continuance of a Judge of a Designated Court under Section 9(7) for the reason that the person who was to be nominated by the Central Government in consultation with the Chief Justice of India under clause (7) of the Special Courts Bill was a person who had held the office as a Judge of the High Court, that is to say the appointment was after the retirement. But in the present Act, the Judge is permitted to continue the same judicial service as a Judge or Additional Judge, as the case may be, on the attainment of superannuation. In other words. the Judge on the attainment of the age of superannuation does not retire. 168. Therefore, we see no force in the above argument challenging the constitutional validity of Section 9(7) by availing the observation in Special Courts Bill, In re54. However, we would like to suggest that the Central Government and the State Government at the time of appointing a Judge or an Additional Judge to the Designated Court with the concurrence of the Chief Justice of the High Court concerned should keep in mind that the Judge designate has sufficient tenure of service even at the initial stage of appointment, so that no one may entertain any grievance for continuance of service of a Judge of the Designated Court after attainment of superannuation. Hence Section 9(7) does not offend any constitutional provision. Section 11(2) of 1987Act 169. A serious argument has been advanced in respect of Section 11(2) of the 1987 Act (TADA) which provides for the transfer of any case pending before one Designated Court in a State to any other Designated Court within that State or to any other Designated Court in any other State. 170. According to Mr V.M. Tarkunde, unless it is read into Section 11(2) that a transfer will be made only after hearing the accused, the provision would be contrary to the rule of natural justice and Section 11(2) would be violative of Article 14 of the Constitution. He further contends that an order, giving concurrence under Section 11(2) should be held to be judicial in character. In support of his argument, he relied upon the decision in A.K. Kraipak v. Union of India55 and stated that the principle of natural justice, the purpose of which is to prevent miscarriage of justice, applies not only to judicial and

quasi-judicial order but also to administrative order. Reference was also made to (1) K. (H.) (An Infant), In re56 (LR at p. 630), and (2) State of Orissa v. Dr (Miss) Binapani Dei57. 54 (1979) 1 SCC 380: (1979) 2 SCR 476 55 (1969) 2 SCC 262: (1970) 1 SCR 457 56 (1967) 2 QB 617 : (1967) 1 All ER 226 57 (1967) 2 SCR 625 : AIR 1967 SC 1269 171. During the course of the argument, Mr Tarkunde stated that even if, on consent of the accused, the concurrence is given, it would be a quasijudicial order and that the authority to transfer a case by way of a motion under Section 406 of the Code of Criminal Procedure vested on the Supreme Court is not taken away by the provision of this Act. He asserted that the accused should be given an opportunity for making his objection, if any, before any order is passed. He further stated that when cases are transferred en masse from one Designated Court to another Designated Court, he will not have any objection, but if the concurrence is sought to be obtained in an individual or a particular case, then the person, to be affected by such transfer must be afforded an opportunity of being heard; that if the Government seeks the concurrence to transfer on the request of the accused, then there may not be any necessity of issuing notice to the accused and that it depends upon the exigencies of every particular case. Lastly Mr Tarkunde in support of his plea drew our attention to paragraph 34 of the judgment rendered by a Full Bench of the Punjab & Haryana High Court in Bimal Kaur Khalsa v. Union of India58 (AIR at p. 102) wherein it is stated that the "learned counsel for the Union of India, conceded that the accused would be entitled to have his say before the Chief Justice of India before the latter gives his consent to the transfer of the case". 172. Mr Hardev Singh also made his submission in the same line Challenging the constitutional validity of Section 11(2). 173. In opposition the learned Additional Solicitor General argued that since the provision presupposes the existence of a notification with regard to any area having been declared as 'terrorist affected area' or 'disturbed area' it is imperative that fair trial within that area would not normally be feasible and that, therefore, the Legislature having regard to such prevailing explosive situation has provided for a liberal procedure for transfer of cases so that a fair and just trial is held in an uncharged atmosphere. However, he Legislature has incorporated the safeguard of obtaining the concurrence of the Chief Justice of India as a condition precedent to such transfers and hat when such a safeguard is incorporated, it cannot be said that a transfer without hearing the accused is bad in law. He has urged that the Parliament is fully empowered to exclude the invocation of the rule of natural justice under certain extraordinary circumstances, having regard to the fact that the entertainment of any objection would only frustrate the proceeding and paralyse the meaningful purpose of the provision. Reliance was placed by he learned ASG on Tulsiram Patel59 in which D.P. Madon, J. speaking for he majority of the Constitution Bench has observed thus: (SCC p. 479, para 101) "[I]t is well established that where a right to a prior notice and an opportunity to be heard before an order is passed would obstruct the taking of prompt action, such a right can be excluded. This right can also 58 AIR 1988 P&H 95 : (1988) 93 Punj LR 189 : 1988 Cri LJ 169 59 Union of India v. Tulsiram Patel, (1985) 3 SCC 398: 1985 SCC (L&S) 672 be excluded where the nature

of the action to be taken, its object and purpose and the scheme of the relevant statutory provisions warrant its exclusion; nor can the audi alteram partem rule be invoked if importing it would have the effect of paralysing the administrative process or where the need for promptitude or the urgency of taking action so demands." In addition, he drew our attention to the decisions in (1) Satya Vir Singh v. Union of India6O, and (2) C.B. Gautam v. Union of India61. 174. Coming to the other aspect of the argument of Mr Tarkunde with reference to Section 406 of the Code the learned Additional Solicitor General relied upon Section 25 of TADA Act which deals with the overriding effect of the provisions of the Act notwithstanding anything inconsistent therewith contained in any other enactment other than the TADA Act. He further stated that the dictum laid down in A.K. Kraipak55 is not at all applicable to the present case because that was the case where the hearing of the accused was excluded by the Act either expressly or by necessary implication. 175. The above controversial debate involves important questions namely (1) what is the nature of the order, the Chief Justice of India passes on the motion moved in that behalf; and (2) whether the accused is entitled to have an opportunity of being heard before the concurrence is given by the Chief Justice of India. 176. Sub-sections (2) and (3) of Section 11 of the Act read thus: 11. (1).... (2) If, having regard to the exigencies of the situation prevailing in a State, the Central Government is of the opinion that- (a) the situation prevailing in such State is not conducive to a fair, impartial or speedy trial, or (b) it is not likely to be feasible without occasioning the breach of peace or grave risk to the safety of the accused, the witnesses, the Public Prosecutor and the judge of the Designated Court or any of them, or (c) it is not otherwise in the interests of justice, it may, with the concurrence of the Chief Justice of India (such concurrence to be obtained on a motion moved in that behalf by the Attorney-General), transfer any case pending before a Designated Court in that State to any other Designated Court within that State or in any other State. (3) Where the whole or any part of the area within the local limits of the jurisdiction of a Designated Court has been declared to be, or forms part of, any area which has been declared to be a disturbed area under any enactment for the time being in force making provision for the 60 (1985) 4 SCC 252: 1986 SCC (L&S) 1 61 (1993) 1 SCC 78 55 (1969) 2 SCC 262: (1970) 1 SCR 457 suppression of disorder and restoration and maintenance of public order, and the Central Government is of opinion that the situation prevailing in the State is not conducive to fair, impartial or speedy trial within the State, of offenses under this Act or the rules made thereunder which such Designated Court is competent to try, the Central Government may, with the concurrence of the Chief Justice of India, specify, by notification in the Official Gazette, in relation to such court (hereafter in this subsection referred to as the local court) a Designated Court outside the State (hereafter in this section referred to as specified court), and thereupon- (a) it shall not be competent, at any time during the period of operation of such notification, for such local court to exercise any jurisdiction in respect of, or try, any offence under this Act or the rules made thereunder; (b) the jurisdiction which would have been, but for the issue of such notification, exercisable by such local court in respect of such

offenses committed during the period of operation of such notification shall be exercisable by the specified court; (c) all cases relating to such offenses pending immediately before the date of issue of such notification before such local court shall stand transferred on that date to the specified court; (d) all cases taken cognizance of by, or transferred to, the specified court under clause (b) or clause (c) shall be dealt with and tried in accordance with this Act (whether during the period of operation of such notification or thereafter) as if such offenses had been committed within the local limits of the jurisdiction of the specified court or, as the case may be, transferred for trial to it under sub-section (2). Explanation 1. Explanation 2. 177. The concurrence of the Chief Justice of India has to be obtained on a motion moved in that behalf by the Attorney General of India, or in his absence the Solicitor General of India, or in the absence of both, one of the Additional Solicitors General of India vide sub-section (2) of Section 11 read with Explanation 2. 178. Sub-section (3) of Section 11 requires the Central Government to specify a Designated Court outside the State by issuing a notification in the Official Gazette with the concurrence of the. Chief Justice of India.. 179. The authority to give concurrence is vested upon an independent judicial authority who is none other than the head of judiciary in India, namely, the Chief Justice of India as a persona designate. The vesting of this power in the Chief Justice of India is evidently with the purpose of making it known that the Central Government is not seeking to obtain the concurrence either with a motivation of bias or mala fide or on being influenced by any extraneous consideration, but on a reasonable and justifiable ground taking into consideration the prerequisite essential conditions, those being (1) that the situation prevailing in the State from which a case under Section 11(2) is sought to be transferred to some other Designated Court is not conducive to a fair, impartial or speedy trial; (2) that it is not likely to be feasible without occasioning the breach of peace or grave risk to the safety of the accused, the witnesses, the Public Prosecutor and the judge of the Designated Court or any of them; and (3) it is not otherwise in the interests of justice. Under sub-section (3) of Section 11 the Central Government is empowered to seek the concurrence of Chief Justice of India to specify a Designated Court outside the State when it is of opinion that the situation prevailing in the State is not conducive to fair, impartial and speedy trial within the State. 180. No doubt, it is true that there are specific provisions already in vogue under the Constitution and some statutes for transfer of cases and appeals from one court subordinate to the transferring court to another court. 181. Under Article 139-A of the Constitution of India either the Attorney General of India or a party to any case can move the Supreme Court on an application for transfer of certain cases as contemplated in that article. Of course, the Supreme Court also on its own motion may withdraw the case or cases pending before the High Court or the High Courts and dispose of all the cases itself. 182. For transfer of criminal cases under Section 406 of the Code of Criminal Procedure, the Attorney General of India or a party interested may move an application by way of a motion (unlike Section 407 of the Code) accompanied by a supporting affidavit or affirmation before the Supreme Court to transfer cases and appeals from one High Court to

another High Court or from a criminal court subordinate to one High Court to another criminal court of equal or superior jurisdiction subordinate to another High Court. 183. Under Section 24 of the Code of Civil Procedure, the High Court and the District Court are given general power of transfer and withdrawal of cases either on an application of any of the parties after issuing notice and hearing them or on their own motion. Section 25 of the Code of Civil Procedure empowers the Supreme Court to transfer any suit, appeal and other proceedings from a High Court or civil court in one State to a High Court or other civil court in any other State on the application of a party and after issuing notice and hearing them. 184. The new Section 25 of the Civil Procedure Code substituted by an Amendment Act, 104 of 1976 provides for the transfer to the Supreme Court the existing power hitherto vested-with the State Government and to confer on the Supreme Court such wide powers of transfer as it has in criminal cases under Section 406 of the Code. Section 25, in fact, is wider in scope than Section 406 of the Code of Criminal Procedure, 1973. Though, there is no express provision in Article 139-A of the Constitution and in Section 406 of the Code of Criminal Procedure to the effect that the Supreme Court before passing any order on the application made or moved for transfer of cases should issue notice and hear the parties as required under Sections 24 and 25 of the Code of Civil Procedure, on the principle of 'audi alteram partem', notice is given to the party/parties who are likely to be affected by any final order. But the question of issuing a notice and hearing the parties may not arise if the order is passed by the Supreme Court suo motu. 185. Harking back to Section 11(2) and (3) of TADA Act, the concurrence of the Chief Justice is sought for when the exigencies of the situation prevailing in the State is not conducive to a fair, impartial or speedy trial. The reasons for seeking such concurrence, of course, will be manifested in the motion moved by the law officers. The Chief Justice of India, while discharging his statutory function passes a statutory order and gives or refuses the concurrence on drawing his requisite subjective satisfaction on the materials placed before him in the motion. 186. It may be added, in this context that the Central Government cannot transfer any case under Section 11(2) or issue a notification under Section 11(3) in case the Chief Justice refuses to give the concurrence. To say differently, to pass an order either under Section 11(2) or 11(3) the concurrence of the Chief Justice is a sine qua non. But at the same time one should be alive to the legal position that the mere according of concurrence by itself is not an order of transfer but it only facilitates the Central Government to pass an order under either of the above provisions. In other words, the obtaining of concurrence of the Chief Justice of India is one of the specified conditions to be fulfilled or complied with before any order either under sub-section (2) or sub-section (3) of Section 11 is passed by the Central Government. The according of the concurrence though imperative does not compel the Government to pass any order if, for any other intervening causes, the Central Government even after obtaining the concurrence decides that there is no necessity of transferring any case. In that situation the concurrence will have no effect. Therefore, the according of concurrence which is a condition precedent for passing the transfer order by the Government is only a statutory

order and not a judicial order because there is no adjudication of any 'lis' and determination of any issue. Hence the final order passed by the Government may be open to judicial review but not the concurrence accorded which is only a statutory condition to be satisfied before passing the transfer order by the Central Government. 187. In this connection, we may refer to the decision in R. V. Cain62. In that case, the appellant was charged for an offence under the Explosive Substances Act, 1883. Section 7(1) of that Act required to obtain the consent of the Attorney General before proceeding further in that matter. The consent of the Attorney General as per that provision, was accorded in that case which was challenged on the ground that the document of consent from the Attorney General did not constitute sufficient consent for the purpose of Section 7. That challenge was rejected by the Court of Appeal holding that the duty of the Attorney General was to consider the general circumstances 62 (1975) 2 All ER 950: (1975) 3 WLR 131 of the case and to decide whether any, and, if he thought fit, which of the provisions of the Act could properly be pursued against the defendant who had been charged before the Magistrate with one such offence. See also Gouriet v. Union of Post Office Workers63. 188. The contention of Mr Tarkunde is that the accused concerned who is likely to be affected by such transfer, should be given an opportunity of making his representation in compliance with the principle of natural justice by the Chief Justice of India before be gives his concurrence. 189. The learned Additional Solicitor General contended that the Parliament is fully empowered to exclude the application of the rule of 'audi alteram partem' when the nature of the action to be taken, the object and purpose as well as the scheme of the relevant statutory provisions are likely to be paralysed or frustrated. According to him, the concurrence of the Chief Justice of India is sought to be obtained only having regard to the exigencies of the situation prevailing in a State which are not conducive to a fair, impartial or speedy trial. 190. As we have repeatedly pointed out, the concurrence by the Chief Justice of India under Section 11(2) and (3) is given or denied in the discharge of his statutory function on drawing the requisite subjective satisfaction on the reasons given in the motion or any material placed before him explaining the exigencies of the situation prevailing in the State which has necessitated the Central Government to obtain the concurrence and then transfer the case. Therefore, we feel that notwithstanding the power of the Parliament to exclude the application of rule of 'audi alteram partem' in exceptional circumstances, it may be open to the Chief Justice of India in an appropriate case to have the view of the accused. 191. The questions involved for consideration on the submission made by the learned counsel are answered accordingly. Section 15 of 1987 Act 192. A blistering attack was made on the validity of the hotly debated Section 15 as per which the confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks, shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under this Act or rules made thereunder. [It may be mentioned that the words "or co-accused, abettor or conspirator" are inserted after the words "trial of such person" by

the TADA (Amendment) Act, 1993 (No. 43 of 1993) w.e.f. 22-5-1993, with a proviso, reading "Provided that co- accused, abettor or conspirator is charged and tried in the same case together with the accused."] But before recording the confession under sub-section (1), the person making the confession should be given a statutory warning as contemplated under subsection (2) of Section 15. 63 (1977) 3 All ER 70: (1977) 3 WLR 300 193. Mr Ram Jethmalani made a scathing attack on this provision contending that this provision is atrocious and totally subversive of any civilized trial system and overrides Sections 25 and 26 of the Evidence Act and Sections 162 and 164 of the Code of Criminal Procedure. According to him when the existing Codes of Law which have a life history of more than a century proceed on the footing that police confessions are untrustworthy, a fortiori, the confessions recorded on mechanical devices are certainly inferior to confessions recorded by Magistrates in open courts with all the precautions prescribed by the statute, High Court rules and judicial decisions. There will be many infirmities in such recording of confessions such as selective recordings, tampering, tailoring and editing and the confessions so recorded on mechanical devices are not as reliable as written confessions and signed by the makers of those confessions. Therefore, he contends that this provision should be held to be unjust and unreasonable and bad in law under both Articles 14 and 21 of the Constitution. In this connection, he made reference to Section 21(1)(c) as per which a confession made by a co- accused that the accused has committed the offence, if proved, a presumption shall be drawn by the Designated Court that the accused has committed such offence unless the contrary is proved. This provision, according to him, totally subverts Section 30 of the Evidence Act and that the confession by the co-accused is not evidence as defined in the Evidence Act. Two decisions were cited by him to strengthen his submission, firstly, Bhuboni Sahu v. King64 wherein the Privy Council after having approved the observation of Reilly, J. in Periyaswami Mooppan, Re65 (ILR at p. 77) that Al where there is evidence against the co- accused sufficient, if believed, to support his conviction, then the kind of confession described in Section 30 may be thrown into the scale as an additional reason for believing that evidence" has held that "... a confession of a co- accused is obviously evidence of a very weak type. It does not indeed come within the definition of 'evidence' contained in Section 3 of the Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination"; and secondly Hari Charan Kurmi and Jogia Hajam v. State of Bihar66 in which Gajendragadkar, C.J. speaking for the Constitution Bench stated that: (SCR headnote) "Though a confession mentioned in Section 30 of the Indian Evidence Act is not evidence as defined by Section 3 of the Act, it is an element which may be taken into consideration by the criminal courts and in that sense, it may be described as evidence in a non- technical way. But in dealing with a case against an accused person, the court cannot start with the confession of a co-accused person, it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then 64 AIR 1949 PC 257: 76 IA 147: 50 Cri LJ 872 65 Periyaswami Mooppan v. Emperor, ILR (1931) 54 Mad

75: AIR 1931 Mad 177: 32 Cri LJ 448 66 (1964) 6 SCR 623 : AIR 1964 SC 1184: (1964) 2 Cri LJ 344 it is permissible to turn to the confession in order to lend assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence." 194.In continuation of his argument, the learned senior counsel has stressed that a police officer can easily find his own favourite informer, record his confession implicating whomsoever he wants and all those persons, forfeit their life and liberty unless they prove the contrary, namely, their innocence, which is an impossible burden to discharge and in that sense Section 21(1)(c) is subversive of all civilized notions of justice and renders a criminal trial a total farce. 195.Mr Harjinder Singh, the learned counsel supplementing the arguments of the other counsel cited the decision, namely, Olga Tellis v. Bombay Municipal Corpn.67 wherein it has been observed that "[i]f a law is found to direct the doing of an act which is forbidden by the Constitution or to compel, in the performance of an act, the adoption of a procedure which is impermissible under the Constitution, it would have to be struck down" and also made reference to (1) E.P. Royappa v. State of T.N.68, (2) Maneka Gandhi2l, (3) M.H. Hoskot v. State of Maharashtra69, (4) Sunil Batra v. Delhi Administration (I)23, (5) Sita Ram v. State of U.P.70, (6) Hussainara Khatoon (IV) v. Home Secretary, State of Bihar, Patna24, (7) Hussainara Khatoon (I) v. Home Secretary, State of Bihar, Patna22, (8) Sunil Batra (II) v. Delhi Administration7l, (9) Jolly George Varghese v. Bank of Cochin72, (10)Kasturi Lal Lakshmi Reddy v. State of J&K73, and (11) Francis Coralie Mullin v. Administrator, Union Territory of Delhi74. A 196. On the dictum laid down in the above decisions, he concluded by saying that unreasonableness vitiates not only law but also the procedure alike and, therefore, it is essential that the procedure prescribed by law for depriving a person of his fundamental right must conform to the norms of justice and fair play. 197. All the counsel who challenged the validity of the provisions of this Act made similar submissions as that of Mr Jethmalani and stated in chorus that Section 15 of the Act gives a death-knell to the very basic principle hitherto recognised and followed that a confession made before a police 67 (1985) 3 SCC 545: 1985 Supp 2 SCR 51 68 (1974) 4 SCC 3: 1974 SCC (L&S) 165: (1974) 2 SCR 348 21 (1978) 1 SCC 248: (1978) 2 SCR 621 69 (1978) 3 SCC 544: 1978 SCC (Cri) 468: (1979) 1 SCR 192 23 (1978) 4 SCC 494: 1979 SCC (Cri) 155: (1979) 1 SCR 392 70 (1979) 2 SCC 656: 1979 SCC (Cri) 576: (1979) 2 SCR 1085 24 (1980) 1 SCC 98: 1980 SCC (Cri) 40: (1979) 3 SCR 532 (IV) 22 (1980) 1 SCC 81: 1980 SCC (Cri) 23: (1979) 3 SCR 169(1) 71 (1980) 3 SCC 488 :1980 SCC (Cri) 777 :(1980) 2 SCR 557 72 (1980) 2 SCC 360: (1980) 2 SCR 913 73 (1980) 4 SCC 1 :(1980) 3 SCR 1338 74 (198 1) 1 SCC 608 : 1981 SCC (Cri) 212: (1981) 2 SCR 516 officer under any circumstance as well as a confession to a Magistrate or a third party while in police custody is totally inadmissible and that such a confession cannot be proved as against a person accused of any offence. 198. The learned Additional Solicitor General strains his every nerve to overthrow the above argument articulating that the constitutional validity of Section 15 is to be determined on the basis of the competence of the Parliament to vary the procedure which is just and fair in the facts and circumstances of the situation with which the

statute tends to grapple and not on the touchstone of the Evidence Act. This section, according to him, contains a significant safeguard by vesting the power of recording confession in superior police officer in order to prevent any misuse or abuse which safeguard has been approved by this Court in Gurbachan Singh v. State of Bombay75 (SCR at p. 743) wherein it has been held that a law which contains an extraordinary procedure can be made to meet the exceptional circumstances otherwise the purpose and object of the Act would be defeated. 199. Coming to the intrinsic value to be attached to the evidence, it has been said by Additional Solicitor General that this section does not lay down the probative value of the confession nor does it indicate that conviction can be based on confession alone made before a police officer. He continues to state that the probative value of the confessions is left to the court to be determined in each case on its own facts and circumstances. Then he drew our attention to certain provisions in various statutes empowering the officers specified therein to secure or arrest the offenders and to record statements from them which statements are held to be admissible in evidence in criminal proceeding as against them by judicial pronouncements of the various High Courts and this Court. Those being (1) Section 12 of the Railway Protection Force Act, 1957; (2) Sections 8 and 9 of the Railway Property (Unlawful Possession) Act, 1966; (3) Section 108 of Customs Act, 1962; and (4) Section 40 of Foreign Exchange Regulation Act, 1973. 200. Now let us analyse Section 15 as amended by Act 43 of 1993 and examine the merit of the contentions of the respective parties with reference to certain relevant provisions of the Constitution, general procedural law and Evidence Act. 201. Section 15 of the Act, as amended reads as follows: "15. Certain confessions made to police officers to be taken into consideration.- (1) Notwithstanding anything contained in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under this Act or rules made thereunder:

75 1952 SCR 737 : AIR 1952 SC 221 : 1952 Cri LJ 1147

Provided that co-accused, abettor or

conspirator is charged and tried in the same case together with the accused. (2) The police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily." 202. In recording a confession by a police officer, the said police officer under Rule 15 of the Rules made under the Act has to observe some legal formalities and comply with certain conditions. If the confession is reduced into writing, then

under sub-rule (3) of Rule 15, the said confession should be signed by the person making the confession and the police officer who records the confession should append a certificate as required by the rule. As Rule 15 has to be read with Section 15 of the TADA Act, we feel that it would be necessary to reproduce the rule so that the legal formality to be observed may be properly understood. 203. Rule 15 of the Terrorist and Disruptive Activities (Prevention) Rules, 1987 is as follows: "15. Recording of confession made to police officers.- A confession made by a person before a police officer and recorded by such police officer under Section 15 of the Act shall invariably be recorded in the language in which such confession is made and if that is not practicable, in the language used by such police officer for official purposes or in the language of the Designated Court and it shall form part of the record. (2) The confession so recorded shall be shown, read or played back to the person concerned and if he does not understand the language in which it is recorded, it shall be interpreted to him in a language which he understands and he shall be at liberty to explain or add to his confession. (3) The confession shall, if it is in writing, be- (a) signed by the person who makes the confession; and (b) by the police officer who shall also certify under his own hand that such confession was taken in his presence an d recorded by him and that the record contains a full and true account of the confession made by the person and such police officer shall make a memorandum at the end of the confession to the following effect:- 'I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing and recorded by me and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him. Sd/-Police Officer' (4) Where the confession is recorded on any mechanical device, the memorandum referred to in sub-rule (3) insofar as it is applicable and a declaration made by the person making the confession that the said confession recorded on the mechanical device has been correctly recorded in his presence shall also be recorded in the mechanical device at the end of the confession. (5) Every confession recorded under the said Section 15 shall be sent forthwith to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate having jurisdiction over the area in which such confession has been recorded and such Magistrate shall forward the recorded confession so received to the Designated Court which may take cognizance of the offence." 204. Before proceeding further, we may point out that Section 21(1)(c) in respect of which some argument has been advanced is omitted along with Section 21(1)(d) by the Amendment Act 43 of 1993. 205. In our Constitution as well as procedural law and law of Evidence, there are certain guarantees protecting the right and liberty of a person in a criminal proceeding and safeguards in making use of any statement made by him. Article 20(3) of the Constitution declares that "No person accused of any offence shall be compelled to be a witness against himself'. 206. Article 20(3) of our Constitution embodies the principle of protection against compulsion of self- incrimination which is one of the fundamental canons of the British System of Criminal Jurisprudence and which has been adopted by

the American System and incorporated in the Federal Acts. The Fifth Amendment of the Constitution of the United States of America provides,"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising... nor shall be compelled in any criminal case to be a witness against himself..... 207. The above principle is recognised to a substantial extent in the criminal administration of justice in our country by incorporating various statutory provisions. One of the components of the guarantee contained in Article 20(3) of the Constitution is that it is a protection against compulsion resulting in the accused of any offence giving evidence against himself. There are a number of outstanding decisions of this Court in explaining the intendment of Article 20(3). We feel that it would suffice if mere reference is made to some of the judgments, those being: (1) M.P. Sharma v. Satish Chandra, District Magistrate, Delhi76, (2) Raja Narayanlal Bansilal v. Maneck Phiroz Mistry77, (3) State of Bombay v. Kathi Kalu Oghad78, and (4) Nandini Satpathy v. P.L. Dani79. 76 1954 SCR 1077 : AIR 1954 SC 300: 1954 Cri LJ 865 77 (1961) 1 SCR 417 : AIR 1961 SC 29: (1960) 30 Comp Cas 78 (1962) 3 SCR 10: AIR 1961 SC 180: (1961) 2 Cri LJ 856 79 (1978) 2 SCC 424: 1978 SCC (Cri) 236 208. Article 22(1) and (2) confer certain rights upon a person who has been arrested. Coming to the provisions of Code of Criminal Procedure, Section 161 empowers a police officer making an investigation to examine orally any person supposed to be acquainted with the facts and circumstances of the case and to reduce into writing any statement made to him in the course of such examination. Section 162 which speaks of the use of the statement so recorded, states that no statement recorded by a police officer, if reduced into writing, be signed by the person making it and that the statement shall not be used for any purpose save as provided in the Code and the provisions of the Evidence Act. The ban imposed by Section 162 applies to all the statements whether confessional or otherwise, made to a police officer by any person whether accused or not during the course of the investigation under Chapter XII of the Code. But the statement given by an accused can be used in the manner provided by Section 145 of the Evidence Act in case the accused examines himself as a witness for the defence by availing Section 315(1) of the Code corresponding to Section 342-A of the old Code and to give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial. 209. There is a clear embargo in making use of this statement of an accused given to a police officer under Section 25 of the Evidence Act, according to which, no confession made to a police officer shall be proved as against a person accused of any offence and under Section 26 according to which no confession made by any person whilst he is in custody of a police officer, unless it is made in the immediate presence of a Magistrate, shall be proved as against such person. The only exception is given under Section 27 which serves as a proviso to Section 26. Section 27 contemplates that only so much of information whether amounts to confession or not, as relates distinctly to the fact thereby discovered, in consequence of that information received from a person accused of any offence while in custody of the police can be proved as against the accused. 210. In the context of the matter under discussion,

two more provisions also may be referred to namely Sections 24 and 30 of the Evidence Act and Section 164 of the Code. 211. Section 24 of the Evidence Act makes a confession, caused to be made before any authority by an accused by any inducement, threat or promise, irrelevant in a criminal proceeding. Section 30 of the Evidence Act is to the effect that if a confession made by one or more persons, affecting himself and some others jointly tried for the same offence is proved, the court may take into consideration such confession as against such other persons as well as the maker of the confession. The explanation to the section reads that "offence" as used in this section includes the abetment of, or attempt to commit, the offence. 212. Section 164 of the Code speaks of recording of confessions and statements by Magistrates specified in that section by complying with the legal formalities and observing the statutory conditions including the appendage of a Certificate by the Magistrate recording the confession as contemplated under sub-sections (2) to (6) thereof. 213. Though in the old Code, there was a specific embargo on a police officer recording any statement or confession made to him in the course of an investigation embodied in the main sub-section (1) of Section 164 itself, in the present Code the legal bar is now brought by a separate proviso to subsection (1) of Section 164 which reads: "Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force." This is a new provision but conveys the same meaning as embodied in the main sub-section (1) of Section 164 of the old Code. 214. Thus, an accused or a person accused of any offence is protected by the constitutional provisions as well as the statutory provisions to the extent that no self-incriminating statement made by an accused to the police officer while he is in custody, could be used against such maker. The submission of the Additional Solicitor General that while a confession by an accused before a specified officer either under the Railway Protection Force Act or Railway Property (Unlawful Possession) Act or Customs Act or Foreign Exchange Regulation Act is made admissible, the special procedure prescribed under this Act making a confession of a person indicted under the TADA Act given to a police officer admissible cannot be questioned, is misnomer because all the officials empowered to record statements under those special Acts are not police officers as per the judicial pronouncements of this Court as well the High Courts which principle holds the field till date. See (1) State of U.P. v. Durga Prasad8O, (2) Balkishan A. Devidayal v. State of Maharashtra81, (3) Ramesh Chandra Mehta v. State of W. B. 82, (4) Poolpandi v. Superintendent, Central Excise83, (5) Directorate of Enforcement v. Deepak Mahajan43, and (6) Ekambaram v. State of T.N.84 We feel that it is not necessary to cite any more decisions and swell this judgment. 215. The above constitutional and statutory procedural guarantees and safeguards are in consonance with the expression, "according to procedure established by law" enshrined in Article 21 of the Constitution within which fold the principle of just and fair trial is read into. 216. The procedure contemplated by Article 21 is that the procedure must be "right, just and fair" and not arbitrary, fanciful or oppressive. In order that the procedure is right, just and fair, it should conform to the principle of natural justice, that is, "fair play

in action". 80 (1975) 3 SCC 210: 1974 SCC (Cri) 828: AIR 1974 SC 2136 81 (1980) 4 SCC 600: 1981 SCC (Cri) 62: AIR 1981 SC 379 82 Ramesh Chandra Mehta v. State of W.B., (1969) 2 SCR 46 : AIR 1970 SC 940: 1970 Cri LJ 863 83 (1992) 3 SCC 259: 1992 SCC (Cri) 620 43 (1994) 3 SCC 440: JT (1994) 1 SC 290 84 1972 MLW (Cri) 261 217. If the procedural law is oppressive and violates the principle of just and fair trial offending Article 21 of the Constitution and is discriminatory violating the equal protection of laws offending Article 14 of the Constitution, then Section 15 of TADA Act is to be struck down. Therefore, it has become inevitably essential to examine the classification of 'offenders' and 'offenses' so as to enable us in deciding whether Section 15 is violative of Articles 14 and 21 of the Constitution. 218. The principle of legislative classification is an accepted principle where under persons may be classified into groups and such groups may differently be treated if there is a reasonable basis for such difference or distinction. The rule of differentiation is that in enacting laws differentiating between different persons or things in different circumstances which government one set of persons or objects such laws may not necessarily be the same as those governing another set of persons or objects so that the question of unequal treatment does not really arise between persons governed by different conditions and different set of circumstances. 219. The limit of valid classification must not be arbitrary but scientific and rational. It must always rest upon some real and substantial distinction bearing reasonable and just relation to the needs in respect of which the classification is made. 220. Coming to the distinction made in TADA Act grouping the terrorists and disruptionists as a separate class of offenders from ordinary criminals under the normal laws and the classification of the offences under TADA Act as aggravated form of crimes distinguishable from the ordinary crimes have to be tested and determined as to whether this distinction and classification are reasonable and valid within the term of Article 14 of the Constitution. In order to consider the question as to the reasonableness of the distinction and classification, it is necessary to take into account the objective for such distinction and classification which of course need not be made with mathematical precision. Suffice, if there is little or no difference between the persons and the things which have been grouped together and those left out of the groups, the classification cannot be said to be a reasonable one. In making the classification, various factors have to be taken into consideration and examined as to whether such a distinction or classification justifies the different treatment and whether they subserve the object sought to be achieved. 221. There is a catena of outstanding judgments on the above principle of law and it is not necessary to refer to all those decisions except to make mention of a few, namely, (1) Chiranjit Lal Chowdhari v. Union of India85, (2) Ram Krishna Dalmia v. Justice S.R. Tendolkar6, and (3) Special Courts Bill, In re, 197854. 85 1950 SCR 869: AIR 1951 SC 41 86 1959 SCR 279: AIR 1958 SC 538 54 (1979) 1 SCC 380: (1979) 2 SCR 476 222. As pointed out supra, the persons who are to be tried for offences specified under the provisions of TADA Act are a distinct class of persons and the procedure prescribed for trying them for the aggravated and incensed nature of offences are under different classification distinguishable from the ordinary criminals and procedure.

This distinction and classification of grouping of the accused and the offences to be tried under TADA are to achieve the meaningful purpose and object of the Act as reflected from the preamble as well as the 'Statement of Objects and Reasons' about which we have elaborately dealt with in the preceding part of this judgment. 223. We have already disposed of the question with regard to the competence of the Parliament and have held in the earlier part of this judgment that the Parliament has got the legislative competence to enact this law namely the TADA Act and the Special Courts Act of 1984. When the validity of this section is scrutinised in the above background, we can safely hold that the procedure prescribed under this Act cannot be said to be unjust, unfair and oppressive, offending Articles 14 and 21 of the Constitution. 224. The learned Additional Solicitor General by giving a comparative chart of the provisions of TADA and of the Northern Ireland Emergency Provision Act of 1978 wherein there are various provisions akin to some of the provisions of TADA including the mode of trial of scheduled offences specified thereunder in a more stringent manner and the onus of proof in relation to offences corresponding to the provisions of TADA Acts and relating to presumption as to offences under Section 3 and so on, contended that the procedure prescribed under this Act for trying the commission of heinous crimes cannot be said to be discriminatory. He also made reference to the Prevention of Terrorism (Temporary Provision) Act, 1984 (UK) and some other Acts enacted in India which are now repealed prescribing special procedure and providing severe punishments. 225. The learned Additional Solicitor General in continuation of his arguments stated that the procedure under the normal penal laws had become grossly inadequate and ineffective to try the distinct group of offenders, i.e., terrorists and disruptionists for the classified aggravated nature of offenses and that his submission is fortified by the statistics with regard to the terrorist crimes in the State of Punjab from 1984 to 1992, annexed in the compilation of his written submission before the court and the debates and discussion made in the Parliament at the time of introduction of the Bill (TADA). He placed reliance on (1) N.B. Khare (Dr) v. State of Delhi87; (2) Kathi Raning Rawat v. State of Saurashtra88 (SCR at pp. 447-450); (3) Kedar Nath Bajoria v. State of W.B.89 (SCR at pp. 38-43); (4) State of Bombay v. R.M.D. Chamarbaugwala9O (SCR at pp. 927) which decisions 87 1950 SCR 519 AIR 1950 SC 211 1951 Cri LJ 550 88 1952 SCR 435 AIR 1952 SC 123 1952 Cri LJ 805 89 1954 SCR 30: AIR 1953 SC 404: 1953 Cri LJ 1621 90 1957 SCR 874: AIR 1957 SC 699 have held that stringency and harshness of provisions are not for courts to determine; (5) Pannalal Binjraj v. Union of India91 wherein it has been said that mere possibility of abuse is not a valid ground to challenge the validity of a statute; (6) Talib Haji Hussain v. Madhukar P. Mondkar92 (SCR at P. 1232) wherein it has been ruled that fair trial has two objects in view, namely, it must be fair to the accused and also to the prosecution; (7) Kangsari Haldar v. State of W.B.93 (SCR at pp. 651, 654, 656); and (8) A.K. Roy v. Union of India4O wherein it has been held that liberty of individual has to be subordinated to the good of the people. 226. He on the basis of the above dictum laid down in those cited decisions, concluded that the reasonable and scientific classification of the offenses and offenders under TADA Acts cannot be

said to be offending either Article 14 or Article 21 and as such the contention of the learned counsel attacking this provision should be thrown overboard. 227. Mr Tulsi, the other learned Additional Solicitor General and the other counsel supporting the validity of this provision made a common submission that the contention of the counsel attacking the legality of this provision tantamounts to an attempt to forcibly drag the substantive law through the coiled barbed wires of procedural law thereby making the substantial law bleeding and becoming dysfunctional and as such that contention should be discarded. 228. In the light of the 'ratio decidendi' regarding the legislative competence to enact a law prescribing a special procedure departing from the procedure for trying offenders in the normal circumstances for achieving the object of the Act and the classification of 'offences' and 'offenders' to be tried under separate procedure for the offences specified in the present case under the TADA Act we shall exam ine the rival contentions of the parties and determine whether the procedure prescribed under this Act violates Articles 14 and 21 of the Constitution. 229. There is a line of decisions in support of the proposition that the Legislature is free to make classification of 'offences' and 'offenders' in the application of a statute. We would like to refer a few of them. 230. In Asbury Hospital v. Cass County94 it has been stated: (L Ed p. 13) "The Legislature is free to make classifications in the application of a statute which are relevant to the legislative purpose. The ultimate test of validity is not whether the classes differ but whether the differences between them are pertinent to the subject with respect to which the classification is made." 91 1957 SCR 233 : AIR 1957 SC 397 :(1957) 31 ITR 565 92 1958 SCR 1226: AIR 1958 SC 376: 1958 Cri LJ 701 93 (1960) 2 SCR 646: AIR 1960 SC 457 :1960 Cri LJ 654 40 (1982) 1 SCC 271: 1982 SCC (Cri), 152: (1982) 2 SCR 272 94 90 L Ed 6: 326 US 207 (1945) 231. In Goesaert v. Cleary95 a Michigan statute forbidding women being licensed as bartenders and at the same time making an exception in favour of the wives and daughters of the owners of liquor establishments was held by a majority of the court not to violate the equal protection clause of the Fourteenth Amendment. 232. Likewise, a city regulation which prohibited advertising vehicles in city streets, but permitted the putting of business notices upon business delivery vehicles, so long as they were used merely or mainly for advertising was held not to violate the Fourteenth Amendment in Railway Express Agency v. New York96. The exception was upheld because the classification had relation to the purpose for which it was made and Douglas, J. remarked that it was by practical considerations based on experience rather than by theoretical exigencies that the question of equal protection should be answered. 233. Of course, the Supreme Court of the United States had struck down certain exemption provisions on the ground that the classification was arbitrary and illusory and did not rest on any ground having a fair and substantial relation to the object of the legislation. 234. Looking back on the meaning and scope of Article 14 of the Constitution of India, this Court has rendered several judgments about the principle and policy of equality enshrined therein. 235. Fazl Ali, J. in State of Bombay v. F.N. Balsara97 (AIR at p. 326) approving the scope of Article 14 discussed in the case of Chiranjit Lal v. Union of India85 has laid down

seven propositions as follows: “1. The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds. 2. The presumption may be rebutted in certain cases by showing that on the face of the statute, there is no classification at all and no difference peculiar to any individual or class and not applicable to any other individual or class, and yet the law hits only a particular individual or class. 3. The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons often require separate, treatment. 4. The principle does not take away from the State the power of classifying persons for legitimate purposes. 5. Every classification is in some degree likely to produce some inequality, and mere production of inequality is not enough. 95 93 L Ed 163 335 US 464 (1948) 96 93 L Ed 533 336 US 106 (1948) 97 AIR 1951 SC 318: 1951 SCR 682 : 52 Cri LJ 1361 85 1950 SCR 869: AIR 1951 SC 41 6. If a law deals equally with members of a well defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. 7. While reasonable classification is permissible, such classification must be base d upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained, and the classification cannot be made arbitrarily and without any substantial basis.” See also Constitutional Law by Prof Willis, 1st Edn., p. 578 236. Keeping the above proposition, we have to decide whether the provisions of Section 15 of the 1987 Act (TADA) contravene Article 14. True, if the classification is shown to be arbitrary and unreasonable and without any substantial basis, the law would be contrary to the equal protection of laws by Article 14. 237. Reliance was strongly placed on the decision of this Court in State of W.B. v. Anwar Ali Sarkar5O by all the counsel attacking this provision. In that decision, the validity of the West Bengal Special Courts Act was impugned. The object of that Act as declared in the preamble was “to provide for the speedier trial of certain offences”. Section 3 of the Act empowered the State Government by notification in the Official Gazette to constitute special courts, and Section 5 provided that: “A special Court shall try such offences or classes of offences or cases or classes of cases, as the State Government may by general or special order in writing, direct.” 238. A procedure different in several respects from that laid down by the Code of Criminal Procedure for trial was laid down by the Act. It was contended that Section 5 was unconstitutional inasmuch as it contravened Article 14 of the Constitution. It was held by a majority of the Court, the learned Chief Justice dissenting, that Section 5 was void as it contravened Article 14. 239. Fazl Ali, J. in his separate judgment while disposing the contention that Section 5 was suffering from unconstitutionality observed: “There is nothing sacred or sacrosanct about the test of reasonable classification, but it has undoubtedly proved to be a useful basis for meeting attacks on laws and official acts on the ground of infringement of the equality principle. In my opinion, it will be dangerous to

introduce a subjective test when the article itself lays down a clear and objective test. that part of it with which alone we are concerned in this appeal, does offend against Article 14 of the Constitution and is therefore unconstitutional and void." 240. Mahajan, J. agreeing with the judgment of Mukherjea, J. expressed his view thus: 50 1952 SCR 284: AIR 1952 SC 75: 1952 Cri LJ 5 10 "The present statute suggests no reasonable basis or classification, either in respect of offences or in respect of cases. It has laid down no yardstick or measure for the grouping either of persons or of cases or of offences by which measure these groups could be distinguished from those who are outside the purview of the Special Act. The Act has left this matter entirely to the unregulated discretion of the provincial Government. . . . Even if it be said that the statute on the face of it is not discretionary, it is so in its effect and operation inasmuch as it vests in the executive Government unregulated official discretion and therefore has to be adjudged unconstitutional." 241. Mukherjea, J. in his separate judgment has said: "But when the statute itself makes a discrimination without any proper or reasonable basis, the statute would be invalidated for being in conflict with the equal protection clause, and the question as to how it is actually worked out may not necessarily be a material fact for consideration. As I have said already, in the present case the discrimination arises on the terms of the Act itself. The fact that it gives unrestrained power to the State Government to select in any way it likes the particular cases or offences which should go to a Special Tribunal and withdraw in such cases the protection which the accused normally enjoy under the criminal law of the country, is on the face of it discriminatory." 242. The 'ratio decidendi' of this decision was that Section 5 did not classify or lay down any basis for classification of the cases which may be directed to be tried by the Special Court, but left it to the uncontrolled discretion of the State Government to direct any cases which it liked to be tried by the Special Court. 243. The above decision, in our view, cannot be availed of for striking down Section 15 of TADA Act because the classification of 'offenders' and ,offences' to be tried by the Designated Court under the TADA Act or by the Special Courts under the Act of 1984, are not left to the arbitrary and uncontrolled discretion of the Central Government but the Act itself has made a delineated classification of the offenders as terrorists and disruptionists in the TADA Act and the terrorists under the Special Courts Act, 1984 as well as the classification of offences under both the Acts. 244. Therefore, the complaint of incorporation of invidious discrimination in the Act has to be turned down. All that the court has to see is whether the power is used for any extraneous purpose i.e. to say not for achieving the object for which the power is granted and whether the Act (TADA) has been made on grounds which are not germane or relevant to the policy and purpose of this Act and whether it is discriminatory so as to offend Article 14. In our considered opinion, the classifications have rational nexus with the object sought to be achieved by the TADA Acts and Special Courts Act and consequently there is no violation of Article 14 of the Constitution. 245. The next question is whether the procedure in recording the confession is just and fair. 246. The counsel were severely critical of the mode and method of obtaining a confession from an accused person. According to them, the oppressive

behavior and excessive naked abuse and misuse of power by the police in extorting confession by compelling the accused to speak under the untold pain by using third degree methods with diabolical barbarity in utter violation of human rights, cannot be lost sight of or consigned to oblivion and the courts would not be justified by showing a volte-face and turning a blind eye to the above reality and drawing a legal presumption that the confession might have been obtained by a police officer not lower in rank than a Superintendent of Police in terms of Section 15(1) only in accordance with the legally permissible procedure. They castigated the conduct of the police officers in whisking away the accused either on arrest or on obtaining custody from the court to an unknown destination or unannounced premises for custodial interrogation in order to get compulsory self-incriminating statement as a source of proof to be produced before a court of law. 247. This Court on several occasions has awarded exemplary compensation to the victims at the hands of the police officials which can be testified by a series of pronouncements of this Court. 248. As we have repeatedly pointed out supra, if it is shown to the court that a confession has been extorted by illegal means such as inducement, threat or promise as contemplated under Section 24 of the Evidence Act the confession thus obtained from an accused person would become irrelevant and cannot be used in a criminal proceeding as against the maker. It may be recalled that Sections 330 and 331 of the Indian Penal Code provide punishment to one who voluntarily causes hurt or grievous hurt as the case may be to extort the confession or any information which may lead to the detection of an offence or misconduct. 249. Thus the Constitution as well as the statutory procedural law and law of Evidence condemn the conduct of any official in extorting a confession or information under compulsion by using any third degree methods. 250. In this connection, we would like to reproduce the view of the National Police Commission (Fourth Report June 1980) with regard to the admissibility of confession made to a police officer as evidence, which is to the following effect: "27. 33 ... This total ban on the entry of a confessional statement recorded by a police officer into the area of judicial proceedings has placed the police at a great disadvantage as compared to several other enforcement agencies who also handle investigational work leading to prosecution in court. Thi s provision in' the Evidence Act which was enacted in 1872 bears relevance to the then situation in which the police were practically the only enforcement agency available to the Government and they had acquired notoriety for the adoption of several gross malpractice involving torture and other pressure tactics of an extreme nature to obtain confessions from accused persons. More than 100 years have rolled by since then. We are aware that the police are still not totally free from adopting questionable practices while interrogating accused persons, but one cannot possibly deny that the greater vigilance now exercised by the public and the press, growing awareness of citizens about their individual rights under the law and increasing earnestness and commitment of the senior levels of command in the police structure to put down such malpractice have all tended to reduce the prevalence of such practices in the police to a lesser degree than before.... After a careful consideration of all aspects of this much debated question we feel that the stage has arrived now for us to take

a small positive step towards removing this stigma on the police and make it possible for a confession made before a police officer to enter the area of judicial proceedings, if not as substantive evidence, at least as a document that could be taken into consideration by the court to aid it in inquiry or trial in the same manner as now provided in regard to case diaries under Section 172(2) CrPC and the confession of a co-accused under Section 30 of the Evidence Act. We are also of the view that this approach to the evidentiary admissibility and value of a confession made before a police officer should apply not only to the police but to all persons in authority before whom a confession may be made. If the Evidence Act reflects this approach to confessions as a class, it would largely remove the present feeling of the police that they have been unjustly discriminated against in law." 251. Whatever may be said for and against the submission with regard to the admissibility of a confession made before a police officer, we cannot avoid but saying that we with the years of experience both at the Bar and on the Bench have frequently dealt with cases of atrocity and brutality practiced by some overzealous police officers resorting to inhuman, barbaric, archaic and drastic method of treating the suspects in their anxiety to collect evidence by hook or by crook and wrenching a decision in their favour. We remorsefully like to state that on few occasions even custodial deaths caused during interrogation are brought to our notice. We are very much distressed and deeply concerned about the oppressive behavior and the most degrading and despicable practice adopted by some of the police officers even though no general and sweeping condemnation can be made. 252. In this connection, we feel it would be appropriate to extract the views expressed by National Judicial Commission (Fourth Report) discountenancing the conduct of police in practicing the third degree methods: "Nothing is so dehumanising as the conduct of police in practicing torture of any kind on a person in their custody. Police image in the estimate of the public has badly suffered by the prevalence of this practice in varying degrees over several years. We note with concern the inclination of even some of the supervisory ranks to countenance the practice in a bid to achieve quick results by short-cut methods. Even well meaning officers are sometimes drawn towards third degree methods because of the expectation of some complainants in individual cases that the suspects named by them should be questioned by the police with some kind of pressure..... 253. Though we at the first impression thought of sharing the view of the learned counsel that it would be dangerous to make a statement given to a police officer admissible (notwithstanding the legal position making the confession of an accused before the police admissible in some advanced countries like United Kingdom, United States of America, Australia and Canada etc.) having regard to the legal competence of the legislature to make the law prescribing a different mode of proof, the meaningful purpose and object of the legislation, the gravity of terrorism unleashed by the terrorists and disruptionists endangering not only the sovereignty and integrity of the country but also the normal life of the citizens, and the reluctance of even the victims as well as the public in coming forward, at the risk of their life, to give evidence hold that the impugned section cannot be said to be suffering from any vice of unconstitutionality. 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. 254. In view of the legal position vesting authority on higher police officer to record the confession hitherto enjoyed by the judicial officer in the normal procedure, we state that there should be no breach of procedure and the accepted norms of recording the confession which should reflect only the true and voluntary statement and there should be no room for hyper criticism that the authority has obtained an invented confession as a source of proof irrespective of the truth and creditability as it could be ironically put that when a Judge remarked,"Am I not to hear the truth", the prosecution giving a startling answer,"No, Your Lordship is to hear only the evidence". 255. As the Act now stands after its amendment consequent upon the deletion of Section 21(1)(c), a confession made by a person before a police officer can be made admissible in the trial of such person not only as against the person but also against the co-accused, abettor or conspirator provided that the co-accused, abettor or conspirator is charged and tried in the same case together with the accused, namely, the maker of the confession. The present position is in conformity with Section 30 of the Evidence Act. 256. Under Section 21(1)(d), in a prosecution for an offence under subsection (1) of Section 3, if it is. proved that the accused had made a confession of the offence to any person other than a police officer, the Designated Court could raise a presumption that the accused had committed such offence unless the contrary is proved. By Act 43 of 1993, clause (d) of Section 21(1) has now been omitted. The resultant position is that no presumption can be raised by the Designated Court against the accused as to offenses under Section 3 on the basis of Section 21. 257. As per Section 15(1), a confession can either be reduced into writing or recorded on any mechanical device like cassettes, tapes or sound tracks from which sounds or images can be reproduced. As rightly pointed out by the learned counsel since the recording of evidence on mechanical device can be tampered, tailored, tinkered, edited and erased etc., we strongly feel that there must be some severe safeguards which should be scrupulously observed while recording a confession under Section 15(1) so that the possibility of extorting any false confession can be prevented to some appreciable extent. 258. Sub-section (2) of Section 15 enjoins a statutory obligation on the part of the police officer recording the confession to explain to the person making it that he is not bound to make a confession and to give a statutory warning that if he does so it may be used as evidence against him. 259. Rule 15 of the TADA Rules imposes certain conditions on the police officer with regard to the mode of recording the confession and requires the police officer to make a memorandum at the end of the confession to the effect that he has explained to the maker that he was not bound to make the confession and that the confession, if made by him, would be used as against him and that he recorded the confession only on being satisfied that it was voluntarily made. Rule 15(5) requires that every confession recorded under Section 15 should be sent forthwith either to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate having jurisdiction over the area in which such confession has been recorded and the Magistrate

should forthwith forward the recorded confession received by him to the Designated Court taking cognizance of the offence. 260. For the foregoing discussion, we hold that Section 15 is not liable to be struck down since that section does not offend either Article 14 or Article 21 of the Constitution. 261. Notwithstanding our final conclusion made in relation to the intendment of Section 15, we would hasten to add that the recording of a confession by a Magistrate under Section 164 of the Code is not excluded by any exclusionary provision in the TADA Act, contrary to the Code but on the other hand the police officer investigating the case under the TADA Act can get the confession or statement of a person indicted with any offence under any of the provisions of the TADA Act recorded by any Metropolitan Magistrate, Judicial Magistrate, Executive Magistrate or Special Executive Magistrate of whom the two latter Magistrates are included in Section 164(1) by sub-section (3) of Section 20 of the TADA Act and empowered to record confession. 262. The net result is that any confession or statement of a person under the TADA Act can be recorded either by a police officer not lower in rank than of a Superintendent of Police, in exercise of the powers conferred under Section 15 or by a Metropolitan Magistrate or Judicial Magistrate or Executive Magistrate or Special Executive Magistrate who are empowered to record any confession under Section 164(1) in view of sub-section (3) of Section 20 of the TADA Act. As we will be elaborately dealing with Section 20(3) in the later part of this judgment, we do not like to go into detail any more. 263. However, we would like to lay down following guidelines so as 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 a esthetic principles and fundamental fairness : (1) The confession should be recorded in a free atmosphere in the same language in which the person is examined and as narrated by him; (2) The person from whom a confession has been recorded under Section 15(1) of the Act, should be produced before the Chief Metropolitan Magistrate or the Chief Judicial Magistrate to whom the confession is required to be sent under Rule 15(5) along with the original statement of confession, written or recorded on mechanical device without unreasonable delay; (3) The Chief Metropolitan Magistrate or the Chief Judicial Magistrate should scrupulously record the statement, if any, made by the accused so produced and get his signature and in case of any complaint of torture, the person should be directed to be produced for medical examination before a Medical Officer not lower in rank than of an Assistant Civil Surgeon; (4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no police officer below the rank of an Assistant Commissioner of Police in the Metropolitan cities and elsewhere of a Deputy Superintendent of Police or a police officer of equivalent rank, should investigate any offence punishable under this Act of 1987. This is necessary in view of the drastic provisions of this Act. More so when the Prevention of Corruption Act, 1988 under Section 17 and the Immoral Traffic Prevention Act, 1956 under Section 13, authorise only a police officer of a specified rank to investigate the offenses under those specified Acts. (5) The police officer if he is seeking the custody of any person for pre-indictment or

pretrial interrogation from the judicial custody, must file an affidavit sworn by him explaining the reason not only for such custody but also for the delay, if any, in seeking the police custody; (6) In case, the person, taken for interrogation, on receipt of the statutory warning that he is not bound to make a confession and that if he does so, the said statement may be used against him as evidence, asserts his right to silence, the police officer must respect his right of assertion without making any compulsion to give a statement of disclosure; The Central Government may take note of these guidelines and incorporate them by appropriate amendments in the Act and the Rules. 264. Though it is entirely for the court trying the offence to decide the question of admissibility or reliability of a confession in its judicial wisdom strictly adhering to the law, it must, while so deciding the question should satisfy itself that there was no trap, no track and no importune seeking of evidence during the custodial interrogation and all the conditions required are fulfilled. 265. In order to ensure higher level of scrutiny and applicability of TADA Act, there must be a screening Committee or a Review Committee constituted by the Central Government consisting of the Home Secretary, Law Secretary and other secretaries concerned of the various Departments to review all the TADA cases instituted by the Central Government as well as to have a quarterly administrative review, reviewing the States' action in the application of the TADA provisions in the respective. States, and the incidental questions arising in relation thereto. Similarly, there must be a Screening or Review Committee at the State level constituted by the respective States consisting of the Chief Secretary, Home Secretary, Law Secretary, Director General of Police (Law and Order) and other officials as the respective Government may think it fit, to review the action of the enforcing authorities under the Act and screen the cases registered under the provisions of the Act and decide the further course of action in every matter and so on. Section 16 of 1987 Act 266. Much argument was advanced stating that Section 16(1) is violative of the provisions of Article 14 of the Constitution on the ground that this provision destroys the guarantee of an open trial and the proviso thereto transfers to the Public Prosecutor the rights of the accused as well as of the public in demanding of the cases in (sic an) openness in conformity with fair trial to the discretion of the Public Prosecutor. 267. The learned Additional Solicitor General made a detailed argument opposing an attack made against the validity of this provision and relied upon the observation made in A.K. Roy case4O to the effect that : (SCC p. 342, para 106)"The right to a public trial is not one of the guaranteed rights under our Constitution as it is under the 6th Amendment of the American Constitution which secures to persons charged with crimes a public, as well as speedy, trial." 268. While disposing a similar question, the Full Bench of the Punjab & Haryana High Court in Bimal Kaur58 struck down Section 16(1) as offending Article 14 of the Constitution holding that Section 16(1) leaves no discretion to the court in the matter of deciding as to whether the court is to be held in public or in camera and also does not provide any guideline to instruct the Public Prosecutor as to in what cases he should demand open trial. 40 (1982) 1 SCC 271: 1982 SCC (Cri) 152: (1982) 2 SCR 272 58 AIR 1988 P&H 95 : (1988) 93 Punj LR 189: 1988 Cri LJ 269. No

doubt, the trials are traditionally open which is an indispensable attribute of the criminal justice. This characteristic flowed not merely from the public interest in seeing fairness and proper conduct in the administration of criminal trials, but, more important, the "therapeutic value" to the public of seeing its criminal laws in operation, purging the society of the outrage felt with the commission of many crimes, convincingly demonstrated why the tradition developed and is maintained. This is the accepted practice of guaranteeing a public trial to an accused as having its roots in the English Common Law heritage. But, however, though it is an indispensable attribute of the criminal justice, in exceptional circumstances there cannot be any legal ban in having the trial in camera. Though the criminal justice prevailing in our country recognises and accepts the practice of only open trial, there is an exception to such trial as contemplated under Section 237(2) of the Code of Criminal Procedure falling under Chapter XVIII with caption "Trial before a Court of Session" which provides an exemption to the general practice. The relevant sub-section reads : "237. (2) Every trial under this section shall be held in camera if either party thereto so desires or if the Court thinks fit so to do." 270. Under the "General provisions as to enquiries and trials" falling under Chapter XXIV there is a specific provision, namely, Section 327 with a caption "Court to be open" according to which the inquiry and trial of any offence should be held in an open court, to which general public may have access. However, under the proviso the discretion is given to the presiding Judge or Magistrate to regulate the public generally, or any person in particular in having access to, or be or remain in, the room or building used by the court. An exemption is given for the open court trial under Section 327(2) which is as follows : "Notwithstanding anything contained in sub- section (1) the inquiry into and trial of rape or an offence under Section 376, Section 376-A, Section 376-B, Section 376-C or Section 376-D of the Indian Penal Code (45 of 1860) shall be conducted in camera: Provided that the presiding judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the court." 271. We feel that no detailed discussion against the challenge of Section 16(1) is required since a new sub- section is substituted to the original Section 16(1) of the principal Act by. the Amendment Act 43 of 1993. The new sub-section reads thus : "Notwithstanding anything contained in the Code, the proceedings under this Act may be held in camera if the Designated Court so desires." 272. By this new substituted sub-section now the discretion is given to the Designated Court either to hold or not to hold the proceedings in camera. 273. It is the further contention of the counsel that the remaining sub-sections of Section 16, save sub-section (1) of that section empower a court to keep back from the defence the names and addresses of the witnesses without which the accused cannot prepare his defence or successfully defend himself at the trial. The object of the cross- examination, according to them, in such circumstances, becomes futile and impotent. In continuation, it has been urged that Section 16(2) and (3) of Act 1987 empower the Designated Court to take measures for keeping the identity and address of witnesses secret and to issue directions for securing that their identity is not disclosed and that these provisions turn a

trial under the provisions of TADA into a farce. 274. Mr Tarkunde states that it is true that in some cases the safety of witnesses requires the non-disclosure of the identity of the witnesses, but at the same time the cross- examination of witnesses is liable to be largely ineffective if their identity is not known to the accused and his counsel. He suggests that a proper course must be that when the Designated Court finds that the identity of witnesses cannot safely be disclosed, the trial should be dropped and the accused may, if the authority so decides, be detained under the preventive detention law. 275. With reference to the arguments relating to sub-section (2) of Section 16, it has been submitted by the learned Additional Solicitor General that the Legislature has merely regulated the right of fair trial and the right of accused. to effectively defend himself keeping in view the requirements of the situation prevailing in terrorists affected areas where the witnesses are living in a reign of terror and are unwilling to depose against the terrorists in courts for fear of retribution or reprisal. Stating that the right of cross-examination is neither absolute nor a constitutional right, the learned Additional Solicitor General placed reliance on (1) Gurbachan Singh v. State of Bombay7 5 (SCR at p. 743), (2) Hira Nath Mishra v. Principal, Rajendra Medical College, Ranchi98, (3) A.K. Roy4O, (4) Russell v. Duke of Norfolk99, and (5) Byrne v. Kinematograph Renters Society Ltd. 100 According to him, the person accused should know; firstly the nature of accusation made, secondly he should be given an opportunity to state his case and thirdly, that the tribunal should act in good faith; beyond that there is nothing more. 276. Before we make a discussion on the intendment of Section 16(2) and (3), we would like to make reference to the decision in Bimal Kaur58 wherein an identical question with regard to the identity of the witnesses has been examined by the Full Bench of the Punjab and Haryana High Court and was rejected holding that Section 16(2) cannot be considered to contain a procedure that can be held to be unreasonable, unjust or unfair. But 75 1952 SCR 737: AIR 1952 SC 221: 1952 Cri LJ 1147 98 (1973) 1 SCC 805 40 (1982) 1 SCC 271: 1982 SCC (Cri) 152: (1982) 2 SCR 272 99 (1949) 1 All ER 109 100 (1958) 2 All ER 579: (1958) 1 WLR 762 58 AIR 1988 P&H 95: (1988) 93 Punj LR 189: 1988 Cri LJ 169 notwithstanding the conclusion, the court has observed that the identity of the witnesses should be disclosed well before the start of the trial. 277. Under the Code of Criminal Procedure, whether it is a trial before a Court of Session or a trial or warrant cases by Magistrates there are specific provisions prescribing the mode of recording evidence with the right of cross-examination of any witness by the accused as contemplated under Sections 244 as well as Sections 273, 275 and 276 of the Code. Both under the sessions trial and trial of warrant cases, the accused is given a discretionary right of deferring the cross examination of any witness or recalling any witness for further cross-examination [vide Sections 231(2), proviso to Section 242 sub-section (3)]. 278. Section 137 of the Evidence Act defines what cross- examination means and Sections 139 and 145 speak of the mode of cross-examination with reference to the documents as well as oral evidence. It is the jurisprudence of law that cross-examination is an acid-test of the truthfulness of the statement made by a witness on oath in examination-in-chief, the objects of which are : (1) to

destroy or weaken the evidentiary value of the witness of his adversary; (2) to elicit facts in favour of the cross- examining lawyer's client from the mouth of the witness of the adversary party; (3) to show that the witness is unworthy of belief by impeaching the credit of the said witness; and the questions to be addressed in the course of cross- examination are to test his veracity; to discover who he is and what is his position in life; and to shake his credit by injuring his character. 279. The identity of the witness is necessary in the normal trial of cases to achieve the above objects and the right of confrontation is one of the fundamental guarantees so that he could guard himself from being victimised by any false and invented evidence that may be tendered by the adversary party. 280. Under the provisions of this Act, the right of cross- examination is not taken away but the identity, and addresses of the witnesses are permitted to be withheld. The submission of the counsel attacking sub-sections (2) and (3) of Section 16 is that the withholding or the issuance of any direction not to disclose the identity, names and addresses of the witnesses prevents the accused from having a fair trial to which right he is otherwise legitimately entitled to. As we have already pointed out that in the normal course, this difficulty does not arise. In fact when the copies of the documents on which the prosecution proposes to rely upon are furnished to the accused with a memo of evidence under Section 173 of the Code, he is informed of the names and addresses of the witnesses. 281. Notwithstanding the provisions of the Evidence Act and the procedure prescribed under the Code, there is no imposition of constitutional or statutory constraint against keeping the identity and address of any witness secret if some extraordinary circumstances or imperative situations warrant such non-disclosure of identity and address of the witnesses. 282. There are provisions in some local laws e.g. Section 56 of Bombay Police Act, 1951 the constitutional validity of which has been approved as well as observations of this court in various decisions touching the question under consideration. 283. The Constitution Bench of this Court while examining the constitutional validity of Section 27(1) of Bombay Police Act, 1902 (which provision is akin to Section 56 of Bombay Police Act, 1951) in Gurbachan Singh v. State of Bombay75 gave its finding with regard to the non-disclosure of the identity and address of the witnesses who deposed against him and on whose evidence the proceedings for externment were started, thus : (SCR pp. 743 and 744) "In our opinion this by itself would not make the procedure unreasonable having regard to the avowed intention of the legislature in making the enactment. The law is certainly an extraordinary one and has been made only to meet those exceptional cases where no witnesses for fear of violence to their person or property are willing to depose publicly against certain bad characters whose presence in certain areas constitutes a menace to the safety of the public residing therein. This object would be wholly defeated if a right to confront or cross-examine these witnesses was given to the suspect. down under the ordinary law has been provided for a particular class of persons against whom proceedings could be taken under Section 27(1) of the City of Bombay Police Act, but the discrimination if any is based upon a reasonable classification which is within the competency of the legislature to make. Having regard to the objective which the legislation has

in view and the policy underlying it, a departure from the ordinary procedure can certainly be justified as the best means of giving effect to the object of the legislature." 284. In Hira Nath Mishra v. Principal, Rajendra Medical College, Ranchi98 a complaint was made by some girl students residing in the girls hostel of the College, alleging that the appellants with some others in a late night had entered into the compound of the girls hostel and walked without clothes on them. In respect of this allegation, an Enquiry Committee was constituted and that Committee recorded the statement of some of the girl students but not in presence of the appellants and finally was of the view that the students deserved deterrent punishment and recommended expulsion from the hostel. The appellants-the students questioned the order on many grounds, the chief contention of which was that the rules of natural justice had not been followed before the order was passed since the inquiry had been held behind their back; the witnesses who tendered evidence against them were not examined in their presence and there was no opportunity to 75 1952 SCR 737 : AIR 1932 SC 221 :1952 Cri LJ 1147 98 (1973) 1 SCC 805 cross-examine the witnesses with a view to test their veracity. Rejecting this contention, this Court held thus : (SCC pp. 809, 810, paras 12, 13) "The very reasons for which the girls were not examined in the presence of the appellants, prevailed on the authorities not to give a copy of the report to them. It would have bee n unwise to do so. ... Rules of natural justice cannot remain the same applying to all conditions. We know of statutes in India like the Goonda Acts which permit evidence being collected behind the back of the goonda and the goonda being merely asked to represent against the main charges arising out of the evidence collected. Care is taken to see that the witnesses who gave statements would not be identified. In such cases there is no question of the witnesses being called and the goonda being given an opportunity to cross-examine the witnesses. The reason is obvious. No witness will come forward to give evidence in the presence of the goonda. However unsavory the procedure may appear to a judicial mind, these are facts of life which are to be faced." 285. In this connection, the observation made by Chandrachud, C.J. speaking for the Constitution Bench in A. K. Roy4O may be recalled, which is as follows : (SCC p. 340, paras 102, 103) "Whatever it is, Parliament has not made any provision in the National Security Act, under which the detenu could claim the right of cross-examination and the matter must rest there. We are therefore of the opinion that, in the proceedings before the Advisory Board, the detenu has no right to cross-examine either the persons on the basis of whose statement the order of detention is made or the detaining authority." 286. Under Section 16(2) of the 1987 Act, the Designated Court is given only a discretionary authority to keep the identity and address of any witness secret on the following three contingencies : (1) On an application made by a witness in any proceedings before it; or (2) on an application made by the Public Prosecutor in relation to such witness; or (3) on its own motion. 287. Sub-section (3) classifies only the measures to be taken by the Designated Court while exercising its discretion under sub-section (2). If neither the witness nor the Public Prosecutor has made an application in that behalf nor the court has taken any decision of its own then the identity and addresses of the

witnesses have to be famished to the accused. The measures are to be taken by the Designated Court under any one of the above contingencies so that a witness or witnesses may not be subjected to any harassment for having spoken against the accused. 288. Generally speaking, when the accused persons are of bad character, the witnesses are unwilling to come forward to depose against such persons 40 (1982) 1 SCC 271: 1982 SCC (Cri) 152: (1982) 2 SCR 272 fearing harassment at the hands of those accused. The persons who are put for trial under this Act are terrorists and disruptionists. Therefore, the witnesses will all the more be reluctant and unwilling to depose at the risk of their life. The Parliament having regard to such extraordinary circumstances has thought it fit that the identity and addresses of the witnesses be not disclosed in any one of the above contingencies. 289. In this context, reference may be made to Section 228-A of the Indian Penal Code as per which the disclosure of the identity of the victims of certain offences, as contemplated under sub-section (1) of that section is punishable but subject to sub-section (2). However, when the witnesses are examined in the presence of the accused then the accused may have the chances of knowing the identity of the witnesses if they are already known to the defence. But if the witnesses are unknown to the defence then there is no possibility of knowing the identity of the witnesses even after they enter into the witness box. During a trial after examination of the witnesses in chief the accused have got a right of deferring the cross-examination and calling the witnesses for cross-examination on some other day. If the witnesses are known to the accused they could collect the material to cross-examine at the time of cross-examination in such circumstances. Whatever may be the reasons for non- disclosure of the witnesses, the fact remains that the accused persons to be put up for trial under this Act which provides severe punishments, will be put to disadvantage to effective cross-examining and exposing the previous conduct and character of the witnesses. 290. Therefore, in order to ensure the purpose and object of the cross-examination, we feel that as suggested by the Full Bench of the Punjab and Haryana High Court in Bimal Kaur58, the identity, names and addresses of the witnesses may be disclosed before the trial commences; but we would like to qualify it observing that it should be subject to an exception that the court for weighty reasons in its wisdom may decide not to disclose the identity and addresses of the witnesses especially of the potential witnesses whose life may be in danger. Section 19 of 198 7 Act 291. This section provides that notwithstanding anything contained in the Code, an appeal shall lie as a matter of right from any judgment, sentence or order not being an interlocutory order of a Designated Court to the Supreme Court both on facts and on law. Sub-section (2) of that section makes it clear that except as contemplated under sub-section (1) of that section, no appeal or revision shall lie to any other court. 292. The above provision is attacked solely on the ground that the conferment of the right of appeal and further appeal to the Supreme Court on grant of leave under Article 136 of the Constitution, both at the remedial and procedural level, is taken away by the statutory compulsion under the guise of speedy trial even in respect of a conviction under the provisions of ordinary criminal law even though the charge for the offence under the TADA Act has ended in acquittal,

and the taking away of the right of 58 AIR 1988 P&H 95 : (1988) 93 Punj LR 189 : 1988 Cri LJ traditional appeal or revision will cause great hardship and make one to suffer in incurring heavy expenditure especially those who are far away from the situs of the Supreme Court. 293. The above argument is vehemently resisted by the learned Additional Solicitor General. He extols the specialised procedure of appeal directly to the Supreme Court both on facts and on law as a matter of right, without approaching the traditional appellate and revisional courts and submits that this appeal procedure is a very significant advantage to the person tried by the Designated Court and the professed object of it is in conformity with the doctrine of 'speedy trial'. He adds that such a procedure of adjudication of appeals is cheaper, faster, procedurally simpler and less formal than other traditional procedure. The Additional Solicitor General relying on the dictum laid down in (1) Syed Qasim Razvi v. State Of Hyderabad10, and (2) V.C. Shukla v. State (Delhi Admn.)102 submitted that the appeal procedure prescribed by the TADA Act cannot be said to be prejudicial or less advantageous to the accused merely on the ground that the right of appeal provided under the Code of Criminal Procedure is taken away. 294. Leave apart the question whether this provision entails or excludes a great deal of delay than the usual course of disposal of appeals, the indisputable reality is that the Supreme Court is beyond the reach of an average person considering the fact of distance, expense etc. One could understand the right of appeal directly to the Supreme Court under Section 19 of the Act against any judgment pronounced, sentence passed or order made by a Designated Court solely under the provisions of TADA or under both the provisions of TADA and the ordinary criminal law. But it would be quite unreasonable to compel a person to prefer an appeal only to the Supreme Court even in a case wherein the trial was for charges under both the provisions of TADA and the ordinary or general criminal law and the trial has ended in acquittal of the offences punishable under the TADA Act but in conviction of the offences under the penal provisions of general law alone. 295. We see no logic or convincing reasoning in providing no choice but forcing a person aggrieved by the judgment, sentence or order of the Designated Court passed only under the ordinary criminal law to prefer an appeal to the Supreme Court directly in which case the aggrieved person has to deny himself firstly, the right of appeal to the High Court and secondly, the benefit of approaching the Supreme Court under Article 136 of the Constitution. If every such person aggrieved by the judgment and order of the Designated Court passed under any criminal law other than the TADA Act has to approach the Supreme Court from far-flung areas, many of the persons suffering from financial constraints may not even think of preferring an appeal at all but to languish in jail indefinitely on that count. The statutory compulsion, in such a situation as pointed out by the counsel, 101 1953 SCR 589: AIR 1953 SC 156: 1953 Cri Li 862 102 1980 Supp SCC 249: 1980 SCC (Cri) 849: AIR 1980 SC 1382 would not only deny fair play and justice to such person but also amount to destruction of the professed object of criminal justice system in the absence of any other valid reason for an abnormal procedure. 296. This predicament and practical difficulty an aggrieved person has to suffer can be avoided if a person who is tried by the

Designated Court for offences under the TADA Act but convicted only under other penal provisions and is acquitted of the offences under the provisions of TADA, Is given the right of preferring an appeal before the next appellate court as provided under the Code of Criminal Procedure and if the State prefers an appeal against the acquittal of the offence under the provisions of TADA then it may approach the Supreme Court for withdrawal of the appeal or revision, as the case may be, preferred by such person to the Supreme Court so that both the cases may be heard together. 297. We have adverted to the practical difficulties faced by the aggrieved persons under the appeal provisions and how the same can be removed so that Parliament may take note of them and devise a suitable mode of redress by making the necessary amendments in the appeal provisions. This does not, however, mean that the existing appeal provisions are constitutionally invalid. Section 20 of 1987 Act 298. Very intense and sharp arguments occasionally filled with emotions were advanced by both the parties with regard to the scope of sub-sections (3), (4), (7) and more particularly of sub-section (8) of Section 20 of the Act which call for an intense, explicit and candid debate and discussion. As every issue involved in respect of every sub-section is a volatile one bringing the parties almost to the critical crossroads, it has become inevitable to examine the burning issues especially with regard to the grant of bail very objectively and dispassionately. 299. Sub-section (3) of Section 20 of the Act reads thus: "Section 164 of the Code shall apply in relation to a case involving an offence punishable under this Act or any rule made thereunder, subject to the modification that the reference in sub-section (1) thereof to 'Metropolitan Magistrate or Judicial Magistrate' shall be construed as a reference to 'Metropolitan Magistrate, Judicial Magistrate, Executive Magistrate or Special Executive Magistrate'." 300. In order to have a better understanding of the above sub- section, we reproduce the sub-section (1) of Section 164, which reads thus : "164. Recording of confessions and statements.- (1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial 301. The reading of these two sub-sections in juxtaposition shows that Section 164(1) of the Code is made substantially applicable in relation to a case involving an offence punishable under the TADA Act or any rule made thereunder. But the modification is only with reference to Judicial Magistrates who are empowered to record any confession or statement made to him in the course of an investigation under Chapter XII or under any other law for the time being in force, that is to say, the expressions 'Metropolitan Magistrate' and 'Judicial Magistrate' should be construed as a reference to Metropolitan Magistrate, Judicial Magistrate, Executive Magistrate or Special Executive Magistrate. In other words, the Executive Magistrate and Special Executive Magistrate are included along with the Metropolitan Magistrate and Judicial Magistrate and they are all empowered to record the confession or statement. 302. Section 3 of the Code deals with the construction of references to the words 'Magistrates', 'Magistrate of the Second Class', 'Magistrate of the First Class' and 'the Chief

Judicial Magistrate'. The classes of criminal courts contemplated under Section 6 of the Code read as follows :"6. Classes of Criminal Courts.- Besides the High Courts and the Courts constituted under any law, other than this Code, there shall be, in every State, the following classes of Criminal Courts, namely(i) (ii) (iii) (iv) Executive Magistrates." 303. Section 20(t) of the Code empowers the State Government to appoint as many persons as it thinks fit to be Executive Magistrates in every district and in every metropolitan area, and that one of the Magistrates so appointed should be appointed as District Magistrate. Section 20(4) of the Code empowers the State Government to place an Executive Magistrate in charge of a sub-division and the said Magistrate so placed should be called as Sub-divisional Magistrate. Section 21 deals with the appointment and functions to be performed by the Special Executive Magistrates. This section empowers the State Government to appoint for such term as it may think fit, Executive Magistrates to be known as Special Executive Magistrates for particular areas or for the performance of particular function and confer on such Special Executive Magistrate such of the powers as are conferrable under this Code on Executive Magistrates, as it may deem fit. 304. The contention of the learned counsel is that the inclusion of the Executive Magistrate or Special Executive Magistrate to record any confession or statement is with an oblique motive of making it possible that the confession or statement may be recorded and admitted in evidence even if the confessions or statements are not made voluntarily but are extorted under coercion or inducement. The empowering of these two Magistrates, according to them, is against the very principle of separation of judiciary from the executive enunciated in Article 50 of the Constitution, and therefore, this provision is bad under Articles 14 and 21 of the Constitution. It has been further stated that the conferment of judicial functions on the newly added non-judicial authorities, who cannot be expected to have judicial integrity and independence, is totally opposed to the fundamental principle of governance contained in Article 50 of the Constitution. 305. Now let us examine the above submission. As we have pointed out supra, the Executive Magistrates are also brought as one of the classes of criminal courts in every State. This revised set up and the allocation of magisterial functions between the two categories of Magistrates, judicial under the control of the High Court and the executive under the control of the State Government, the new Code has provided for, make for the simple scheme of separation of the judiciary from the executive on an all India basis. The Executive Magistrates have not been further classified evidently for the reason that the judicial functions to be performed by the Executive Magistrates under the new Code are very few. Broadly speaking the functions which are essentially of judicial nature are for the Judicial Magistrates and the functions which are of police and administrative nature are for the Executive Magistrates as appears from the rules of construction contained in sub-section (4) of Section 3. When Section 6 brings Executive Magistrates' Courts as one of the classes of criminal courts, it must be held that it is acting as a criminal court. The orders passed by the criminal courts inclusive of the Executive Magistrates are revisable as having been passed in 'judicial proceedings'. See R. Subramaniam v. Commissioner of Police103. As pointed out

above, there is no classification or gradation of the Courts of Executive Magistrates but the Special Executive Magistrate is the one appointed by the State Government for a particular area or for the purpose of particular functions. 306. Under the Code, the Executive Magistrates and Special Executive Magistrates are empowered to perform certain functions some of which are 'judicial or quasi-judicial' in character. Besides they also perform statutory functions in their executive capacity. Reference may be made to Sections 22, 23, 40, 44, 78, 79, 80, 81 and 93 etc. Apart from the above, the Executive Magistrates are also assigned significant functions for prevention and dealing with the investigation and trial of criminal offences. Various quasi-judicial and judicial functions are also assigned to Executive Magistrates and Special Executive Magistrates under Sections 107, 108, 109, 110, 133, 144, 145, 146, 174, 176 etc. In addition, under sub-section (2-A) of Section 167 of the Code which has been inserted by Act 45 of 1978 w.e.f. 18-12-1978, an Executive Magistrate is also authorised to perform certain judicial functions of authorising the detention of the accused in such custody as he thinks fit for a term not exceeding 7 days in an aggregate for the reasons to be recorded in writing and also releasing the arrestee on bail on the expiry of the period of detention so authorised by him when the police officer making an investigation transmits to the nearest Executive Magistrate conferred with the powers of Judicial Magistrate when the Judicial Magistrate is not available, a copy of the entry in the police diary and forwards the accused to 103 AIR 1964 Mad 185: (1964) 1 Cri LJ 519 such Executive Magistrate. The above functions of authorising detention and releasing the arrestee on bail are normally performed by the Judicial Magistrates in the discharge of their judicial functions. 307. Under Chapter VIII of the Code of Criminal Procedure dealing with security for keeping the peace and for good behavior Section 106 empowers the Court of Session or Court of a Magistrate of the first class to take security from that person convicted of any offenses specified in subsection (2) of Section 106 or of abetting any such offence. Sections 107, 108, 109 and 110 of the Code empower the Executive Magistrate to deal with the cases under security proceedings. In order to bring the mode of taking evidence as contemplated under Section 273 to proceedings under Chapter VIII also an explanation was added to Section 273 of the Code reading : "In this Section, 'accused' includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code." 308. It may be noted, in this connection that certain legislative changes were made in Section 436 of the old Code corresponding to Section 398 of the new Code by substituting the expression "person accused of an offence" by Act XVIII of 1923 so as to make Section 436 of the Code inapplicable to the security proceedings as well as to proceedings under Sections 133, 134 and 135 of the Code. See Directorate of Enforcement v. Deepak Mahajal43. 309. Therefore, merely because the Executive Magistrates and Special Executive Magistrates are included along with the other Judicial Magistrates in Section 164(1) of the Code and empowered with the authority of recording confessions in relation to the case under the TADA Act, it cannot be said that it is contrary to the accepted principles of criminal jurisprudence and that the Executive Magistrates and Special Executive Magistrates are personam

outside the ambit of machinery for adjudication of criminal cases. 310. The next question that falls for our consideration is whether the conferment of judicial function to record confessions or statements by the Executive Magistrate is opposed to the fundamental principle of governance contained in Article 50 of the Constitution. 311. The Indian Constitution provides for an independent judiciary in the States and in order to place the independence of the subordinate judiciary beyond question, provides in Article 50 of the Directive Principles for the separation of the judiciary from the executive. 312. We, without entering into the wide range of the scope and value underlying Article 50, would confine ourselves to the issue whether the Executive Magistrates falling under one of the classes of criminal courts under Section 6 of the Code are judicial officers. 313. This Court in Statesman (P) Ltd. v. H.R. Deb104 had an occasion to examine the question who is a 'judicial officer' and Hidayatullah, C.J. speaking for the Constitution Bench answered the same thus : (SCR p. 620) 43 (1994) 3 SCC 440: JT (1994) 1 SC 290 104 (1968) 3 SCR 614: AIR 1968 SC 1495 "All learned Judges seem to agree that a Magistrate exercises judicial functions. This does not admit of any doubt and no reasons are required. That his duties are partly judicial and partly other does not in any way detract from the position that while acting as a Magistrate he is a judicial officer." Further, the Bench agreed with the view expressed by Bachawat, J. that a Magistrate holds a 'judicial office' dissenting from the view taken by Banerjee, J. that a Magistrate could not be said to hold judicial office. See Shree Hanuman Foundries v. H.R. Deb1O5. 314. Recently, this Court in Shri Kumar Padma Prasad v. Union of India106 has observed as follows : (SCC p. 445, para 22) "The expression 'judicial office' in generic sense may include wide variety of offices which are connected with the administration of justice in one way or the other. Under the Criminal Procedure Code, 1973 powers of judicial Magistrate can be conferred on any person who holds or has held any office under the Government. Officers holding various posts under the executive are often vested with the Magisterial powers to meet a particular situation." After having thus observed, the learned Judges went further to the question with regard to the interpretation of Article 217(2)(a) and 236(b) and so on which are not germane for the determination of the question with which we are confronted. See also Chandra Mohan v.State of Up.107 315. In this context, we feel that it would be quite significant to recall the opinion of a Constitution Bench in Ram Jawaya Kapur v. State of Punjab108. In that case, Mukherjea, C.J. while dealing with the scope of separation of powers has observed thus : (AIR at p. 556) "The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated it by the legislature. It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law.

This is clear from the provisions of Article 154 of the Constitution but, as we have already stated, it does not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of the executive are limited merely to the carrying out of these laws. 28, 1965 106 (1992) 2 SCC 428: 1992 SCC (L & S) 56: (1992) 20 ATC 239 107 (1967) 1 SCR 77: AIR 1966 SC 1987 108 AIR 1955 SC 549: (1955) 2 SCR 225 The limits within which the executive Government can function under the Indian Constitution can be ascertained without much difficulty by reference to the form of the executive which our Constitution has set up. Our Constitution, though federal in its structure, is modeled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State." 316. In view of the discussions made above and also in the light of the principles laid down in the various decisions cited above, we hold that the Executive Magistrates while exercising their judicial or quasi-judicial functions though in a limited way within the frame of the Code of Criminal Procedure, which judicial functions are normally performed by Judicial Magistrates can be held to be holding the judicial office. Therefore, the contention of the learned counsel that the conferment of judicial functions on the Executive Magistrates and Special Executive Magistrates is opposed to the fundamental principle of governance contained in Article 50 of the Constitution cannot be countenanced. Resultantly, we hold that sub-section (3) of Section 20 of the TADA Act does not offend either Article 14 or Article 21 and hence this sub-section does not suffer from any constitutional invalidity. 317. Though we are holding that this section is constitutionally valid, we, in order to remove the apprehension expressed by the learned counsel that the Executive Magistrates and the Special Executive Magistrates who are under the control of the State may not be having judicial integrity and independence as possessed by the Judicial Magistrates and the recording of confessions and statements by those Executive Magistrates may not be free from any possible oblique motive, are of the opinion that it would be always desirable and appreciable that a confession or statement of a person is recorded by the Judicial Magistrate whenever the Magistrate is available in preference to the Executive Magistrates unless there is compelling and justifiable reason to get the confession or statement, recorded by the Executive or Special Executive Magistrates. Sub-section (4) of Section 20 of 1987 Act 318. Sub-section (4) of Section 20 (as amended by Act 43 of 1993) reads thus: "4. Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act or any rule made thereunder subject to the modifications that (a) the reference in sub-section (1) thereof to 'Judicial Magistrate' shall be construed as a reference to 'Judicial Magistrate or Executive Magistrate or Special Executive Magistrate'; (b) the references in sub-section (2) thereof to 'fifteen days', ninety days' and 'sixty days', wherever they occur, shall be construed as references to 'sixty days', 'one hundred and eighty days' and 'one hundred and eighty days' respectively; and (bb) in sub-section (2), after the proviso, the following proviso shall be inserted, namely :-

Provided further that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Designated Court shall extend the said period up to one year, on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days; and (c) sub-section (2-A) thereof shall be deemed to have been omitted." 319. The modification in sub-section (4)(a) of Section 20 is in the same line of sub-section (3); in that the Executive Magistrate and the Special Executive Magistrate are included along with the Judicial Magistrate. Therefore, whenever a person is arrested for an offence under the provisions of TADA Act, the arrestee can be transmitted to the Judicial Magistrate or the Executive Magistrate or the Special Executive Magistrate though the transmission of the accused under Section 167(1) for other offenses is still only to the Judicial Magistrate. It may be recalled that under sub- section (2A) of Section 167, a police officer can transmit the copy of the entry in the diary relating to the case and forward the accused arrested normally to the Judicial Magistrate and when he is not available, to a nearest Executive Magistrate who is empowered to authorise detention only for a specified period not exceeding seven days in the aggregate. But by the modification of Section 167 in relation to sub-section (4)(a) of Section 20 of TADA Act, the Executive Magistrate or Special Executive Magistrate can perform all the powers of a Judicial Magistrate. 320. Under sub-section (4)(b) of Section 20, the modification is only with reference to the period of detention of the accused in custody. As per Section 167(2), the Magistrate is authorised to detain the accused from time to time, in such custody as he thinks fit for a term not exceeding fifteen days on the whole but the period of fifteen days now is extended to sixty days and the authorisation of the detention of an accused person otherwise than in the custody of police can be up to ninety days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years and sixty days where the investigation relates to any other offence. The words 'ninety days' and 'sixty days' are construed to be under clause (b) of sub-section 4 as 'one year' and 'one year' respectively. However, by the Amendment Act 43 of 1993, one year period is reduced to one hundred and eighty days but subject to the newly introduced proviso where under 'one hundred and eighty days' can be extended up to 'one year' on the report of Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention beyond the said period of 'one hundred and eighty days'. The extended period of remand of one year now reduced to one hundred and eighty days, subject to the proviso, is attacked on the ground that this extended period of detention of an accused is not in tune with the spirit of the doctrine of speedy trial'. This criticism is resisted by the learned Additional Solicitor General stating that in view of the activities of terrorists and disruptionists covering wide range of area both domestically and internationally the extended period of detention is justifiably required since it is not possible to complete the investigation within a shorter period. 321. Be that as it may, the other scathing attack is that by availing the extended period of detention, the prosecution makes the accused not only languish in incarceration

but also denies the right to get bail within that period. We will deal with the second attack while disposing the contention in relation to sub-section (8) of Section 20. 322. For the reasons mentioned in the preceding part of the judgment while disposing the submission made with reference to sub-section (3) of Section 20, we hold that the criticism that the inclusion of Executive Magistrate and Special Executive Magistrate in sub-section (1) of Section 167 is with an ulterior motive, cannot be countenanced and this provision cannot be said to be unconstitutional. 323. In view of this finding, the conclusion in Bimal Kaur58 that "clause (a) of sub-section (4) of Section 20 is held to be ultra vires" is liable to be vacated and accordingly set aside. Sub-section (7) of Section 20 of 1987 Act 324. Sub-section (7) reads thus : "Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence punishable under this Act or any rule made thereunder." This provision, according to Mr Jethmalani, takes away the right of an accused in availing the anticipatory bail which the arrestee would have otherwise been entitled to. Section 438 of the Code, according to him, is a most essential safeguard for liberty of a person and that it is found necessary to meet the obvious cases of misuse of police power. 325. Mr Tarkunde raised the same contention and then drawing strength from the judgment in Gurbaksh Singh Sibbia v. State Of Punjab1O9 supplements the argument that abolition of the right of anticipatory bail amounts to deprivation of personal liberty as enshrined in Article 21 of the Constitution. 326. The High Court of Punjab and Haryana in Bimal Kaur58 has examined a similar challenge as to the vires of Section 20(7) of TADA Act, and held thus 58 AIR 1988 P&H 95: (1988) 93 Punj LR 189: 1988 Cri LJ 169 109 (1980) 2 SCC 565: 1980 SCC (Cri) 465: (1980) 3 SCR 383 "In my opinion Section 20(7) is intra vires the provision of Article 14 of the Constitution in that the persons charged with the commission of terrorist act fall in a category which is distinct from the class of persons charged with commission of offenses under the Penal Code and the offenses created by other statutes. The persons indulging in terrorist act form a member of well organised secret movement. The enforcing agencies find it difficult to lay their hands on them. Unless the Police is able to secure clue as to who are the persons behind this movement, how it is organised, who are its active members and how they operate, it cannot hope to put an end to this movement and restore public order. The Police can secure this knowledge only from the arrested terrorists after effective interrogation. If the real offenders apprehending arrest are able to secure anticipatory bail then the police shall virtually be denied the said opportunity." 327. It is needless to emphasise that both the Parliament as well as the State Legislatures have got legislative competence to enact any law relating to the Code of Criminal Procedure. No provision relating to anticipatory bail was in the old Code and it was introduced for the first time in the present Code of 1973 on the suggestion made of the Forty-first Report of the Law Commission and the Joint Committee Report. It may be noted that this section is completely omitted in the State of Uttar Pradesh by Section 9 of the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1976 (U.P. Act No. 16 of 1976) w.e.f. 28-11- 1975. In the State of West Bengal, proviso is inserted to Section 438(1)

of the Code w.e.f. 24-12-1988 to the effect that no final order shall be made on an application filed by the accused praying for anticipatory bail in relation to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than seven years, without giving the State not less than seven days' notice to present its case. In the State of Orissa, by Section 2 of Orissa Act 11 of 1988 w.e.f. 28-6-1988, a proviso is added to Section 438 stating that no final order shall be made on an application for anticipatory bail without giving the State notice to present its case for offence punishable with death, imprisonment for life or imprisonment for a term of not less than seven years. 328. It is relevant to note one of the reasons given by the Law Commission for its suggestions to introduce the provision for anticipatory bail, that reason being "... where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail". To put it differently, it can be deduced from the reasoning of the Report of the Law Commission that where a person accused of a non-bailable offence is likely to abscond or otherwise misuse his liberty while on bail, will have no justification to claim the benefit for anticipatory bail. Can it be said with certainty that terrorists and disruptionists who create terrorism and disruption and inject sense of insecurity, are not likely to abscond or misuse their liberty if released on anticipatory bail. Evidently, the Parliament has thought it fit not to extend the benefit of Section 438 to such offenders. 329. Further, at the risk of repetition, we may add that Section 438 is a new provision incorporated in the present Code creating a new right. If that new right is taken away, can it be said that the removal of Section 438 is violative of Article 21. In Gurbaksh Singh109, there is no specific statement that the removal of Section 438 at any time will amount to violation of Article 21 of the Constitution. 330. Hence for the aforementioned reasons, the attack made on the validity of sub-section (7) of Section 20 has to fail. Section 9 of Code of Criminal Procedure (U.P. Amendment) Act, 1976 331. As the constitutional validity of Section 9 of U.P. Act 16 of 1976 is attacked on the same ground of sub-section (7) of Section 20 of the Act, we would like to dispose of a batch of writ petitions filed by several petitions confining the question only with regard to the constitutional validity of Section 9 of the U.P. Amendment Act 16 of 1976 by which the U.P. Legislature has deleted the operation of Section 438 of the Code w.e.f. 2811-1975. The facts of the cases are not relevant, except to the extent that the first information reports in all those cases have been lodged for various offenses mainly under Section 302 IPC. The questions which arise for consideration are : (a) whether the State Legislature has legislative competence to delete Section 438 of the Code; and (b) whether the U.P. Act 16 of 1976 is violative of Articles 14, 19 and 21 of the Constitution. 332. The learned counsel for the State of U.P. submitted that this Act is a valid piece of legislation as it does not suffer from legislative incompetence and the State Legislature is empowered to pass this Act taking into consideration the crime infected situation in the State and this amendment was necessary keeping in view the prevailing situation and the increasing rate of offenses in the State. According to him, it

was in order to meet the deteriorating situation, the State Legislature besides deleting Section 438 of the Code was compelled to promulgate the U.P. Dacoit Areas Act, 1983 and other like enactments. 333. The competence of the State Legislature to amend Central Act has been recognised in U.P. Electric Supply Co. Ltd. v. R.K. Shukla11O. The Legislature has passed Act No. 16 of 1976 in exercise of powers under List III (Concurrent List) of the Seventh Schedule and deleted Section 438 of the Code. Moreover, the Amendment Act which has received the assent of the President of India on 30-4-1976 by virtue of Article 254(2) of the Constitution prevails in U.P. State, notwithstanding any prior law made by the Parliament. As the Act is applied throughout the State, there is no question of discrimination in the application of this provision in the State of Uttar Pradesh. 334. Hence, in view of the discussion made in relation to Section 20(7) of the TADA Act and of the legislative competence of the State, the 109 (1980) 2 SCC 565: 1980 SCC (Cri) 465: (1980) 3 SCR 383 110 (1969)2SCC400 contention that it is violative of Articles 14, 19 and 21 of the Constitution has no merit and as such has to be rejected. Sub-section (8) of Section 20 of 1987 Act 335. The construction of the above sub-section which imposes severe limitations on the grant of bail in addition to the limitations contained in Section 437(3) of the Code, has led to a fiery articulation by both the parties. Of course, it is one of the most important debatable issues which repeatedly come up before this Court for interpretation in addition to the question whether the High Court in exercise of its extraordinary prerogative right under Article 226 can entertain an application and pass an order either granting or denying bail. As sub- section (9) which in term provides that the limitations on granting of bail specified in sub-section (8) are in addition to the limitations under the Code or other law for the time being in force on granting of bail, serves as a qualifying provision to sub-section (8), it has become imperative while interpreting sub-section (8) to construe sub-section (9) also along with sub-section (8). Therefore, we would like to reproduce both the sub-sections (8) and (9) of Section 20 hereunder : "(8) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless- (a) the Public Prosecutor has been given an opportunity to oppose the application for such release, and (b) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. (9) The limitations on granting of bail specified in sub-section (8) are in addition to the limitations under the Code or any other law for the time being in force on granting of bail." 336. Much earlier to the enactment of the Acts of 1984, 1985 and 1987, there was a similar provision, namely, Rule 184 of the Defence and Internal Security of India Rules, 1971 (for short 'Rules of 1971) (with which we are not concerned otherwise). It ran as follows : "Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (V of 1898), no person accused or convicted of a contravention of these Rules or orders made thereunder shall, if in custody, be released on bail or his own bond unless- (a) the prosecution has been given an opportunity to oppose the application for such release, and (b) where the pros-

ecution opposes the application and the contravention is of any such provision of these rules or orders mad e thereunder as the Central Government or the State Government may by notified order specify in this behalf, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such contravention." 337. Sub-section (8) of Section 20 commences with a non-obstante clause as in Rule 184 of the Rules of 1971 (referred to above) and in its operation imposes a ban on release on bail of a person accused of any offence punishable under the TADA Act or any rule made thereunder unless the two conditions specified in clauses (a) and (b) of that sub-section are satisfied. 338. In relation to the question involved, a lot of arguments were advanced at the bar and voluminous decisions were relied upon. It is the common grievance of all the counsel assailing this provision that whilst Section 20(7) makes Section 438 of the Code inoperative, Section 20(8) makes the grant of bail as an impossible one. According to them, an overgenerous infusion of constraints and restrictions as well as unreasonable restrictions which are not found in any of the bail provisions of the Code, have made this provision as prescribing a procedure which is unjust and unfair. 339..Mr V.M. Tarkunde impugns this provision contending that this subsection infringes the underlying principle of Articles 21 and 14 of the Constitution as the manifested intention of this provision make impossible for even an innocent person to get bail when he is falsely charged with an offence under the TADA Act. When the salutary principle of criminal justice is that every person is presumed to be innocent till he is proved to be guilty, this provision under challenge goes diametrically contrary to that principle. Placing reliance on the decision in Gudikanti Narasimhulu v. Public Prosecutor111 wherein Krishna Iyer, J. has commenced his judgment with a prefatory note reading, " 'Bail or jail?' at the pretrial or post-conviction stage belongs to the blurred area of the criminal justice system and largely hinges on the hunch of the Bench, otherwise called judicial discretion" and observed, "The significance and sweep of Article 21 make the deprivation of liberty a matter of grave concern and permissible only when the law authorising it is reasonable, even-handed and geared to the goals of community good and State necessity spelt out in Article 19"- Mr Tarkunde asserts that this provision is totally in violation of Article 21. 340. Mr Jethmalani attacks this provision contending that it is the most obnoxious and unfair provision, requiring the court to certify that "the accused is not likely to commit any offence while on bail". He pleads to declare this clause as unconstitutional, based on the observation of the Full Bench of Punjab and Haryana High Court in Bimal Kaur58. 341. The learned Additional Solicitor General attempts to meet the above arguments stating that there is no question of unconstitutionality of the provision and in fact, the conditions imposed under clause (b) of sub- 111 (1978) 1 SCC 240: 1978 SCC (Cri) 115: (1978) 2 SCR 371 58 AIR 1988 P&H 95 : (1988) 93 Punj LR 189 : 1988 Cri LJ section (8) is in consonance with the requirements prescribed under clauses (i) and (ii) of sub-section (1) of Section 437 and clause (b) of sub-section (3) of that section. In any event, according to him, the conduct of an accused seeking bail in the context of his background and the nature of crime committed are to be evaluated before the concession of bail can be granted and that the evaluation is

fundamentally from the point of view of his likelihood of either tampering with the evidence or unleashing a threat to the society during the period when he may be allowed to be on bail. He also quotes another observation of Krishna Iyer, J. in Gudikanti111 in support of his submission which reads: (SCR at p. 376: SCC p. 245, para 12) "All deprivation of liberty is validated by social defence and individual correction along an anti-criminal direction. Public justice is central to the whole scheme of bail law. Fleeing justice must be forbidden but punitive harshness should be minimised. ... No seeker of justice shall play confidence tricks on the court or community." 342. Sub-section (8) which imposes a complete ban on release on bail against the accused of an offence punishable under this Act minimises or dilutes that ban under two conditions, those being (1) the Public Prosecutor must be given an opportunity to oppose the bail application for such release; and (2) where the Public Prosecutor opposes the bail application the court must be satisfied that the two conditions, namely, (a) there are reasonable grounds for believing that the person accused is not guilty of such offence and (b) he is not likely to commit any offence while on bail. Sub-section (9) qualifies sub-section (8) to the effect that the above two limitations imposed on grant of bail specified in sub-section (8) are in addition to the limitations under the Code or any other law for the time being in force on granting of bail. Section 436 of the Code provides for grant of bail to a person accused of a bailable offence, while Section 437 provides for grant of bail to any accused of, or suspected of, the commission of any non- bailable offence. Nonetheless, sub-section (1) of Section 437 imposes certain fetters on the exercise of the powers of granting bail on fulfillment of two conditions, namely (1) if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life; and (2) if the offence complained of is a cognizable offence and that the accused had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more or he had previously convicted on two or more occasions of a non-bailable and cognizable offence. Of course, these two conditions are subject to three provisos attached to sub-section (1) of Section 437. But we are not very much concerned about the provisos. However, sub-section (3) of Section 437 gives discretion to the court to grant bail attached with some conditions if it considers necessary or in the interest of justice. For proper understanding of those conditions or limitations to which two other conditions under clauses (a) and (b) of sub-section (8) of Section 20 of the TADA Act are attached, we reproduce those conditions in Section 437(3) hereunder 111 (1978) 1 SCC 240: 1978 SCC (Cri) 115: (1978) 2 SCR 371 "437. (3) (a) in order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or (b) in order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or (c) otherwise in the interests of justice." 343. Section 438 of the code speaks of bail and Section 439 deals with the special powers of High Court or Court of Session regarding bail. It will be relevant to cite Section 439(1)(a) also, in this connection, which reads as follows : "439. Special powers of High Court or Court of Session regarding bail.- (1) A High Court or Court

of Session may direct- (a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub- section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section; (b) ..." 344. In this connection, we would like to quote the following observation of this Court in Usmanbhai Dawoodbhai Memon v. State Of Gujarat53, with which we are in agreement: (SCC pp. 286-287, para 19) "Though there is no express provision excluding the applicability of Section 439 of the Code similar to the one contained in Section 20(7) of the Act in relation to a case involving the arrest of any person on an accusation of having committed an offence punishable under the Act or any rule made thereunder, but that result must, by necessary implication, follow. It is true that the source of power of a Designated Court to grant bail is not Section 20(8) of the Act as it only places limitations on such power. This is made explicit by Section 20(9) which enacts that the limitations on granting of bail specified in Section 20(8) are 'in addition to the limitations under the Code or any other law for the time being in force'. But it does not necessarily follow that the power of a Designated Court to grant bail is relatable t o Section 439 of the Code. It cannot be doubted that a Designated Court is 'a court other than the High Court or the Court of Session' within the meaning of Section 437 of the Code. The exercise of the power to grant bail by a Designated Court is not only subject to the limitations contained therein, but is also subject to the limitations placed by Section 20(8) of the Act." 345. Reverting to Section 20(8), if either of the two conditions mentioned therein is not satisfied, the ban operates and the accused person cannot be released on bail but of course it is subject to Section 167(2) as modified by Section 20(4) of the TADA Act in relation to a case under the provisions of TADA Act. 53 (1988) 2 SCC 271 : 1988 SCC (Cri) 318 346. Though the conditions of Rule 184 of 1971 Rules are more or less similar to those of the limitations imposed in Section 20(8) of the Act, this Court in Balchand Jain v. State of M.P.112 set aside the order of the arrest rejecting the bail application on the ground that the power conferred by Section 438 is not taken away by Rule 184 as there was no provision in that rule over-riding Section 438. [But under the TADA Act Section 20(7) completely excludes the application of Section 438 of the Code.] However, in Balchand112 Bhagwati, J. (as the learned Chief Justice then was) speaking for the Bench observed as follows : (SCC p. 577, para 3) "The Rule, on its plain terms, does not confer any power on the Court to release a person accused or convicted of contravention of any Rule or order made under the Rules, on bail. It postulates the existence of power in the Court under the Code of Criminal Procedure and seeks to place a curb on its exercise by providing that a person accused or convicted of contravention of any Rule or order made under the Rules, if in custody, shall not be released on bail unless the aforesaid two conditions are satisfied. It imposed fetters on the exercise of the power of granting bail in certain kinds of cases and removes such fetters on fulfillment of the aforesaid two conditions. When these two conditions are satisfied, the fetters are removed and the power of granting bail possessed by the Court under the Code of Criminal Procedure revives and becomes exercisable. The non-obstante clause at the commencement of the Rule

also emphasises that the provision in the Rule is intended to restrict the power of granting bail under the Code of Criminal Procedure and not to confer a new power exercisable only on certain conditions. It is not possible to read Rule 184 as laying down a self-contained code for grant of bail in case of a person accused or convicted of contravention of any Rule or order made under the Rules so that the power to grant bail in such case must be found only in Rule 184 and not in the Code of Criminal Procedure. Rule 184 cannot be construed as displacing altogether the provisions of the Code of Criminal Procedure in regard to bail in case of a person accused or convicted of contravention of any Rule or order made under the Rules. These provisions of the Code of Criminal Procedure must be read along with Rule 184 and full effect must be given to them except in so far as they are, by reason of the non-obstante clause overridden by Rule 184." .lm0 347. In Usmanbhai53, this Court after considering the above view expressed in Balchand112 and the opinion expressed by the High Court of Himachal Pradesh in Ishwar Chand v. State of H.P.113 held that both the decisions are clearly distinguishable and opined that Section 439 as well as Section 482 of the Code cannot be availed of for grant of bail in cases under the Act of TADA on the principle in Balchand112 dealing with Rule 184 of 112 (1976) 4 SCC 572: 1976 SCC (Cri) 689: (1977) 2 SCR 52 53 (1988) 2 SCC 271 : 1988 SCC (Cri) 318 113 ILR 1975 HP 569 1971 Rules. The relevant finding of this Court is thus : (SCC pp. 289, 290, paras 22, 23) "Further, while it is true that Chapter XXXIII of the Code is still preserved as otherwise the Designated Courts would have no power to grant bail, still the source of power is not Section 439 of the Code but Section 437 being a court other than the High Court or the Court of Session. Any other view would lead to an anomalous situation. If it were to be held that the power of a Designated Court to grant bail was relatable to Section 439 it would imply that not only the High Court but also the Court of Session would be entitled to grant bail on such terms as they deem fit. The power to grant bail under Section 439 is unfettered by any conditions and limitations like Section 437. It would run counter to the express prohibition contained in Section 20(8) of the Act which enjoins that notwithstanding anything in the Code, no person accused of an offence punishable under the Act or any rule made thereunder shall, if in custody, be released on bail unless the conditions set forth in clauses (a) and (b) are satisfied. Lastly, both the decision in Balchand Jain112 and that in Ishwar Chand113 turn on the scheme of the Defence and Internal Security of India Act, 1971. They proceed on the well recognise d principle that an ouster of jurisdiction of the ordinary courts is not to be readily inferred except by express provision or by necessary implication. It all depends on the scheme of the particular Act as to whether the power of the High Court and the Court of Session to grant bail under Sections 438 and 439 exists. We must accordingly uphold the view expressed by the High Court that it had no jurisdiction to entertain an application for bail under Section 439 or under Section 482 of the Code. That takes us to the approach which a Designated Court has to adopt while granting bail in view of the limitations placed on such power under Section 20(8). The sub-section in terms places fetters on the power of a Designated Court on granting of bail and the limitations specified therein are in addition to the limitations

under the Code." 348. We are in full agreement with the above view expressed by the learned Judges in Usmanbhai53. In that case, this Court finally set aside the orders passed by various Designated Courts and remitted the cases with a direction that the Designated Courts should consider each particular case on merit as to whether it fell within the purview of Section 3 and/or Section 4 of the TADA of 1987 and if so whether the accused in the facts and circumstances of the case were entitled to bail, while keeping in view the limitations on the powers of the court under Section 20(8) of the Act, and transfer the other category of cases not falling within the purview of the TADA Act for trial to the ordinary criminal courts. 112 (1976) 4 SCC 572: 1976 SCC (Cri) 689: (1977) 2 SCR 52 113 ILRI975HP569 53 (1988) 2 SCC 271 : 1988 SCC (Cri) 318 349. The conditions imposed under Section 20(8)(b), as rightly pointed out by the Additional Solicitor General, are in consonance with the conditions prescribed under clauses (i) and (ii) of sub-section (1) of Section 437 and clause (b) of sub-section (3) of that section. Similar to the conditions in clause (b) of sub-section (8), there are provisions in various other enactments such as Section 35(1) of Foreign Exchange Regulation Act and Section 104(1) of the Customs Act to the effect that any authorised or empowered officer under the respective Acts, if, has got reason to believe that any person in India or within the Indian customs waters has been guilty of an offence punishable under the respective Acts, may arrest such person. Therefore, the condition that "there are grounds for believing that he is not guilty of an offence", which condition in different form is incorporated in other Acts such as clause (i) of Section 437(1) of the Code and Section 35(1) of FERA and 104(1) of the Customs Act, cannot be said to be an unreasonable condition infringing the principle of Article 21 of the Constitution. 350. In view of the detailed discussion made above, we set aside the conclusion of the Punjab and Haryana High Court in Bimal Kaur58 holding, "Therefore, the last portion of clause (b) of subsection (8) of Section 20 of the Act, which reads 'and that he is not likely to commit any offence while on bail' alone ... is ultra vires". 351. No doubt, liberty of a citizen must be zealously safeguarded by the courts; nonetheless the courts while dispensing justice in cases like the one under the TADA Act, should keep in mind not only the liberty of the accused but also the interest of the victim and their near and dear and above all the collective interest of the community and the safety of the nation so that the public may not loose faith in the system of judicial administration and indulge in private retribution. 352. It is true that on many occasions, we have come across cases wherein the prosecution unjustifiably invokes the provisions of the TADA Act with an oblique motive of depriving the accused persons from getting bail and in some occasions when the courts are inclined to grant bail in cases registered under ordinary criminal law, the investigating officers in order to circumvent the authority of the courts invoke the provisions of the TADA Act. This kind of invocation of the provisions of TADA in cases, the facts of which do not warrant, is nothing but sheer misuse and abuse of the Act by the police. Unless, the public prosecutors rise to the occasion and discharge their onerous responsibilities keeping in mind that they are prosecutors on behalf of the public but not the police and unless the Presiding Officers of the Designated Courts discharge

their judicial functions keeping in view the fundamental rights particularly of the personal right and liberty of every citizen as enshrined in the Constitution to which they have been assigned the role of sentinel on the qui vive, it cannot be said that the provisions of TADA Act are enforced effectively in consonance with the legislative intendment. 58 AIR 1988 P&H 95 :(1988) 93 Punj LR 189: 1988 Cri LJ 169 353. Reference may be made to State of Maharashtra v. Anand Chintaman Dighe114. 354. The next nagging question that frequently comes up for our consideration is with regard to the right of a person indicted of an offence under the TADA Act to approach the High Court for bail under Article 226 of the Constitution of India. Some of the High Courts have taken the view that the jurisdiction of the High Courts under Article 226 of the Constitution to entertain bail applications and pass orders in cases registered under the provisions of TADA cannot, in any way, be taken away or whittled down. In fact, bail applications are freely entertained by some High Courts. Relating to this question, we would like to refer to a decision of a Division Bench of the Bombay High Court in Rafiq Abid Patel v. Inspector of Police, Thane115. In that case, the learned Judges disagreeing with the view taken by another Bench116 refusing to exercise its jurisdiction under Article 226 of the Constitution, observed thus : "The points which have been urged before us do not appear to have been urged before th e Division Bench or considered by it, namely that it is only at the stage of taking cognizance of the offence after filing of the charge-sheet that the Designated Court can exercise its powers under Section 18 of the TADA Act and till then, if the investigation has taken a considerable period of time, as in the present case, and if no prima facie case is disclosed for applying the provisions of the TADA Act, the Court can exercise its powers under Article 226 of the Constitution to entertain a petition. . . . . 355. In Usmanbhai53 one of the questions of substantial importance was as to the jurisdiction and power of the High Court to grant bail under Section 439 of the Code or by recourse to its inherent powers under Section 482 to a person held in custody accused of an offence under Sections 3 and 4 of the TADA Act of 1987, During the course of the discussion, one of the questions posed for consideration was whether a bail application can be moved before the High Court under Article 226 or Article 227 of the Constitution. The Court answered that question holding thus : (SCC p. 283, para 12)"At the very outset, Shri Poti, learned counsel appearing for the State Government with his usual fairness, unequivocally accepted that the provisions of the Act to do not take away the constitutional remedies available to a citizen to approach the High Court under Article 226 or Article 227 or move this Court by a petition under Article 32 for the grant of an appropriate writ, direction or order. It must necessarily follow that a citizen can always move the High Court under Article 226 or Article 227, or this Court under Article 32 challenging the constitutional validity of the Act or its provisions on the ground that they 114 (1990) 1 SCC 397: 1990 SCC (Cri) 142 115 1992 Cri LJ 394 (Bom) 116 Writ Petition (Cri) No. 458 of 1991, decided on April 25, 1991 53 (1988) 2 SCC 271 : 1988 SCC (Cri) 318 offend against Articles 14, 21 and 22 or on the ground that a notification issued by the Central Government or the State Government under Section 9(1) of the Act constituting a Desig-

nated Court for any area or areas or for such case or class or group of cases as specified in the notification, was a fraud on powers and thus constitutionally invalid." 356. A careful reading of the above observation makes it clear that it is not the rule laid down by this court on a detailed discussion of the legal provisions, but on the other hand, it is only the reflection of the opinion of a counsel who appeared in that case, as seen from the beginning of the sentence, "It must necessarily follow..... Except this passing observation, no discussion has been made in the entire judgment. 357. In a recent judgment, this Court in State of Maharashtra v. Abdul Hamid Haji Mohammed117 after examining a question regarding the justification of the High Court to exercise its jurisdiction under Article 226 for quashing the prosecution for an offence punishable under the TADA Act has observed thus : (SCC pp. 669-70, para 7)"... It is no doubt true that in an extreme case if the only accusation against the respondent prosecuted in the Designated Court in accordance with the provisions of TADA Act is such that ex facie it cannot constitute an offence punishable under TADA Act, then the High Court may be justified in invoking the power under Article 226 of the Constitution on the ground that the detention of the accused is not under the provisions of TADA Act. We may hasten to add that this can happen only in extreme cases which would be rare and that power of the High Court is not exercisable in cases like the present where it may be debatable whether the direct accusation made in conjunction with the attendant circumstances, if proved to be true, is likely to result in conviction for an offence under TADA Act. ... There was thus no justification for the High Court in the present case to exercise it jurisdiction under Article 226 of the Constitution for examining the merits of the controversy much less for quashing the prosecution of respondent Abdul Hamid in the Designated Court for offenses punishable under TADA Act." After observing thus, the Court finally concluded : (SCC p. 671, para 10) "The view taken by the High Court on this aspect is contrary to law apart from being unjustified and impermissible in exercise of its jurisdiction under Article 226 of the Constitution." 358. Shri V.R. Reddy, the learned Additional Solicitor General appearing in Criminal Appeal No. 172 of 1992 has raised a serious objection that the High Court in its power of superintendence under Article 227 of the Constitution has no jurisdiction in matters relating to TADA provisions ignoring the manifest intention of the Parliament to exclude the jurisdiction of the High Courts in such matters. In support of his submission, he cited several decisions dealing with the power of superintendence of the High 117 (1994)2 SCC 664 Court under Article 227, those being: (1) Waryam Singh v. Amarnath118, (2) State of Gujarat v. Vakhtsinghji Sursinghji Vaghela119, (3) Ahmedabad Mfg. & Calico Ptg. Co. Ltd. v. Ram Tahel Ramnand12O, (4) Mohd. Yunus v. Mohd. Mustaqim121, and (5) Mani Nariman Daruwala v. Phiroz N. Bhatena122. He also cited another decision in Narcotics Control Bureau v. Kislian Lal123 in which the decision of Usmanbhai53 was relied upon. 359. Though the High Courts have very wide powers under Article 226, the very vastness of the powers imposes on it the responsibility to use them with circumspection and in accordance with the judicial consideration and well established principles. The legislative history and the object of TADA Act indicate that

the special Act has been enacted to meet challenges arising out of terrorism and disruption. Special provisions are enacted in the Act with regard to the grant of bail and appeals arising from any judgment, sentence or order (not being an interlocutory order) of a Designated Court etc. The overriding effect of the provisions of the Act (i.e. Section 25 of TADA Act) and the Rules made thereunder and the non-obstante clause in Section 20(7) reading, "Notwithstanding anything contained in the Code..... clearly postulate that in granting of bail, the special provisions alone should be made applicable. If any party is aggrieved by the order, the only remedy under the Act is to approach the Supreme Court by way of an appeal. If the High Courts entertain bail applications invoking their extraordinary jurisdiction under Article 226 and pass orders, then the very scheme and object of the Act and the intendment of the Parliament would be completely defeated and frustrated. But at the same time it cannot be said that the High Courts have no jurisdiction. Therefore, we totally agree with the view taken by this Court in Abdul Hamid Haji Mohammed' 17 that if the High Court is inclined to entertain any application under Article 226, that power should be exercised most sparingly and only in rare and appropriate cases in extreme circumstances. What those rare cases are and what would be the circumstances that would justify the entertaining of applications under Article 226 cannot be put in strait- jacket. However, we would like to emphasise and re- emphasise that the judicial discipline and comity of courts require that the High Courts should refrain from exercising their jurisdiction in entertaining bail applications in respect of an accused indicted under the special Act since this Court has jurisdiction to interfere and correct the orders of the High Courts under Article 136 of the Constitution. 118 1954 SCR 565: AIR 1954 SC 215 119 (1968) 3 SCR 692: AIR 1968 SC 1481 120 (1972) 1 SCC 898 121 (1983) 4 SCC 566 122 (1991) 3 SCC 141 123 (1991) 1 SCC 705: 1991 SCC (Cri) 265 53 (1988) 2 SCC 271 : 1988 SCC (Cri) 318 117 (1994) 2 SCC 664 Section 22 of Act of 1987 360. Though no oral argument has been advanced by the learned counsel challenging the validity of this provision, since we are scrutinising the entire Act, we feel that it would be better if our view on this provision is also recorded. However, Mr Jethmalani in his written submissions has stated that this section is unintelligible and that it is quite impossible to identify any person on the basis of his photograph especially in the present day when trick photographs are being taken. I see much force in this submission. 361. If the evidence regarding the identification on the basis of a photograph is to be held to have the same value as the evidence of a test identification parade, we feel that gross injustice to the detriment of the persons suspected may result. Therefore, we are inclined to strike down this provision and accordingly we strike down Section 22 of the Act. Re Section 2(1)(i) of 1984 Act and Section 2(1)(f) of 1987 Act 362. Section 2(1)(i) of 1984 Act defines the expression"terrorist affected area" meaning an area declared as a terrorist affected area under Section 3, and Section 2(1)(f) of TADA Act of 1987 defines 'notified area' meaning such area as the State Government may, by notification in the Official Gazette, specify. We are given to understand that in some of the States, the State Governments have notified almost all the areas of the State as 'notified area'. But no noti-

fied area seems to have been renotified after notification. Further, nothing has been brought to our notice about the denotification of any area in any State. Therefore, we suggest that the State Governments should review periodically and take decision either to denotify any area or continue the same as 'notified area' and act accordingly. The Screening or Review Committee which we have suggested while dealing with Section 15 of the 1987 Act, may also be empowered by the respective Governments to scrutinise the prevailing situations and to make recommendations to the State Governments, recommending either to continue or to discontinue the notification. Our opinion in this regard may also be followed in the case of declaring any area as "terrorist affected area". 363. Before formulating our conclusions, we would like to express our opinion on the role of the police in the implementation of these Acts. 364. Lord Denning in his treatise, The Due Process of Law says: "In safeguarding our freedoms, the police play a vital role. Society for its defence needs a well-led, well-trained and well-disciplined force of police whom it can trust : and enough of them to be able to prevent crime before it happens, or if it does happen, to detect it and bring the accused to justice. The police, of course, must act properly. They must obey the rules of right conduct." 365. It is heart-rending to note that day in and day out we come across with the news of blood-curdling incidents of police brutality and atrocities, alleged to have been committed, in utter disregard and in all breaches of humanitarian law and universal human rights as well as in total negation of the constitutional guarantees and human decency. We are undoubtedly committed to uphold human rights even as a part of long standing heritage and as enshrined in our constitutional law. We feel that this perspective needs to be kept in view by every law enforcing authority because the recognition of the inherent dignity and of the equal and inalienable rights of the citizens is the foundation of freedom, justice and peace in the world. If the human rights are outraged, then the court should set its face against such violation of human rights by exercising its majestic judicial authority. 366. The protection that the citizens enjoy under the Rule of Law are the quintessence of two thousand years of human struggling from Adam. It is not commonly realised how easily this may be lost. There is no known method of retaining them but by eternal vigilance. There is no institution to which the duty can be delegated except to the judiciary. If the law enforcing authority becomes a law breaker, it breeds contempt for law, it invites every man to become a law unto himself and ultimately it invites anarchy. 367. Many a time in human history, great societies have crumbled into oblivion through their failure to realise the significance of crisis situations operating within them. True, ours is a country which stands tallest even in troubled times, the country that clings to fundamental principles of human rights, the country that cherishes its constitutional heritage and rejects simple solutions that compromise the values that lie at the root of our democratic system. Each generation of mankind has considered its (sic own) perplexities and concerns to be unique and consequently their fundamental demands are more : the cry for justice the longing for peace and the felt need for security 368. The above are to maintain the higher rhythms of pulsating democratic life in a constitutional order. TO SUM UP (1) The Terrorist

Affected Areas (Special Courts) Act, 1984 (Act 61 of 1984); The Terrorist and Disruptive Activities (Prevention) Act, 1985 (Act 31 of 1985); and The Terrorist and Disruptive Activities (Prevention) Act, 1987 (Act 28 of 1987) fall within the legislative competence of Parliament in view of Article 248 read with Entry 97 of List I and could fall within the ambit of Entry 1 of List I, namely, 'Defence of India'. (2) As the meaning of the word 'abet' as defined under Section 2(1)(i)(a) of 1987 Act is vague and imprecise, 'actual knowledge or reason to believe' on the part of person to be brought within the definition, should be read into that provision instead of reading that provision down; (3) The power vested on the Central Government to declare any area as 'terrorist affected area' within the terms of Section 3(1) of the Act of 1984 does not suffer from any invalidity; (4) The contention that Sections 3 and 4 of the Act of 1987 are liable to be struck down on the grounds that both the sections cover the acts which constitute offenses under ordinary laws and that there is not guiding principle as to when a person is to be prosecuted under these sections, is rejected; (5) Section 8 of the TADA Act is not violative of Articles 14 and 21 of the Constitution; (6) The challenge on the validity of Section 9 on the ground of lack of legislative competence has no merit. (7) We uphold sub-section (7) of Section 9 of the TADA Act with a suggestion that the Central Government and the State Governments at the time of appointing a Judge or an Additional Judge to the Designated Court should keep in mind that the Judge designate has sufficient tenure of service even at the initial stage of appointment so that no one may entertain any grievance for continuance of service of a Judge of the Designated Court after attainment of superannuation; (8) The order granting 'concurrence' by the Chief Justice of India on a motion moved in that behalf by the Attorney General to transfer any case pending before a Designated Court in that State to any other Designated Court within that State or in other State, is only a statutory order and not a judicial order since there is no adjudication of any 'lis' and determination of any issue. Therefore, sub-sections (2) and (3) of Section 11 are not violative of Articles 14 of the Constitution; (9) Section 15 of the TADA Act is neither violative of Article 14 nor of Article 21. But the Central Government may take note of certain guidelines which we have suggested and incorporate them by appropriate amendments in the Act and the Rules made thereunder; (10) The challenge made to Section 16(1) does not require any consideration in view of the substitution of the newly introduced sub - section by Amendment Act 43 of 1994 giving discretion to the Designated Court either to hold or not to hold the proceedings in camera; (11) Sub-sections (2) and (3) of Section 16 are not liable to be struck down. However, in order to ensure the purpose and object of cross-examination, we uphold the view of the Full Bench of the Punjab and Haryana High Court in Bimal Kaur58 holding, "the identity, names and addresses of the witnesses may be disclosed before the trial commences" but subject to an exception that the court for weighty reasons in its wisdom may decide not to disclose the identity and addresses of the witnesses especially of potential witnesses, whose life may be in danger; (12) The existing appeal provisions provided under Section 19 are not constitutionally invalid. But having regard to the practical difficulties to be faced by the aggrieved person under

the appeal provisions, the Parliament may devise a suitable mode of redress by making the necessary amendments in the appeal provisions, as suggested during the discussion of the validity of Section 19; (13) Sub-section (3) and (4)(a) of Section 20 do not suffer from any infirmity on account of the inclusion of the Executive Magistrate and Special Executive Magistrate within the purview of Sections 164 and 58 AIR 1988 P&H 95 :(1988) 93 Punj LR 189: 1988 Cri LJ 169 167 of the Code of Criminal Procedure in respect of their application in relation to a case involving an offence punishable under the TADA Act or any rule made thereunder. Likewise, clause (a) of Section 15 of the Special Courts Act, 1984 does not suffer from any infirmity; (14) Section 20(7) of the TADA Act excluding the application of Section 438 of the Code of Criminal Procedure in relation to any case under the Act and the Rules made thereunder, cannot be said to have deprived the personal liberty of a person as enshrined in Article 21 of the Constitution; (15) The deletion of the application of Section 438 in the State of Uttar Pradesh by Section 9 of the Code of Criminal Procedure (U.P.) Amendment, 1976 does not offend either Article 14 or Article 19 or Article 21 of the Constitution and the State Legislature is competent to delete that section, which is one of the matters enumerated in the Concurrent List (List III of the Seventh Schedule) and such deletion is valid under Article 254(2) of the Constitution; (16) Sub-section (8) of Section 20 of TADA Act imposing the ban on release of bail of a person accused of any offence punishable under the Act or any rule made thereunder, but diluting the ban only on the fulfillment of the two conditions mentioned in clauses (a) and (b) of that sub-section cannot be said to be infringing the principle adumbrated in Article 21 of the Constitution; (17) Though it cannot be said that the High Court has no jurisdiction to entertain an application for bail under Article 226 of the Constitution and pass orders either way, relating to the cases under the Act 1987, that power should be exercised sparingly, that too only in rare and appropriate cases in extreme circumstances. But the judicial discipline and comity of courts require that the High Courts should refrain from exercising the extraordinary jurisdiction in such matters; (18) Section 22 of the TADA Act is struck down as being opposed to the fair and reasonable procedure enshrined in Article 21 of the Constitution. 369. Keeping in view the doctrine of 'speedy trial' which is read into Article 21 as an essential part of the fundamental right to life and liberty guaranteed and preserved under our Constitution and which concept is manifested in the Special Courts Act, 1984 and TADA Act, 1987, the Designated Courts should dispose of the cases pending before them without giving room for any complaint of unreasonable delay. The Government concerned should ensure that no vacancy of Presiding Officer of the Designated Court remains vacant and should take necessary steps to fill up the vacancy as soon as any vacancy arises and also if necessitated, should constitute more Designated Courts so that the under trials charged with the provisions of TADA do not languish in jail indefinitely and the cases are disposed of expeditiously. 370. In the result, the legal questions raised and debated are answered accordingly. The writ petitions, criminal appeals and SLP are disposed of accordingly with no costs. The contentions raised on the facts of each case will be decided separately by

the appropriate bench. 371. Before parting with this judgment, we place on record our uninhibited high appreciation on the valuable and painstaking assistance rendered and cooperation extended by the learned Additional Solicitors General, learned Senior Counsel and advocates who by their thorough study of the complicated legal issues involved and by their research and analysis of the historical background with formidable knowledge in constitutional and criminal law have presented their conflicting views on points raised in all the petitions and appeals listed before us. K. RAMASWAMY, J.- I have had the benefit of reading the judgment pregnant with scholarship and erudition of my learned Brother Ratnavel Pandian, J. whom I hold in high personal esteem. But law respects no individuals and abiding to her command, with all my profound respect for his learning discernible even to a casual reader, I may be permitted to tread my lone path in three areas : Constitutionality of Section 9(7); Section 15 and partly of the propriety in exercising the power under Article 226 by the High Court of the matters covered under the Act. In other respects I am in full agreement. 373. The foundation of Indian political and social democracy, as envisioned in the preamble of the Constitution, rests on justice, equality, liberty, and fraternity in secular and socialist republic in which every individual has equal opportunity to strive towards excellence and of his dignity of person in an integrated egalitarian Bharat. Right to justice and equality and stated liberties which include freedom of expression, belief and movement are the means for excellence. The right to life with human dignity of person is a fundamental right of every citizen for pursuit of happiness and excellence. Personal freedom is a basic condition for full development of human personality. Article 21 of the Constitution protects right to life which is the most precious right in a civilised society. The trinity i.e. liberty, equality and fraternity always blossoms and enlivens the flower of human dignity. One of the gifts of democracy to mankind is the right to personal liberty. Life and personal freedom are the prized jewels under Article 19 conjointly assured by Articles 20(3), 21 and 22 of the Constitution and Article 19 ensures freedom of movement. Liberty aims at freedom not only from arbitrary restraint but also to secure such conditions which are essential for the full development of human personality. Liberty is the essential concomitant for other rights without which a man cannot be at his best. The essence of all civil liberties is to keep alive the freedom of the individual subject to the limitations of social control envisaged in diverse articles in the chapter of Fundamental Rights Part III in harmony with social good envisaged in the Directive Principles in Part IV of the Constitution. Freedom cannot last long unless it is coupled with order. Freedom can never exist without order. Freedom and order may coexist. It is essential that freedom should be exercised under authority and order should be enforced by authority which is vested solely in the executive. Fundamental rights are the means and the directive principles are essential ends in a welfare State. The evolution of the State from police State to a welfare State is the ultimate measure and accepted standard of democratic society which is an avowed constitutional mandate. Though one of the main functions of the democratic Government is to safeguard liberty of the individual, unless its exercise is subject to social control, it becomes anti-social

or undermines the security of the State. The Indian democracy wedded to rule of law aims not only to protect the fundamental rights of its citizens but also to establish an egalitarian social order. The individual has to grow within the social confines preventing his unsocial or unbridled growth which could be done by reconciling individual liberty with social control. Liberty must be controlled in the interest of the society but the social interest must never be overbearing to justify total deprivation of individual liberty. Liberty cannot stand alone but must be paired with a companion virtue; liberty and morality; liberty and law; liberty and justice; liberty and common good; liberty and responsibility which are concomitants for orderly progress and social stability. Man being a rational individual has to live in harmony with equal rights of others and more differently for the attainment of antithetic desires. This intertwined network is difficult to delineate within defined spheres of conduct within which freedom of action may be confined. Therefore, liberty would not always be an absolute licence but must arm itself within the confines of law. In other words there can be no liberty without social restraint. Liberty, therefore, as a social conception is a right to be assured to all members of a society. Unless restraint is enforced on and accepted by all members of the society, the liberty of some must involve the oppression of others. If liberty be regarded a social order, the problem of establishing liberty must be a problem of organising restraint which society controls over the individual. Therefore, liberty of each citizen is borne of and must be subordinated to the liberty of the greatest number, in other words common happiness as an end of the society, lest lawlessness and anarchy will tamper social weal and harmony and powerful courses or forces would be at work to undermine social welfare and order. Thus the essence of civil liberty is to keep alive the freedom of the individual subject to the limitation of social control which could be adjusted according to the needs of the dynamic social evolution. 374. The modem social evolution is the growing need to keep individual to be as free as possible, consistent with his correlative obligation to the society. According to Dr Ambedkar in his closing speech in the Constituent Assembly, the principles of liberty, equality and fraternity are not to be treated as separate entities but in a trinity. They form the union or trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality. Equality cannot be divorced from liberty. Nor can equality and liberty be divorced from fraternity. Without equality, liberty would produce supremacy of law. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality would not become a natural course of things. Courts, as sentinel on the qui vive, therefore must strike a balance between the changing needs of the society for peaceful transformation with orders and protection of the rights of the citizen. 375. As seen, one of the functions of the State is to maintain peace and order in the society. As its part, State is not only the prosecutor of the offender but also the investigator of crime. To facilitate such investigation police has been given wide powers to arrest the suspect without warrant, interrogate him in custody, search and seize incriminating material, to collect the evidence and to prosecute the offender. Deprivation of dignity of person, self-respect and inviolable right to life, would

only be within the prescribed limits set down by laws; assiduously supervised by courts; and executive excesses strictly be limited. Excessive authority without liberty is intolerable. Equally excessive liberty without authority and without responsibility soon becomes intolerable. Lest the freedoms and fundamental rights become sacrificial objects at the altar of expediency. Unrestricted liberty makes life too easy for criminals and too difficult for law abiding citizens. In a free society too many crooks blatantly break the law, blight young lives, traffic in drugs and freely indulge in smuggling and claim fundamental rights to exploit weak links of law, indulge in violence and commercial camouflage. Our values are drastically eroded because many a man with no more moral backbone than a chocolate eclair claim the freedom and free action which results inevitably in increasing the members of violent criminals. 376. The Criminal Procedure Code, 1973 for short 'the Code' and its predecessor occupied the field. Police have been empowered to carry out thorough investigation, as is practicable and reasonable in a cognizable offence, in order that all relevant information and facts about the allegations of the crime are collected and placed for the trial of the offender within the limits set down by law. A suspect, if under arrest, be placed as expeditiously as possible before the Magistrate within 24 hours after excluding the time taken for journey. Though every person has social or statutory duty to assist the police, exceptions have been engrafted and it is a constitutional mandate under Articles 20(3) and 21 as a fundamental right against self-incrimination. Article 3 of Declaration of Human Rights assures that everyone has right to life, liberty and security of person. The constitutional and human rights commitment, therefore, is that no one shall be constrained to commit himself out of his own mouth. In other words, the procedural checks are the valued means to prevent excess and civilises the actions of the executive. Articles 20(3) and 21 accord, therefore, to every person privilege against self-incrimination as part of right to life which reflects many of fundamental values, the notable ones being unwillingness to subject those suspected of crime to the cruel or inhuman treatment of self-accusation, and abuse of person. It is a protection to the innocent or may be a shelter or shield to the guilty but so far as the constitutional protection is available, its deprivation is permissible only in accordance with law consistent with the mandate of Articles 20 to 22 of the Constitution. 377. Custodial interrogation exposes the suspect to the risk of abuse of his person or dignity as well as distortion or manipulation of his self incrimination in the crime. No one should be subjected to physical violence of the person as well as to torture. Infringement thereof undermines the peoples' faith in the efficacy of criminal justice system. Interrogation in police lock-up are often done under conditions of pressure and tension and the suspect could be exposed to great strain even if he is innocent, while the culprit in custody to hide or suppress may be doubly susceptible to confusion and manipulation. A delicate balance has, therefore, to be maintained to protect the innocent from conviction and the need of the society to see the offender punished. Equally everyone has right against self-incrimination and a right to be silent under Article 20(3) which implies his freedom from police or anybody else. But when the police interrogates a suspect, they abuse their authority having unbridled

opportunity to exploit his moral position and authority inducing the captive to confess against his better judgment. The very fact that the person in authority puts the questions and exerts pressure on the captive to comply (sic). Silence on the part of the frightened captive seems to his ears to call for vengeance and induces a belief that confession holds out a chance to avoid torture or to get bail or a promise of lesser punishment. The resourceful investigator adopts all successful tactics to elicit confession as is discussed below. 378. In Confessions : Recent Developments in England and Australia by Kumar Amarasekara, Lecturer, Faculty of Law, Manash University [International and Comparative Law Quarterly, Vol. 29, (1980) pp. 327-29] the exclusion of the confession on the ground of oppressive treatment of the accused is stated elaborately. It is stated that the Criminal Law Revisional Committee of Australia recommended that use of oppressive treatment of the accused should be an additional ground for excluding a confession. Intimidation, persistence, sustained or undue insistence or pressure are some of the grounds which can render a confession involuntary. The use of prolonged, sustained pressure on a suspect to make him confess has long been recognised in Australia as a ground of exclusion. Whether such pressure was exerted by persistent interrogation or other means such as inducing mental and physical strain, the question of voluntariness has sometimes to be decided as a matter of degree. In Confession and the Social Psychology of Coercion by Edwin D. Driver, Professor of Sociology, University of Massachusetts [1968-69 (Vol. 82) Harvard Law Review 42 at pp. 48, 50-60], it is stated that voluntariness is a test for admissibility of confession. Courts have to consider mental abuse as well as physical force and threats, deficiencies and talents peculiar to the individual defendant are to be assessed, and an investigation into the totality of the circumstances surrounding the confession is required to be gone into. Since in custody interrogations are highly secretive, the courts have to infer what transpired from questionable data. Police adopt successful tactics for eliciting confessions; crucial importance is of self-confidence, which may not remain intact in interrogation. Barred are physical abuse or threats, mental coercion, lengthy detention or interrogations, inducements or promises of legal gains which are some of the grounds to infer involuntariness. In addition to the interrogation setting and the propensities of the interrogator, the ethical interrogator still has an adequate range of persuasive and manipulative tactics at his disposal to obtain confession. First, the interrogator, communicates by word and gesture that he strongly believes the suspect guilty. The next tactics is to provide factual evidence in the support of this belief. It is, however, self-confidence and self- assertion which indigents, a category into which over one-half the felony defendants fall, are likely to lack; thus a majority of suspects in their passivity and uncertainty will be little protected against the pressures of even proper interrogation. Moreover, the imbalance between the State and the defendant begins with arrest and detention, for these experiences influence the detenu in ways analogous to interrogation, the negative implications of silence, the self-mortification or extreme humiliation at being arrested, the desire to shield the self from potentially, humiliating questioning and the emotional stress caused by the symbols of the law's authority even in persons of higher sta-

tus would get lost. 379. In Crime and Confession by Arthur E. Sutherland, Jr. Professor of Law, Harvard Law School [reported in 1965-66, Vol. 79, Harvard Law Review pp. 21-25, 32, 35-37, 39-41, 93- 97] stated that the zealous executive agents of public authority must demonstrate the suspect's offence to impartial judicial officers and people insist on the correlative principle that the citizen may stand mute without prejudice in the face of official accusation. Despite centuries of experience in which people have chosen thus to weigh the scales in favour of the accused, many of those officers whom people look to for the difficult task of enforcing our criminal laws are "still not convinced of the wisdom of adopting rightful means in interrogation and eliciting confessions."It is a nice theory", such an officer might say."We subscribe to this, at any rate for those wrongly accused. But when we get wicked men in our hands we cannot afford to let technicalities permit them to escape condign punishment." But the officers know of persons in some way connected with the event, family or associates, persons seen in the vicinity, men with records suggesting that they are likely to have been involved in offenses of the sort in question .... Much worse than the conviction of the innocent in its ultimate consequence is the undermining of public confidence in the whole administration of criminal justice, which ensues when public officers commit widespread violations of the Constitutions of the United States and the States, and follow these by cynical accounts of "voluntariness", not convincing to any person who studies the record, or even to the casual newspaper reader and they would suspect the constitutional and legal rights systematically (sic) deny them on grounds of expediency, popular respect for the system for the processes of law enforcement, and for the men engaged in it inevitably declines. Crime is contagious, if the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means to declare that the Government may commit crimes in order to secure the conviction of a private criminal would bring terrible retribution. The only effective way to establish a constitutional regime in the administration of criminal justice is for the administrative superiors of police and prosecutors to insist on compliance of the constitutional mandate to see that nothing occurs which deprives the accused of a right which he is entitled to assert. The Constitution of United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of its grave exigencies of Government. In the Psychology of Evidence and Trial Procedure edited by Saul M. Kassim and Lawrence S. Wrightsman at pp. 7880, it was stated from a psychological standpoint, that the suspects readily make false confession to escape an aversive situation and to secure a favorable self-outcome. Interrogation process is like hypnosis. He refers to Foster theory in this behalf "station house syndrome" at pp. 690-91 that police interrogation can produce a trance like state of heightened suggestibility so that "truth and falsehood become hopelessly confused in the suspect's mind". He explained that due to hypnosis the suspect lose initiative

and in the heightened fantasy, confabulation and distortion get mixed up due to leading questions. A study by Weistein Abrahams and Subbons said to have revealed that implanting a false sense of guilt by hypnosis would not pass a polygraphic lie detector test. He cited Munsterberg (1908) Report in a murder case in which the accused was convicted and executed on the basis of a confession that might have been elicited through hypnotic induction that he raped Bessie Hollister. That statement obtained through hypnosis was subjected to medical analysis. His statement was denied at the trial, namely, "I saw the flash of steel in front of me. Then two men got before me. I can remember no more than that about it. I suppose I must have made those statements, since they all say I did. But I have no knowledge of having made them." It was proved later that those statements were made under hypnosis. Hugo Munsterberg and William James, the renowned psychologists noted some instances that under conditions normally associated with telling the truth, subject comes to believe the lies they had been inducted to tell. The minimum of inducement and the mildest and most subtle forms of coercion used could be sufficient to extract false confession. In 1991, Law Quarterly Review, Vol. 107) "Should confessions be corroborated" by Rosemary Patenden of University of East Anglia it was stated at pp. 318-19 that coercion is produced by situational factors accusation by a person in a position of authority by fact and intimidating environment and the use of psychological interrogation techniques by the police. The police use these tactics to extract true confession, but an innocent suspect who is susceptible to intimidation may respond by confessing to something which he did not do. The majority of untrue statements that come before the courts, probably from coerced-complaint suspect. The suspect goes along with the views of the interrogator without internalising these views as his own in order to please or to gain some temporary advantage bail, termination of an unpleasant interrogation, possibly an end to violence or the threat of violence. According to an eminent forensic psychologist, Armstrong, confession falls into various categories. In the Principles of Criminal Evidence by A.A.S. Suckerman at pp. 302-306 it is stated that in order to preserve our freedom from excessive State interference the police powers have to be strictly limited and assiduously supervised. The custodial interrogation lays the suspect open to two particular risks of harm against which the law must protect him the risk of abuse of his person or dignity and the risk of distortion or manipulation of his statements so as to implicate him in crime. The questioning in the police station is often conducted under conditions of pressure and tension. Suspects under investigation are likely to experience considerable strain even if they are innocent, while those who have something to hide or fear may be doubly susceptible to confusion and manipulation. If one adds to this the natural tendency of the investigator to manipulate the suspect's responses and interprets them in a way that confirms his own suspicion, one realizes that the scope for unreliability of confessions is not insignificant. However, the need to safeguard reliability does not necessarily create a conflict between the protection of the innocent from conviction and the need of the community to see that the offenders are punished because the latter only demands the conviction of the guilty, not of the innocent. It is difficult for a suspect to insist his privilege and

refuse to answer police questions, considering the mental pressures generated by police interrogation and the fear that silence would be construed as an admission of guilt which would operate as a factor to make false confession. However, when the police interrogate the suspect they have an opportunity to exploit his moral position and induce the suspect to confess against his better judgment. Bentham observed that the very fact that questions are put by a person in authority exerts pressure on the suspect to comply with, silence on the part of the affrighted culprit seems to his ear to call for vengeance, confession holds out a chance for indulgence. Physical abuse, threat, mental coercion, prolonged detention or interrogation, inducement, promise are per se prohibited methods to obtain confession. In addition interrogator conveys to the captive that he strongly believes that the captive committed the crime and he has evidence in support of that behalf. In Harvard Law Review, Vol. 82 (1968-69), Prof. Driver stated at pp. 48-50 that psychological control, assumed personal roles of the interrogator, certain persuasive or manipulative tactics may substantially influence suspects to change their ideas and memories. 380. Undoubtedly organised crimes' are being committed and the precious lives of countless innocent people are put an end to and innocent people are at the mercy of the terrorists and gangsters by planting bomb at public places, etc. Law abiding citizens become easy targets of killing and equally of law enforcement officers to demoralise the public or to achieve their object of intimidating the political power to come to terms with them or the people who rally around them to achieve their alleged perceptions or programmes undermining the constitutional limitations. They violate law with contempt and destabilise social well-being and order. Large number of youth and educated unemployed are indoctrinated to crime or indulge in violence. Hardened criminals are equally involved in greater number. They are using latest sophisticated arms and ammunition, weaponry in committing heinous crimes. 381. Equally true that in the midst of clash of interests, the individual interest would be subservient to social interest, yet so long as ubi jus, ebi remedium is available the procedure prescribed and the actions taken thereon by the law enforcement authority must meet the test of the constitutional mandates. 382. In a recent Working Paper on "Custodial Crimes", the Law Commission of India stated that custodial violence and abuse of police power has been concern of international community. The General Assembly of the United Nations adopted on December 9, 1975 the declaration for protection of persons from being subjected to torture and other crimes of inhuman or degrading treatment or punishment. It prohibited the member States to permit or tolerate abuse of powers even in exceptional circumstances such as state of war or threat of war or internal political instability. Article 5 thereof required comprehensive training of law enforcement officers against torture. Article 7 required system of review of the interrogation, methods and practices as well as custodial arrangements. It obligates the States to ensure that the acts of torture are made offenses under National Criminal Law. The declaration is a part of binding international law and in our country it has not yet been implemented. There is a code of conduct for law enforcement officials adopted by the General Assembly on December 17, 1979, under which substantive norms

were prescribed for " effective maintenance of ethical standards" by the officials. Article 5 thereof prohibits law enforcement officials from inflicting, instigating or tolerating any act of torture. It was followed by another declaration on December 10, 1984, by a convention which provides more elaborate procedure in 33 articles. The United Nations' General Assembly adopted yet another declaration known as "Carcus Declaration on Basic Principles of Justice for the Victims of Crime and Abuse of Power" on November 29, 1985, which obligates the State to define laws prohibiting the criminal abuse of power and also for prohibition of recourse to third degree methods. The aforestated working paper says that India being a party to the declarations and Conventions, is under an obligation to take effective steps to prohibit abuse of power, including torture and custodial violence, etc. in accordance with Article 51 of the Constitution. 383. Neither the Evidence Act, 1872 nor the Code, nor its predecessor defined "confession". This Court in Palvinder Kaur v. State of Punjab'24 ruled that: (SCR at p. 104) "A confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a 124 1953 SCR 94, 104: AIR 1952 SC 354: 1953 Cri LJ 154 gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession. A statement that contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact, which if true, would negative the offence alleged to be confessed." Therefore, confession means an admission of certain facts which constitute an offence or substantially all the facts that constitute the offence, made by a person charged with the offence which is the subject-matter of the statement. In Pakala Narayana Swami v. King-Emperor125 Lord Atkin, held at p. 81 thus: "An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession, e.g., an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession." Sections 24 to 30 of the Evidence Act deal with provability or relevancy of a confession. A confession made by an accused person is irrelevant if it appears to the court to have been caused by inducement, promise or threat having a reference to the charge proceeding from a person in authority. By Section 25 there is an absolute ban at the trial against proof of a confession to a police officer, as against a person accused of any offence. The partial ban under Section 24 and total ban under Section 25 applied equally with Section 26 that no confession made to any person while the accused is in the custody of a police officer, unless it is made in the immediate presence of a Magistrate, shall be proved as against such person. Section 27 makes an exception to Sections 24, 25 and 26 and provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. The provisions in Sections 28 to 30 are not relevant for discussion. The fascicule of Sections 24 to 30 aim to zealously protect the accused against becoming the victim of his own delusion or the mechanisation of others to self-incriminate in crime. The confession, therefore, is not received with an assurance, if its source

be not omni suspicious mojes, above and free from the remotest taint of suspicion. The mind of the accused before he makes a confession must be in a state of perfect equanimity and must not have been operated upon by fear or hope or inducement. Hence threat or promise or inducement held out to an accused makes the confession irrelevant and excludes it from consideration. A confession made to a police officer while the accused is in the custody or made before he became an accused, is not provable against him on any proceeding in which he is charged to the commission of the said offence. Equally a confession made by him, while in the custody of the police officer, to any person is also not provable in a proceeding in which he is charged with the commission of the offence unless it is made in the immediate 125 66IA66,81:AIR1939PC47:40CriU364 presence of the Magistrate. Police officer is inherently suspect of employing coercion to obtain confession. Therefore, the confession made to a police officer under Section 25 should totally be excluded from evidence. The reasons seem to be that the custody of police officer provides easy opportunities of coercion for extorting confession. Section 25 rests upon the principle that it is dangerous to depend upon a confession made to a police officer which cannot extricate itself from the suspicion that it might have been produced by the exercise of coercion or by enticement. The legislative policy and practical reality emphasise that a statement obtained, while the accused is in police custody, truly be not the product of his free choice. So a confessional statement obtained by the law enforcement officer is inadmissible in evidence. 384. In Chapter 12 of the Code, "Information by the police and their powers to investigate", Section 162 mandates that no statement made by any person to a police officer in the course of an investigation shall, if reduced to writing, be signed by the person making it, nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. Under the proviso to sub-section (1) it may be used by the accused, and with the permission of the court, by the prosecution, to contradict such witness in the manner provided by Section 145 of the Evidence Act or for the purpose of explaining any matter referred to in the cross- examination by reexamining such witness. In Pakala Narayana Swami case125 the Privy Council held that any person referred to in Section 162 would include a person who eventually became an accused. "Any such statement", must therefore, include such a case and it would appear that if the statement is to be admitted at all, it can only be by limiting the words "used for any purpose" by the addition of such words "except as evidence for or against the person making it when accused of an offence". Accordingly it was held that "the words of Section 162 in their Lordships' view plainly are wide enough to exclude any confession made to a police officer in the course of investigation, whether a discovery is made or not. They may, therefore, pro tanto repeal the provisions of the section which would otherwise apply. If they do not, presumably it would be on the ground that Section 27 of the Evidence Act is a special law within the meaning of Section 1, sub-section (2) of the Code of Criminal Procedure, and that Section 162 is not a specific provision to the con-

trary. In Tahsildar Singh v. State of U.P.126 the Constitution Bench held that it must be used only for cross-examination of the maker under Section 145 of the Evidence Act. 385. Section 164 of the Code gives power to the Metropolitan Magistrate or Judicial Magistrate to record confession and statements during the course of investigation under Chapter 12 or under any law for the time being in 125 66IA66,81:AIR1939PC47:40CriLJ364 126 AIR 1959 SC 1012: 1959 Supp 2 SCR 875: 1959 Cri LJ 1231 force, or at any time afterwards before the commencement of the inquiry or trial. The Magistrate may record confession or statement made to him. But before doing so he is enjoined by sub-section (2) thereto to explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily. He shall record the confession in the manner provided in Section 281 for recording the examination of the accused person. It shall not only be signed by the Magistrate, but also by the accused himself. The Magistrate shall also append a memorandum at the foot of the record as laid down in sub- section (4). If he has no jurisdiction to inquire into or try the offence he shall forward the confession so recorded to the Magistrate by whom the case is to be inquired into or tried. High Courts have made rules in this behalf to give sufficient time to the accused for reflection, relevant warnings and other related procedural safeguards, etc. 386. The Magistrate before recording the confession should properly question the accused, as far as may be necessary, elicit from him whatever facts he is willing to state; to understand exactly what his meaning is and how far he intends his confession or admission to go. The confession must be recorded with great care and circumspection. The Magistrate must record the questions put to the accused to ascertain whether the confession was of voluntary nature, that he will not have to go back to the police custody after statement was recorded; to warn the accused of the consequences which would ensue if the confession is false or if he has in the hope of release implicated himself and to ask the accused whether the police or any other person had subjected him to ill-treatment etc. No hard and fast rule could or should be laid down as to the procedure which would be adopted when an accused is brought before the Magistrate to record his confession. Confession extracted while in custodial interrogation excites suspicion of its voluntariness. But when it is recorded by the Judicial Magistrate it removes the stains and assures voluntariness. The object of keeping the accused/suspect in judicial custody and giving him sufficient time for reflection and necessary warnings reinforces it since sufficient time given the accused frees himself from the pressure of police interrogation and for reflection before making confession. It will have sobering effect on the accused/suspect. 387. In Nazir Ahmad v. King-Emperor' 27 the Privy Council held that the Magistrate acting under Section 164, though is not acting as a court, yet he is a judicial officer, and both as a matter of construction and of good sense, the recording of the confession shall be in compliance with Section 164 read with Section 364 (Section 281 of the 1973 Code). The confession shall be recorded in the manner prescribed under Section 164 and the standing orders and in no other way. The

Magistrate had not recorded the confession as 127 AIR 1936 PC 253: 37 Cri LJ 897 enjoined under Section 164. He tendered his oral evidence of the confession made by the accused. It was held that the confession was inadmissible and the accused was acquitted. In Ram Chandra V. State of U.P.128 this Court held that the confession must be recorded in open court and during the court hours unless for exceptional reasons it is not feasible to do so. This is a very important provision which emphasises that the Magistrate in recording confession is exercising"part of his judicial function" in the manner prescribed by the law. One of the instructions provides that the Magistrate should enquire the reason why the accused is making the confession knowing that it may be used against him. In that case since the confession was recorded in the police lock-up, it was held that it was inadmissible. 388. It would thus be clear that the provisions of Section 164 are mandatory and it is the duty of the Magistrate to follow the procedure strictly. If he fails to do so, he would be failing in his discharge of judicial duty. If the statement or confession was recorded in strict compliance with Sections 164 and 281 and the rules made thereunder, the confession would be admissible, although it is retracted. In Nazir Ahmad case127 it was held that a confession recorded by a Magistrate without conforming to the provisions of Section 164 or Section 364 of CrPC renders the precautions laid in those provisions of such trifling value as to be almost idle. A confession duly recorded with the prescribed certificate appended to it may be presumed to be voluntary and be admissible in evidence subject to the conditions contained in Sections 24 to 30. A retracted confession may form basis for conviction of that accused, if it receives some general corroboration from other independent source. 389. When the Indian Evidence Act was enacted, the British Parliament had with them the Law Commission's Report that the police resorted to extort confession by force, threat or inducement and therefore had taken care of elaborate safeguards engrafted in Sections 24 to 30 to exclude from evidence confession obtained in the stated circumstances with an exception of Section 27 that fact discovered in consequence of the statement made by the accused alone was made admissible. 390. It is equally settled law that a statement cannot be said to be properly recorded under Section 164 of the Code if a police officer is present or allowed to be present at that time or is allowed to put question to the accused. Equally it is settled law that confession would not be recorded during night time or late hours after the accused has been subjected to interrogation by the police officer for 3 to 4 hours and had broken down under the continued interrogation. It is not enough for a Magistrate to give the accused a warning that the confession, if made, would be used against him but it is essential that he should put questions to satisfy himself that the confession was in fact voluntary and the questions with answers must be recorded. The court before whom the confession is used must have material 128 AIR 1957 SC 381, 386: 1957 Cri LJ 559 127 AIR 1936 PC 253: 37 Cri LJ 897 on which it can be satisfied that the confession was in fact voluntary. It is mandatory under Section 164 of the Code that the Magistrate must record the confession strictly in accordance with the prescribed procedure. Sufficient time should be given to the accused for reflection, but no hard and fast rule could be laid as to the proper time. It is settled law that at

least 24 hours should be given to the accused to decide whether or not he should make a confession. If the circumstances generate any suspicion that the accused was induced or coerced or threatened to make a confession, even longer period should be given as held by this Court in Sarwan Singh v. State of Punjab129 so much is the concern, protection and safeguard provided by the Evidence Act. 391. The question from the afore scenario emerges whether Section 15(1) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 for short "the Act" empowering the police officer not below the rank of the Superintendent of Police to record the confession is constitutionally valid. 392. Section 15(1) of the Act reads thus: " 15. (1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (I of 1872), but subject to the provisions of this section, a confession made by 'a person' before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person for an offence under this Act or rules made thereunder. (2) The police officer shall, before recording any confession under sub- section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily." (emphasis supplied) 393. There cannot be a dispute with the proposition, as argued by Shri Tulsi, learned Additional Solicitor General, that the Legislature when has power to make the Evidence Act, has equally power to amend and alter the pre- existing procedure in the light of the changing needs of the society and that there is no vested right to procedure. The legislature can equally take away the procedure by omitting it by amendment. We are not concerned so much with the power of the Parliament to make the law and it does possess such power under Article 248 and Entry 97 of List 1. Equally it is settled law that conferment of power in a high ranking officer is presumed to be exercised according to law or rules. Such conferment of power may be prima facie presumed to be valid. But the crux of the question would be whether the power given as to the police officer unlike an independent agency from which the suspicion least generates is a civilised procedure. The angulation from these perspectives protects the liberty. As seen, a voluntary confession 129 AIR 1957 SC 637, 643: 1957 SCR 953: 1957 Cri LJ 1014 is a valuable piece of evidence in proof of the guilt of the accused. If the confession is found to have been made voluntarily in paenitentia, it would form basis for conviction. In State of Maharashtra v. Sukhdev Singh130 this Court confirmed the conviction of an accused on the basis of admissions made during trial and his examination, under Section 313 of the Code. Even retracted confession if it receives general corroboration would form basis for conviction. 394. Under Article 20(3) of the Constitution, "no person, accused of an offence, shall be compelled to be a witness against himself'. Article 21 assures of right to life or personal liberty. It would be deprived only according to procedure validly established by law. Article 20 is not confined to individual or common law offenses. It extends to statutory offenses. Offenses under the Act are statu-

tory offenses. As soon as a formal accusation constituting an offence under the Act has been made before SHO or in a private complaint the person is entitled to the protection under Articles 20(3) and 21. Their violation, except in accordance with valid procedure established by law, are in violation of human right to life assured by Article 21 of the Constitution. Liberty of every citizen is an invaluable and precious right. Burden is on the State to establish that its deprivation is constitutionally valid. In the State of W.B. v. Anwar Ali Sarkar5O it was held that procedural law as well as substantive law must pass the tests prescribed by Article 14. Article 21 is not intended to be a limitation upon the powers of the legislature which it otherwise has under the Constitution. Yet the substantive as well as the procedural law made, modified or amended must be just, fair and reasonable. The purity of the procedure to discover truth shall always remain fair, sensitive to the needs of the society and fairly and justly protect the accused. The procedural safeguards are indispensable essence of liberty. The history of personal liberty is largely the history of procedural safeguards. The procedure contemplated by Article 21 of the Constitution means just and fair procedure and reasonable law but not formal or fanciful. The standard of fairness in recording confession under Section 15(1) of the Act must be within constitutionally sustainable parameters. No person shall be deprived of his life or personal liberty except in accordance with the procedure established by law mandated by Article 21, would mean that a person shall not be subjected to coercion which does not admit of legal justification. Procedure envisaged in Article 20(3) is the manner, means and the form in which the right is enforced, or the person is subjected to. Though the Constitution does not guarantee any particular procedure and the legislature is left free to lay down the procedure, Articles 14 and 21 prescribe in built limitation in prescribing the procedure, i.e., there must be fundamental fairness in the procedure prescribed by law and should not be unconscionable or oppressive. 395. Article 50 enjoins the State to separate the judiciary from the executive. Having done so by the Code and having entrusted under Article 130 (1992) 3 SCC 700: 1992 SCC (Cri) 705: JT (1992) 4 SC 73 50 1952SCR284:AIR1952SC75:1952CriLJ510 164 judicial duty on the Judicial Magistrate of First Class, whether conferment of self same power on Superintendent of Police under Section 15 by employing a non-obstante would be just, fair and reasonable? The constitutional courts are sentinels on the qui vive and guardians of human rights and common man looks upon them as their protectors. Where two procedures coexist and classify one procedure to one set of accused and another one for some other accused, both must satisfy the test of Articles 14 and 21. It is true and courts also would take judicial notice that terrorists or organised criminals have committed and have been committing murders of innocent people in countless number, thereby rudely shaking the foundations of stable social order. Equally the lawless elements who flout the law with impunity need to be dealt with separately. But suppression of crime by harsh procedure whether meets the test of Articles 14 and 21. 396. In the State of Bombay v. Kathi Kalu Oghad78 a Bench of II Judges, per majority, interpreting Article 20(3) held on"testimonial compulsion" that, "[w]e can see no reason to confine the content of the constitutional guarantee to this barely

literal import. So to limit it would be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions." Indeed every positive act which furnishes evidence is testimony and testimonial compulsion connotes coercion which procures positive oral evidence. The acts of the person, of course, is neither negative attitude of silence or submission on his part, nor is there any reason to think that the protection in respect of the evidence procured is confined to what transpires at the trial in the court room. The phrase used in Article 20(3) is to be a witness and not to appear as a witness. It follows that the protection accorded to an accused insofar as it is related to the phrase "to be a witness" is not merely in respect of the testimonial compulsion in the court room but may well extend to compelled testimony previously obtained from him. The guarantee was, therefore, held to include not only oral testimony given in a court or out of court, but also statements in writing which incriminated the maker when figuring as accused person. In Nandini Satpathy v. P.L. Dani79 it was further held that compelled testimony must be read as evidence procured not merely by physical threat or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like not legal penalty for violation. 397. The expression "life or personal liberty" in Article 21 of the Constitution as stated hereinbefore includes right to live with human dignity which would include guarantee against torture and assault by the State. This Court in Sunil Batra v. Delhi Administration (1)23 and Sunil Batra v. Delhi Administration(II)71 held that Article 21 guarantees protection against torture 78 (1962) 3 SCR 10: AIR 1961 SC 180: (1961) 2 Cri LJ 856 79 (1978) 2 SCC 424: 1978 SCC (Cri) 236: (1978) 3 SCR 608 23 (1978) 4 SCC 494: 1979 SCC (Cri) 155: AIR 1978 SC 1675 71 (1980) 3 SCC 488: 1980 SCC (Cri) 777: AIR 1980 SC 1579 and assault by the State while a person is in custody. It is a legitimate right of the police to arrest a suspect on receiving some credible information or material, but the arrest must be in accordance with law and the interrogation should not be accompanied with torture or use of third degree methods. The interrogation and investigation should be in true sense purposeful to make the investigation effective. This Court in Sheela Barse v. State of Maharashtra131 held that the accused should be produced before the Magistrate. It should be mandatory for the Magistrate to enquire from the arrested person whether he has any complaint of torture or maltreatment in custody and he should further be informed that he has a right under Section 54 of the Code of Criminal Procedure to be medically examined. In Nandini Satpathy case79 this Court held that the accused is entitled to have his counsel during interrogation. Torture or beating of arrested person in the lock-up is generally carried on behind the closed doors and no member of the public is permitted to be there and instances are not wanting that even the family members of the arrested persons are not allowed to meet the suspect. 398. A police officer is clearly a person in authority and insistence on the accused/suspect to answer his interrogation is a form of pressure, especially in the atmosphere of police station unless certain safeguards erasing duress are adhered to. Policy or rationale or object of the Act have little relevance in determining the con-

stitutional validity of the offending provision. The court is not sitting over the policy of the State in enacting the law, nor at this stage to sift the evidence. Fair criminal trial is the fundamental right under Article 21. Though the State is free to regulate the procedure for investigation of a crime, to collect evidence and place the offender for trial in accordance with its own perceptions of policy, yet in its so doing if it offends some fundamental principles of fair justice rooted in the traditions and conscience of our people, it would be classified or characterised or ranked as unjust and unfair procedure. Appearance of injustice is denial of justice. Built in procedural safeguards assure a feeling of fairness. When the procedure prescribed by the statute offends the principle of fair justice or established judicial ethos or traditions or shocks the conscience, it could be said that it is fundamentally unfair and violative of the fundamental fairness which are essential to the very concept of justice and civilised procedure. Whether such fundamental fairness has been denied is to be determined by an appraisal of the totality of facts, gathered from the setting, the contents and the procedure which feed the end result. The procedure which smacks of the denial of fundamental fairness and shocks the conscience or universal sense of justice is an anathema to just, fair or reasonable procedure. Articles 14 and 21 frown against arbitrary and oppressive procedure. 399. The procedure envisaged in Article 21 means the manner and method of discovering the truth. Section 36 of the Code also empowers 131 (1983) 2 SCC 96: 1983 SCC (Cri) 353: AIR 1983 SC 378 79 (1978) 2 SCC 424: 1978 SCC (Cri) 236: (1978) 3 SCR 608 " superior police officer" or an officer-in-charge of the police station to exercise the same powers throughout his local area. The Superintendent of Police is in-charge of the district police administration. Under Section 2(h) of the Code investigation includes all proceedings under the code for collection of evidence conducted by the police officer other than an authorised Magistrate in that behalf. A superior police officer in-charge to maintain law and order, while recording confession of a person in police custody though ostensibly complying with Section 15(2) of the Act whether would rise above the stream and transcends above the weather of the day and exhibits the even equanimity and objectivity of a trained Judicial Magistrate? While the Code and the Evidence Act seek to avoid inherent suspicion of a police officer obtaining confession from the accused, does the same dust not cloud the vision of superior police officer? Does such a procedure not shock the conscience of a conscientious man and smell of unfairness? Would it be just and fair to entrust the same duty by employing non-obstante clause in Section 15(1)? Whether mere incantation by employing non-obstante clause cures the vice of afore enumeration and becomes valid under Articles 14 and 21? My answer is “NO”, “absolute no no”. The constitutional human rights perspectives projected hereinbefore; the history of working of the relevant provisions in the Evidence Act and the wisdom behind Section 164 of the Code ignites inherent invalidity of sub-section (1) of Section 15 and the court would little afford to turn Nelson’s blind eye to the above scenario and blissfully bank on Section 114 Ill.(e) of the Evidence Act that official Acts are done according to law and put the seal that sub- section (1) of Section 15 of the Act passes off the test of fair procedure and is constitutionally valid. In Special Courts Bill, 1978,

Re54 (AIR at p. 518) it was held that the procedure prescribed by the Bill was unjust and unfair to the accused violating Article 21 of the Constitution on the ground that there was no provision in the Bill for the transfer of a case from one special court to another, though the presiding judge had a bias. The appointment of the Judge to the special court during the pleasure of the Government is subversive of judicial independence and appointment of a retired judge to preside over a special court violates Article 21. The Division Bench of the Andhra Pradesh High Court reported in V.M. Ranga Rao v. State of A.P.132 considering the validity of conferment of judicial powers on high ranking police officers, Superintendent of Police as a Special Executive Magistrate to try offence under Sections 107(2), 110, 133, 143 to 145, held that the appointment violates Article 21. It was further held that the faith of the people is the Saviour and succour of justice. Any weakening link would rip apart the edifice of law. The principle of justice is ingrained in our conscience and though ours is a nascent democracy it has now taken deep roots in our ethos of adjudication, judicial process, be it judicial, quasi-judicial or administrative, is hallmark. Respect for law is one of the essential principles for an effective operation of popular Government. It is the courts and not the 54 (1979) 1 SCC 380: AIR 1979 SC 478, 518: (1979) 2 SCR 457 132 (1985) 2 APLJ 361 legislature that our citizens primarily feel with keen abiding faith for redress, the cutting edge of the law. If they have respect for the working of their courts, their respect for law will survive the shortcomings of every other branch of the Government. If they lose their respect for the work of the courts, their respect for law and order will vanish with it to the great detriment of the society. Conferment of judicial powers in higher degree on the police will erode public confidence in the administration of justice. The veil of expediency to try the cases by the persons acquainted with the facts and to track the problems posed or to strike down the crime or suppression thereof cannot be regarded as a valid ground to give primacy to the arbitrary or irrational or ultra vires action taken by the Government in appointing the police officers as Special Executive Magistrate, nor is the right of revision against his decision a solace. It not only sullies the stream of justice at its source but also chills the confidence of the general public and erodes the efficacy of rule of law and is detrimental to the rule of law. 400. In Andrew R. Mallory v. USA133 the defendant, a 19 year-old lad of limited intelligence, was arrested by the police on suspicion of rape. The police interrogated him for half an hour and then asked him to submit to a lie detector test and subjected to another such test four hours after further detention without telling him of his right to counsel to be present or to preliminary examination before a Magistrate, nor was he warned that he might keep silent, etc. His confession was used at the trial and he was convicted imposing death sentence for the offence of rape. In a unanimous decision Frankfurter, J., speaking for the court, held that the confession was in violation of Rule 5(a) of the Federal Rules of Criminal Procedure and the confession was inadmissible. 401. In Winston Massiah v. United Statesl34 the defendant while on bail had a conversation in the absence of his counsel with one of his codefendants without knowing that latter was cooperating with the government agent who had allowed the installation of a

radio transmitter under the front seat of the automobile, by means of which a federal agent listened to the conversation. At the trial the conversation was testified as incriminating confessional statement made by the defendant which resulted in his conviction. On certiorari,-the Supreme Court, by majority of six Judges, held that the confession was in violation of the Sixth Amendment guaranteeing the right to assistance of a counsel and the confession was held inadmissible. 402. In William Malloy v. Patrick J. Hoganl35 the petitioner as a witness in a state enquiry into gambling and other crimes, availed of his privilege against self-incrimination, refused to answer a number of questions related to the events surrounding his previous arrest during a gambling raid and his conviction of pool selling. He was convicted for contempt and sent to prison for his unwillingness to answer. His application for habeas corpus was rejected. On certiorari, the US Supreme Court held, per majority of five 133 354 US 449: 1 L Ed 2d 1479 (1957) 134 377 US 201: 12 L Ed 2d 246 (1964) 135 378 US 1: 12 L Ed 2d 653 (1964) Judges, that the Fifth Amendment makes the privilege against self incrimination applicable to the States. The privilege, if properly invoked in a State proceeding, is governed by federal standards and the petitioner's claim of the privilege should have been upheld. 403. In William Murphy v. Waterfront Commission of New York Harborl36 when the witnesses refused to answer the questions on the ground that the answers might tend to incriminate them under federal law, to which the grant of immunity did not purport to extend, the superior court, the New Jersey Supreme Court held them guilty of civil contempt. On certiorari, the Supreme Court of US, per majority, held that the constitutional privilege against self-incrimination protects the witnesses against incrimination under federal as well as State law and the Federal Government is prohibited from making any use of testimony which the witnesses were compelled to give after grant of immunity by the State laws. Therefore, it was held that they did not commit any civil contempt. 404. In Emesto A. Miranda v. State of Arizona137 it was held that the confession obtained from an accused in police custody and subjected to interrogation offends the Fifth Amendment privilege against selfincrimination and "inherently compelling pressure" of custodial interrogation without proper safeguards (right of the counsel to be present) inevitably and "inherently work it to undermine the individual's will to resist and to compel him to speak what he would not otherwise do so freely". 405. In Edward v. Arizona'38 during the interrogation, police and Edward discussed a possible deal and Edward stated finally that, "I want an attorney before making a deal". He was returned to jail, but next morning he was interrogated again by two detectives, not involved in the earlier discussion. They again warned Edward and after waiving his rights, he made the incriminatory statement. The court held that the statement was inadmissible. In that scenario it was held that, "when an accused has invoked his right to have counsel present during custodial interrogation ... he is not subject to further interrogation by the authorities until the counsel is made available to him, unless the accused himself initiates further communication, exchanges or makes further conversation with the police" (at pp. 484 and 485). This rule Was further expanded in Arizona v. Robertson139 where the suspect was approached by an officer who was unaware

that Robertson in earlier discussion with another officer, had invoked his right to counsel. The second officer successfully questioned Robertson concerning an offence unrelated to the offence with which the first interrogation had been concerned. The court held explaining the Edwardl38 ratio that the former was based upon the need to vigorously discourage the police activities reapproaching the suspect who has been interrogated by police when he was 136 378 US 52: 12 L Ed 2d 678 (1964) 137 384 US 436: 16 L Ed 2d 694 (1966) 138 451 US 477 (1981) 139 486 US 675 (1988) not capable of undergoing interrogation when the lawyer helps ... that creates a specially high risk of involuntary waiver. This rationale applies when the suspect is reapproached concerning a different offence since there is no basis for concluding that the officers interrogating such offence will lack the " eagerness to obtain a confession that this situation poses the high risk to self- incrimination interest". 406. It would, therefore, be clear that any officer not below the rank of the Superintendent of Police, being the head of the District Police Administration responsible to maintain law and order is expected to be keen on cracking down the crime and would take all tough steps to put down the crime to create terror in the heart of the criminals. It is not the hierarchy of officers but the source and for removal of suspicion from the mind of the suspect and the objective assessor that built-in procedural safeguards have to be scrupulously adhered to in recording the confession and trace of the taint must be absent. It is, therefore, obnoxious to confer power on police officer to record confession under Section 15(1). If he is entrusted with the solemn power to record a confession, the appearance of objectivity in the discharge of the statutory duty would be seemingly suspect and inspire no public confidence. If the exercise of the power is allowed to be done once, may be conferred with judicial powers in a lesser crisis and be normalised in grave crisis, such an erosion is anathema to rule of law, spirit of judicial review and a clear negation of Article 50 of the Constitution and the constitutional creases. It is, therefore, unfair, unjust and unconscionable, offending Articles 14 and 21 of the Constitution. 407. The further contention of Shri Tulsi that the Parliament being competent to enact Section 15(1) of the Act and the effect of Sections 24 to 30 of Evidence Act can equally be taken away by employing non-obstante clause; the legislature adopted the above device in its legislative claim to contain the escalated large scale crimes by organised terrorists and gangsters and the apprehended misuse is eliminated as it was vested in high ranking officer, cannot be given acceptance for the aforestated reasons. 408. The next question is whether Section 9 of the Act constituting Designated Court; appointment of a Sessions or Additional Sessions Judge to that court and his continuance in office beyond superannuation find hospitable soil in constitutional contours. Section 9(1) empowers the Central Government or the State Government to constitute, by notification published in the Official Gazette, one or more Designated Courts for such area or areas, or for such case or class or group of cases, as may be specified in the notification. Under sub-section (4). thereof the Designated Court shall be presided over by a Sessions Judge to be appointed by the Central Government or the State Government, as the case may be, with the concurrence of the Chief Justice of the High Court. Under sub-section (5) Additional Sessions

Judge is eligible to be appointed as Designated Court. Under sub-section (6) a Sessions Judge or Additional Sessions Judge, in any State, shall be qualified for appointment as a Judge of a Designated Court. Sub-section (7) is material for the purpose of this case which reads thus:"For the removal of doubts, it is hereby provided that the attainment of a person appointed as a judge or additional judge of a Designated Court of the age of superannuation under the rules applicable to him in the service to which he belongs, shall not affect his continuance as such judge or additional judge." Sub-sections (2) and (8) are omitted as being immaterial for the present purpose. Section 6 of the Code classifies criminal courts in every State, namely, besides the High Courts and the courts constituted under any law, other than the Code, there shall be, in every State (i) Courts of Session; (ii) Judicial Magistrates of the first class and, in any metropolitan area Metropolitan Magistrates; (iii) Judicial Magistrates of the second class; and (iv) Executive Magistrates. 409. Under Section 9 of the Code the State Government shall establish a Court of Session for every sessions division. Under sub-section (2) thereof, the Court of Session shall be presided over by a Judge to be appointed by the High Court. Under sub-section (3) the High Court may also appoint Additional or Assistant Sessions Judges to exercise jurisdiction in a Court of Session. The other sub-sections are not material. Hence they are omitted. The High Court or the State Government, as the case may be, may by order under Sections 32 and 33 empower these persons specially by name or in virtue of their offices or classes of officials generally by their official titles to perform the functions of Court of Session. Under the Code, throughout any local area, such persons exercise the powers in local area or any other local area to which they are so appointed, in addition. They are subject to appellate or revisional jurisdiction of the High Court. 410. In Chapter V, Part VI of the Constitution of India, with the caption “The High Courts in the State” Article 214 provides that there shall be a High Court for each State and it shall be a court of record under Article 215. Articles 216 to 224 are not relevant here. Under Article 225 subject to the provisions of the Constitution and to the provisions of any law of the appropriate legislature made by virtue of powers conferred on that legislature, the jurisdiction of the High Court would continue to be exercised with the respective powers of the judges thereof in relation to the administration of justice in the Court etc., etc. By operation of Article 227, every High Court shall have superintendence “over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction”. That apart it also has the power to call for returns from such courts, make rules regulating the practice and procedure of such courts etc. etc. In Chapter VI, “Subordinate Courts”, Article 233 deals with appointments to and promotion of district judges. They shall be made under Article 233(1) by the Governor of the State in consultation with the High Court. Other judicial officers other than district judges to the judicial service of a State shall be made by the Governor in accordance with the rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court as envisaged in Article 234. Article 235 gives control to the High Court over district courts and courts subordinate thereto including posting and promotion of the officers

in the judicial service of the State. Such control "shall be vested in the High Court". By operation of the interpretation clause in Article 236, the expression 'district judge' includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge. The judicial service shall mean the service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge. It could thus be clear that the recruitment of the officers to the judicial service of the State below the level of the district judge is either by the Public Service Commission of the State or by the High Court in some States, Equally recruitment to the post of district judge shall be by the High Court and the Governor makes appointment of the candidates selected and recommended by the High Court as District or Additional District Judges. They are invested with the powers of Sessions Division under the Code. All the judicial officers shall be exclusively under the control of the High Court including their promotion, posts, transfer, grant of leave and disciplinary control, etc. till they attain the age of superannuation prescribed under the relevant rules. By operation of Article 237 the High Court has the control on all the judicial officers. They are the core members and floor level officers of the judicial service of the State exposed to direct public gaze, It is settled law that the High Court has exclusive control over judicial officers and the Governor should normally act according to the recommendation of the High Court. Even in respect of dismissal, removal, reduction in rank etc. of subordinate judicial officers, the Government Advocates etc., it is made in consultation with and advice of the High Court. The constitutional scheme thus guarantees and secures independence of the subordinate judiciary as well. 411. It is the basic postulate under the Indian Constitution that the legal sovereign power has been distributed between the legislatures to make the law, the executive to implement the law and the judiciary to interpret the law within the limits set down by the Constitution. The courts are intermediary between the people and the other organs of the State in order to keep the latter within the parameters delineated by the Constitution. There can be no liberty if the power of judging be not separated from the legislative and executive powers. Article 50 of the Constitution, therefore, enjoins the State and in fact separated the judiciary from the executive in the public services of the State. It is the constitutional duty of the judiciary to adjudicate the disputes between the citizen and the citizen; and the State; the States inter se and the States and Centre in accordance with the Constitution and the law. 412. Independent judiciary is the most essential attribute of rule of law and is indispensable to sustain democracy. Independence and integrity of the judiciary in a democratic system of Government is of the highest importance and interest not only to the judges but to the people at large who seek judicial redress against perceived legal injury or executive excesses. Dispensation of justice by an impartial presiding judge, without fear or favour, affection or ill-will, is the cardinal creed and is zealously protected by the Constitution. Judicial review is the basic structure and independent judiciary is the cardinal feature and an assurance of faith enshrined in

the Constitution. Confidence of the people in impartial dispensation of justice is the binding force for acceptance of justice delivery system. Independence is not limited to insulating the judges from executive pressures alone. Its sphere extends to many other impeccable zones of pressures or prejudices. Judges should be made of stem stuff unbending before the power, economic or political which alone would ensure fair and effective administration of justice. The officer exercising judicial power vested in him must be, of necessity, free to act upon his own conscience and without apprehension of personal consequences to himself or lure of retrial rehabilitation. The judges should be made independent of most of their restraints, checks and punishments which are usually called into play against other public officers and he should be devoted to the conscientious performance of his duties. Therefore, he must be free from external as well as internal pressures. The need for independent and impartial judiciary manned by persons of sterling character, impeccable integrity, undaunting courage and determination, impartiality and independence is the command of the Constitution and call of the people. He would administer justice without fear or favour, affection or ? ill-will. His sanction and succor are nurtured and nourished from the Constitution itself. The ability and integrity of the judge to make a decision free from external interference or influence or external cravings is an essential component and an in built assurance to shape the orderly life of the community. Independent and impartial judiciary thus sustain the faith of the people in the efficacy, effectivity and impartiality of judicial process. Independence of the judiciary has been secured by providing security of tenure and other conditions of service. Judicial independence means total liberty of the presiding judge to try, hear and decide the cases that have come before him according to the set procedure and decide the cases and give binding decision on merits without fear or favour, affection or ill-will. 413. The subordinate judiciary is complement to constitutional courts as part of the constitutional scheme and plays vital part in dispensation of justice. Its decisions are subject to appeal or revision to the High Court which exercises control and supervision over the proceedings and decisions of subordinate courts, tribunals and other bodies or persons who carry out administrative or quasi-judicial functions within its territorial jurisdiction. Judicial review is not only concerned with the merits of the decision but also of the decision-making process. It intends to protect the individual against the misuse or abuse of the power by a wide range of authorities. Judicial review is a protection to the individual and not a weapon. It, therefore concerns with the manner in which the authority makes the decision. The court of appeal though substitutes its own decision to that of the subordinating courts or the tribunal etc. on merits, it is to ensure that the individual is give a fair treatment. Judicial review ensures that the authority acts fairly and the order is not vitiated by illegality, unreasonableness, irrationality or procedural impropriety. The civil rights and criminal justice are integral part of judicial process. Procedure is the handmaid to substantive justice. Law therefore, has to be vigilant to ensure adequate safeguards for those whose rights are affected or to exercise their rights or acts. Equally the exercise of the executive power of the Government should be put under control. Judicial review, therefore, is the process by which

the constitutional courts i.e. the Supreme Court and the High Court exercise supervisory jurisdiction over the proceedings and decisions of the subordinate courts etc., tribunals or authority or persons entrusted with administrative or quasi-judicial acts or duties. Subordinate courts also, as said earlier, exercise, in a small measure judicial review of administrative acts. Subordinate courts are integral part of the judiciary under the Constitution. In Black's Law Dictionary, 6th Edn., Judicial power has been defined at p. 849 thus: "The authority exercised by that department of government which is charged with declaration of what law is and its construction. The authority vested in courts and judges, as distinguished from the executive and legislative power. Courts have general powers to decide and pronounce a judgment and carry it into effect between two persons and parties who bring a case before it for decision; determination of questions of right in specific cases affecting interests of person or property, as distinguished from ministerial power involving no discretion. Inherent authority not only to hear and determine controversies between adverse parties, but t o make binding orders or judgments. Power to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before court for decision. Power that adjudicates upon and protects the rights and interests of persons or property, and to that end declares, construes and applies the law." 414. Judicial power, therefore, means the judicial power which every authority i.e. courts i.e. High Court and subordinate judiciary, established under Chapters V and VI of Part VI and the Union Judiciary constituted in Chapter IV in Part V, 'the Supreme Court of India' must of necessity have to decide controversies between citizen and the citizen, and the State or the States inter se, whether the rights relate to life, liberty or property. The courts have power and authority to declare the law, apply the law and give a binding and authoritative decision between the parties before it and carry it into effect. 415. The Courts of Session constituted by Section 6 of the Code and invested with the powers under the Code are manned by District and Additional District or Joint District Judges appointed under Article 233 of the Constitution. They are called Sessions or Additional Sessions Judges. Criminal Law (Amendment) Act, 1952 or the Prevention of Corruption Act either of 1947 or 1988 Act, Delhi Special Police Establishment Act, empower the Central or State Government by notification to appoint special judges i.e. Sessions or Additional Sessions Judges to deal with the offenses relating to corruption by public servants. The offenses under Essential Commodities Act and the order issued thereunder are dealt with by Sessions or Additional Sessions Judges. They remain under the administrative and judicial control of the High Court including their transfer and postings and disciplinary control till they attain the age of superannuation according to the relevant rules or the law laid by this Court. A conjoint reading of Sections 9, 11 and 12 of the Act does not indicate to preserve the control or supervision of the High Court over the Designated Courts or judges holding the posts, though they were appointed initially with the concurrence of the Chief Justice of the High Court. Section 19 of the Act provides an appeal to the Supreme Court from any judgment, sentence or order of a Designated Court both on facts and under law. Control of the High Court over the judicial work of the judge or

additional judge of the Designated Court was taken out. Thus it would be clear that appointment of Sessions or Additional Sessions Judges as judge of the Designated Court under Section 9(1) are outside the scheme of the Constitution and the Code but a creature of the Act. Though the appointment of the District or Additional Sessions Judge to the Designated Court by the Central Government or the State Government, as the case may be, is with the concurrence of the Chief Justice of the High Court, thereafter the High Court ceases to have any administrative or judicial supervision or control over them. On appointment as a judge of the Designated Court, the Sessions or Additional Sessions Judge is transposed to the administrative control of the executive, be it the Central or State Government. In other words the concurrence of the Chief Justice of the High Court is necessary only for the initial appointment of a judge of the Designated Court and thereafter the High Court cease to have any administrative and judicial control and supervision of him. Sub-section (7) of Section 9 of the Act postulates its fulcrum without mincing any word that despite the judge or additional judge of a Designated Court having attained the age of superannuation under rules applicable to him in the State judicial service, he shall be entitled to continue as such judge or additional judge by employing unequivocal language "shall not affect his continuance as such judge or additional judge". In other words, the legislative intention is clear that though Designated Judge attained superannuation under the relevant rules applicable to him in his normal judicial service as a Sessions or Additional Sessions Judge, he shall remain in service during the pleasure of the Central or the appropriate State Government. What would be its message? Is it consistent with the independence of the judiciary? Would it create confidence in the accused that the Designated Judge would be of stem stuff unbending before power or lure of personal advantage? The constitutional validity of Section 9(7) of the Act should be addressed from the above setting and perspectives. The concern here is not so much with the initial appointment as Designated Judge but with the control and supervision over his discharge of judicial functions and on its part is he insulated from executive influence overtly or covertly? 416. In Liyanage v. Queenl40 the Criminal Law (Special Provisions) Act, 1 of 1962 made by the Parliament of Ceylon contained special procedure for nomination of special judges by the Minister of Justice to try certain offenders or class of offenses which was later amended giving power of nomination to the Chief Justice of the Ceylon Supreme Court. Power was also given to the police to record confession of those in police custody. The vires of Section 9 modifying Section 440-A of the Criminal Procedure Code and the nomination of three judges who tried the offenders and other sections and the consequential conviction of them were challenged as being ultra vires and void. The Supreme Court of Ceylon held that the power of nomination was ultra vires clause 4 of the Charter of Justice, 1833. The convictions were set aside. On appeal, the Judicial Committee held that the provisions of the Charter of Justice, 1833 manifest an intention to secure to the judiciary freedom from political, legislative and executive control. They are wholly appropriate in a constitution which intends that judicial power shall be vested only in the judiciary. They would be inappropriate in a constitution by which it was intended that judicial

power should be shared by the executive or the legislature. The constitution's silence as to the vesting of judicial power is consistent with its remaining, where it was for more than a century, in the hands of the judicature and was inconsistent with any intention that henceforth it should pass on to or be shared by the executive or the legislature. It was further held that each case has to be decided in the light of its own facts and circumstances including the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings. It is, therefore, necessary to consider more closely the nature of the legislation's challenge. It was further held that: "The Act made admissible the statements inadmissibly obtained by the police during the detention. It altered the fundamental law of evidence so as to facilitate their conviction and finally it altered the ex post facto punishment to be imposed on them. Still further it was also held that the true nature and purpose of these enactments are revealed by their conjoint impact on the specific proceedings in respect of which they were designed, and they take their color in particular, from the alterations they purported to make as to their ultimate objection, the 140 (1967) 1 AC 259: (1966) 1 All ER 650 (PC) punishment of those convicted. These alterations constituted a grave and deliberate incursion under the judicial sphere. ... It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. But that consideration is irrelevant and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution". 417. In Northern Pipeline Construction Co. v. Marathon Pipe Line Co. and United Statesl41 under the Bankruptcy Act of 1978 established, in each federal judicial district as an adjunct to the Federal District Court for the District, United States' Bankruptcy Court and the President, with the advice and consent of the Senate, appointed judges with office for 14 years' term. The judges were subject to removal by the judicial council of the circuit on account of incompetence, misconduct, neglect of duty or physical or mental disability. Their salaries were set by statute and were subject to adjustment. The Act grants the courts jurisdiction over all civil proceedings arising under title II or arising in or related to cases under title 11 [28 USCS Section 1471(b)]. When proceedings were initiated in Bankruptcy Court for the District of Minnesota, a suit against Corporation was filed for damages for breach of contract and warranty. The defendant sought dismissal of the suit on the ground that the Act is unconstitutional offending Article III conferring judicial power upon judges who lacked life tenure and protection against salary diminution. The Bankruptcy Judge denied the motion. On appeal the District Court for the District of Minnesota, entered an order granting the motion on the ground that delegation of authority in 28 USCS Section 1471 to the Bankruptcy Judges to try cases, otherwise relegated under the Constitution to Article III Judges, was unconstitutional. On appeal, the United States Supreme Court confirming

the decision, per majority, held that Bankruptcy Judges created by the Act, not being Article III Judges, Article III bars the Congress from establishing under Article III Schedule 1 legislative courts to exercise jurisdiction over all matters arising under the Bankruptcy laws. The establishment of such courts not falling within any of the historically recognised situations courts of the territories of the United States or the District of Columbia, courts martial and courts created by Congress to adjudicate public rights in which general principle of independent adjudication commanded by Article III does not apply, nor there being any reason why the Bankruptcy Courts so established lie beyond reach of Article III. Section 241(a) of the Bankruptcy Act having impermissibly removed most, if not all of the essential attributes of judicial power from Article III District Court and having vested those attributes in a non-Article III adjunct, which grant of jurisdiction cannot be sustained as an exercise of Congress's power to create adjuncts to Article III courts. The Federal 141 73 L Ed 2d 598: 458 US 50 (1982) Judiciary was designed to stand independent of the executive and the legislature. Periodical appointments are fatal to the independence of the Judiciary. If the power of appointment is committed either to the executive or legislature, there would be danger of improper compliance to the branch which possessed it. A judiciary free from control of the executive and legislature is essential to relieve the judiciary from potential domination by other branches of Government. The inexorable command of Article 111, Section 1 is that judicial power shall be vested in Supreme Court and inferior courts. Bankruptcy Judges whose officers are created under the Act are under the executive control. The Congress's majority to control the manner in which the rights adjudicated, through assignment of historically judicial functions to a non-Article III adjunct must be unconstitutional. Accordingly the court declared the Act to be ultra vires the power of the Congress. However, the declaration was held prospective in operation since retrospective operation would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting jurisdiction in the Bankruptcy Courts. The court gave time to the Congress to amend the law and the operation of the judgment was postponed till specified date. 418. In Special Courts Bill, 1978, Re54 a Bench of seven judges were called upon to answer Reference No. 1 of 1978. Clause 7 of the Special Courts Bill provided constitution of special court and nomination, in consultation with the Chief Justice of India, of a sitting Judge of a High Court of India or a person who has held office as a judge of a High Court in India nominated by the Central Government in consultation with the Chief Justice of India is valid in law. A Bench of 7 judges opined against the reference. Shinghal, J. pointedly considered the question in a separate but concurrent opinion of the validity of clauses 2 and 7 and held: (SCC pp. 455 and 456, paras 151-152, 153 and 154) "That is in fact necessary to ensure the independence of every court dealing with civil and criminal matters. It may be permissible to create or establish civil and criminal courts in a State with designations other than those expressed in Article 236, namely, those covered by the expression 'district judge', or by any existing designation in the Codes of Civil and Criminal Procedure, but that is far from saying that it is permissible to establish a hierarchy of courts other

than that envisaged in the Constitution." It was also further held that: "The Constitution has thus made ample and effective provision for the establishment of a strong, independent and impartial judicial administration in the country, with the necessary complement of civil and criminal courts. It is not permissible for Parliament or a State Legislature to ignore or bypass that scheme of the Constitution by providing for the establishment of a civil or criminal court, parallel to a High Court in a State, or by way of an additional or extra or a second 54 (1979) 1 SCC 380: AIR 1979 SC 478, 518: (1979) 2 SCR 457 High Court, or a court other than a court subordinate to the High Court. Any such attempt would be unconstitutional and will strike at the independence of the judiciary which has so nobly been enshrined in the Constitution and so carefully nursed over the years." (emphasis supplied) It was further held that: "It is beyond any doubt or controversy that the Constitution does not permit the establishment of a criminal court, of the status of a court, presided over by a 'district judge' as defined in Article 235, which is not subordinate to the High Court..... (emphasis supplied) Dealing with an argument based on Section 6 of the Code that it was a court under the Code, this Court held that:"[A]11 that the section states is that the five classes of criminal courts stated in it shall be in addition to the High Courts and courts that may be constituted under any other law, and it cannot be said with any justification that it provides for the constitution of courts parallel to or on the same footing as the High Courts, or of criminal courts which are not subordinate t o the High Court. ... Section 6 of the Code does not therefore justify the creation of Special Courts of the nature contemplated in the Bill, and the argument to the contrary is quite untenable." (emphasis supplied) It was further opined that all persons charged with crime must, in law, stand on the same footing at the Bar of Justice. Such an equality should be assured not only between one accused and another but also between the prosecution and the accused. Thus this is not a mere rights explosion but, as will appear, it is what our Constitution has carefully, assuredly and fully provided for every citizen of the country. Article 21 of the Constitution is, by itself, enough to bring this out. Nomination of the retired judges was treated with disfavor. This principle reinforces that the judicial function must be coterminous with superannuation and no longer. 419. It would thus be seen that constitution of a Designated Court per se may be valid but as a court parallel to Courts of Session and appointment of Sessions Judge or Additional Sessions Judge as a judge of the Designated Court without administrative and judicial control of the High Court concerned and continuance in office after attaining superannuation are clearly in negation of and subversive to the independence of the judiciary, carefully conserved and given to the people of India. It would foster the " pleasure doctrine" laying the seeds to bear fruits of poisoned tree to destroy independence and impartiality of justice which the Constitution of India consciously avoided. It is, therefore, unconstitutional. 420. This conclusion does not mean that the offenses under the Act cannot be tried by the regular courts especially assigned by the High Court to the Sessions or Additional Sessions or Joint Sessions Judges to exercise those functions or the power under the Act. Moreover, Section 19 confers appellate powers on this Court. It is

true as contended by Shri Tulsi, expeditious trial and disposal of the cases and appeals is one of the aims of the Act. But as rightly contended for the accused that many an accused being indigent, cannot effectively pursue the remedy of appeal in the Supreme Court due to oppressive distance and heavy litigation costs, conferment of appellate power on the High Court would be just and fair remedy. I find considerable force in the contention. Yet it being a legislative policy, it would be left to the wisdom of the Parliament to decide and suitably amend the Act, keeping in view Article 39-A which itself is a fundamental right to the indigent. The remedy of appeal to the High Court would be easily accessible at the State level, lest the poor may be constrained to forego the remedy of appeal. The right to approach this Court under Article 136 has constitutionally been preserved to everyone. 421. In Managing Director, ECIL, Hyderabad v. B. Karunakarl42 in a separate but concurrent judgment, I have considered elaborately the need to give prospective operation of a decision of this Court, be it, constitutional, civil or criminal. In paragraph 73 (SCC p. 783) it was held that the cut-off date to give effect to the law laid down in the judgment is the date of the judgment. Though I had held that the parties before the Court in that judgment were entitled to the relief, majority held otherwise to which I am bound. In Victor Linkletter v. Victor G. Walker143 it was held that though the evidence was collected in illegal search and seizure violating the Fourth Amendment, and the conviction based thereon is not valid, the decision was held to be prospective and the conviction thereunder was not interfered with. In Ernesto A. Miranda v. State of Arizona137 a confessional statement obtained from the accused violating his constitutional right and evidence was held to be inadmissible, yet the conviction based thereon was not interfered with. Same view was followed in Danny Escobedo v. Illinois144 and Sylvester Johnson v. State of New Jersey145 wherein the conviction and sentence were not interfered with though held that evidence obtained in violation of the constitutional right was inadmissible. It is already seen that in Northern Pipeline Construction Co. case141 though the establishment of the Bankruptcy Courts was held to be unconstitutional, the operation of the judgment was declared prospective and time was given to Congress to amend the, law without disturbing the judgments already rendered. Article 233-A validated the appointment of District Judges which were declared to be invalid. In Gokaraju Rangaraju v. State of A. P. 146 this Court applied the doctrine of de facto authority and validated the conviction or 142 (1 993) 4 SCC 727: 1993 SCC (L&S) 1184: (1993) 25 ATC 704: JT (1 993) 6 SC 1 143 14 L Ed 2d 601: 381 US 618 (1965) 137 384 US 436: 16 L Ed 2d 694 (1966) 144 12 L Ed 2d 977: 378 US 478 (1964) 145 16 L Ed 2d 882: 384 US 719 (1966) 141 73 L Ed 2d 598: 458 US 50 (1982) 146 (1981) 3 SCC 132: 1981 SCC (Cri) 652: (1981) 3 SCR 474 sentence awarded by the Sessions Judges whose appointments were declared illegal. 422. In Gokaraju Rangaraju v. State of A.P.146 this Court held that (SCR pp. 484-85: SCC p. 140, para 17) "A judge, de facto, therefore, is one who is not a mere intruder or usurper but one who holds office, under color of lawful authority, though his appointment is defective and may later be found to be defective. Whatever be the defect of his title to the office, judgments pronounced by him and acts done by him when he

was clothed with the powers and functions of the office, albeit unlawfully, have the same efficacy as judgments pronounced and acts done by a Judge de jure. Such is the de facto doctrine, born of necessity and public policy to prevent needless confusion and endless mischief." This Court also further held that the validity of the appointment cannot be challenged in collateral proceedings. It is true that in the light of the finding that Section 9(7) is invalid, violative of the basic structure and judicial independence envisaged in the Constitution, public policy requires that the doctrine of de facto be engrafted on necessity to protect the interest of the public and the individuals involved in the official acts of persons exercising the duty of an office without actually being one in strict point of law. Therefore, though, de jure they are not by title validly appointed, but by color of title the exercise and functions as Judge of the Designated Court, trials conducted, judgments rendered, orders passed, punishments imposed and convictions made are legal and valid. The de facto doctrine is not a stranger to the Constitution or to the Parliament and the legislature of the States. Article 233-A recognises this doctrine brought by Constitution Twentieth Amendment Act, 1966. Therefore, the trials conducted, judgments pronounced and the orders or punishment imposed under the Act remained valid. 423. Thus it must be held that the confessions recorded by any police officer below the rank of Superintendent of Police under Section 15(1) and the appointment of Sessions and Additional Sessions Judges to the Designated Court under Section 9(7) are unconstitutional. Yet the confessions so recorded by exercising the power under Section 15(1) shall remain valid and would be considered at the trial or in appeal in accordance with law. Any judgment or order made and conviction rendered exercising powers under the Act and sentence imposed relying thereon does not become invalid or void. We further hold that it is open to the Parliament to amend Sections 9(7) and 15(1) of the Act suitably.. The operation of this judgment is postponed for a year from today to carry out the amendments and necessary steps be taken to have Sections 15(1) and 9(7) suitably amended. If no amendments are effected within the period or extended period on and from the date of expiry of the period aforementioned, or any extended time by order of this Court, Section 15(1) and Section 9(7) would thereafter become void. 146 (1981) 3 SCC 132: 1981 SCC (Cri) 652: (1981) 3 SCR 474 424. The further question is whether the High Court would be justified to exercise its power under Article 226 of the Constitution in respect of the matters covered under the Act? 425. The legislature treated terrorism as a special criminal problem under the Act and the ordinary criminal courts created under the Code were divested of the power and jurisdiction to try the offenses governed under the Act and invested the same in the Designated Court and appellate powers to this Court. 426. From the scheme of the Act therefore it is clear that the offenses created thereunder are exclusively triable by the Designated Court and conviction made or orders passed, whether final or interlocutory orders pending trial are regulated under the provisions of the Act. Right of appeal thereon has been provided by Section 19 to this Court. Under the Code the Court of Session and the High Court play major role in the administration of criminal justice, from the stage of arrest of an accused or suspect till the trial is con-

cluded or conviction became final. The High Court has jurisdiction and control over the Court of Session or the Magistrate, but under the scheme of the Act there is a wall of separation and complete exclusion of the jurisdiction of the High Court is total. The Designated Court is neither subordinate to the High Court, nor the High Court has any control or supervisory jurisdiction under Article 227. 427. From this scenario, the question emerges whether the High Court under Article 226 would be right in entertaining proceedings to quash the charge-sheet or to grant bail to a person accused of an offence under the Act or other offenses committed during the course of the same transaction exclusively triable by the Designated Court. Nothing is more conspicuous than the failure of law to evolve a consistent jurisdictional doctrine or even elementary principles, if it is subject to conflicting or inconceivable or inconsistent result which lead to uncertainty, incongruity and disbelief in the efficacy of law. The jurisdiction and power of the High Court under Article 226 of the Constitution is undoubtedly constituent power and the High Court has untrammeled powers and jurisdiction to issue any writ or order or direction to any person or authority within its territorial jurisdiction for enforcement of any of the fundamental rights or for any other purpose. The legislature has no power to divest the court of the constituent power engrafted under Article 226. A superior court is deemed to have general jurisdiction and the law presumes that the court has acted within its jurisdiction. This presumption is denied to the inferior courts. The judgment of a superior court unreservedly is conclusive as to all relevant matters thereby decided, while the judgment of the inferior court involving a question of jurisdiction is not final. The superior court, therefore, has jurisdiction to determine its own jurisdiction, may be rightly or wrongly. Therefore, the court in an appropriate proceeding may erroneously exercise jurisdiction. It does not constitute want of jurisdiction, but it impinges upon its propriety in the exercise of the jurisdiction. Want of jurisdiction can be established solely by a superior court and that in practice no decision can be impeached collaterally by an inferior court. However, acts done by a superior court are always deemed valid wherever they are relied upon. The exclusion thereof from the rule of validity is indispensable in its finality. The superior courts, therefore, are the final arbiters of the validity of the acts done not only by other inferior courts or authorities, but also their own decisions. Though they are immune from collateral attack, but to avoid confusion the superior court's decisions lay down the rules of validity; are not governed by those rules. The valid decision is not only conclusive, it may affect, but it is .also conclusive in proceedings where it is sought to be collaterally impeached. However, the term conclusiveness may acquire other specific meanings. It may mean that the finding upon which the decision is founded as distinct or it is the operative part or has to be conclusive or these findings bind only parties on litigated disputes or that the organ which has made the decision is itself precluded from revoking, rescinding or otherwise altering it. 428. The decision or order or a writ issued by the High Court under Article 226 is subject to judicial review by an appeal to this Court under Article 136 whose sweep is wide and untrammeled. The question, therefore, is whether the High Court would be proper to exercise its power under Article

226 over the proceedings or the offenses, or the other offenses committed in the course of the same transaction, covered under the Act. The jurisdiction of the High Court though was not expressly excluded under the Act, by necessary implication it gets eclipsed not so much that it lacked constituent power but by doctrine of concomitance. 429. In Connolly Brothers Ltd., Re; Wood v. Connolly Brothers Ltd. 147 the facts were that Palatine Court and Chancery Division have coordinate jurisdiction over debenture holder of a company carrying on business in the County Palatine of Lancaster. When the debenture holder was indicted of an offence of cheating, Palatine Court and the Chancery Division simultaneously had taken cognizance of the offence on a motion, the High Court issued an injunction restraining the plaintiff in the Palatine action while the proceedings in Palatine Court had jurisdiction to grant the same injunction. The question was whether the Palatine Court was justified in taking cognizance and issuance of the injunction prayed for. Parker, J. as he then was, exercising the jurisdiction of the Chancery Division issued the injunction restraining the plaintiff in the Palatine Court from proceeding with the action. On appeal, Fletcher Moulton, L.J., of Court of Appeal, as he then was, held that a man has a right to bring an action in a court of inferior jurisdiction when the circumstances of the case entitle him to do so and if he is within the right, he is neither more nor less liable to be restrained from proceeding with an action in a court of coordinate jurisdiction. The question of jurisdiction to grant the injunction has nothing to do with the status of the court. It has to do with the circumstances of the case as bearing on the 147 (1911)ICh731:80LJCh409 conduct of the party enjoined. That being so, the court held that the case turns upon propriety of making the order. The existence of the jurisdiction does not warrant the court in exercising it on occasions when its exercise is not fully justified by the facts of the case. It held that since the Chancery Court has avoided vexation, the Chancery Court was justified in exercising the jurisdiction in issuing the injunction. 430. In Imperial Tobacco Ltd. v. Attorney General148 the plaintiff Tobacco company launched sales promotion known as “spot cash” for a particular brand of cigarette. The Director of Public Prosecution laid prosecution in the Crown Court against the company under Lotteries and Amusement Act, 1976. The plaintiff initiated action in the Commercial Court, High Court, seeking a declaration that their schemes are lawful. Before charges were tried in the Commercial Court, the Crown Court took a preliminary objection that the Commercial Court has no jurisdiction to grant declaration sought for and if it were to be held in its jurisdiction it regulated to decline to be summoned the declaration on the ground that criminal case was already pending in the coordinate jurisdiction, namely the Crown Court. In that context the Court of Appeal through Ormrod, L.J. following Connolly Brothers Ltd. case147 held that the case is one of concurrent jurisdiction, the Crown Court being a court of coordinate jurisdiction, it is unusual that the court of coordinate jurisdiction is a criminal court. This is clearly a major factor to be taken into account is deciding whether the High Court in its discretion, to assume or decline jurisdiction to hear the summons on its merits. It was held: " The basic principles are not in doubt. The object of all procedural rules is to enable justice to be

done between the parties consistently with the public interest. So, the choice between courts of concurrent jurisdiction must always depend on where and how justice can best be done. Many factors have to be considered, but, where the conflict lies between courts of civil and criminal jurisdiction, the most important consideration is the obvious one: criminal courts exist to deal with criminal matters, and their procedural rules are designed for that purpose. It is only in those relatively rare cases where the sole issue is one of law that a case can be made for the High Court to assume jurisdiction. This is because, there being no issue of fact to be determined., trial by jury is otiose; the issue of guilt will be determined by the judge of the Crown Court on submission of law, leading inevitably to a formal direction to the jury to acquit or convict, as the case may be. The criminal procedure, is no better designed, indeed it is often less well adapted than the civil procedure to determine pure questions of law. Appeals in either case lie to the same court. Where issues of law can best be determined, therefore, is essentially a question of convenience in the true sense of that word." 148 (1979) 2 All ER 592: (1979) 2 WLR 805 147 (1911) 1 Ch 731: 80 LJ Ch 409 Accordingly it was held that when the proceedings were initiated in the High Court, though the Crown Court was the court of coordinate jurisdiction, the matter being pure question of law untrammeled by questions of facts, the summons issued by the High Court were held to be efficacious and upheld. 431. In Santoshi Tel Utpadak Kendra v. Dy. C.S. T 149 the Commissioner and the tribunal under Bombay Sales Tax Act had concurrent jurisdiction to entertain revision against the orders of the Dy. Commissioner. When the proceedings before the tribunal were pending, the Commissioner entertained the revisional jurisdiction. When the propriety of the exercise thereunder was questioned, the High Court upheld the exercise of the jurisdiction by the Commissioner on the ground that the tribunal cannot decide the matter on merits. On appeal this Court held thus: (SCC p. 470, para 8) "Now it seems to us past question that when the appellate jurisdiction of superior authority is invoked against an order and that authority is seized of the case, it is inconceivable for a subordinate authority to claim to exercise jurisdiction to revise that very order. The tribunal is the supreme appellate and revisional authority under the statute. It cannot be divested of its jurisdiction to decide on the correctness of an order, it cannot be frustrated in the exercise of that jurisdiction, merely because a subordinate authority, the Commissioner, has also been vested with jurisdiction over that order. Unless the statute plainly provides to the contrary, that appears to us to be incontrovertible. It is not open to the Commissioner to invoke his power under clause (a) of sub-section (1) of Section 57 and summon the record of an order over which the tribunal has already assumed appellate jurisdiction. The subordinate status of the Commissioner precludes that." 432. In Tilokchand & Motichand v. H.B. Munshi, C.S.T150 a Constitution Bench of this Court considering the power of this Court under Article 32 vis-a-vis the High Court under Article 226, held that this constitutes "a comity between Supreme Court and the High Court". When a party had already moved the High Court with a similar complaint and for the same relief and failed, this Court insists on an appeal to be brought before it and does not allow fresh proceedings under Article 32 to be

started. 433. In Lakshmi Charan Sen v. A.K.M. Hassan Uzzamanl51 another Constitution Bench considered the question whether the High Court would be justified in exercising its powers under Article 226 in staying general elections to the West Bengal Legislative Assembly and held that though the High Court did not lack jurisdiction to entertain the writ petition and to issue appropriate directions therein, no High Court in the exercise of its power under Article 226 should pass any order, interim or otherwise which has the tendency or effect of postponing an election, which is reasonably imminent and in relation to which its writ jurisdiction is invoked. The more imminent 149 (1981) 3 SCC 466: 1981 SCC (Tax) 253 150 (1969) 1 SCC 110: AIR 1970 SC 898 151 (1985) 4 SCC 689: 1985 Supp 1 SCR 493 such process, the greater ought to be the reluctance of the High Court to do anything or direct anything to be done, which will postpone that process indefinitely by creating a situation in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. In State of Maharashtra v. Abdul Haji Mohammad117 the Bombay High Court quashed the charge-sheet filed under TADA exercising the power of Article 226 and directed to release the respondent on bail. This Court held that where the facts ex facie do constitute an offence or contentious question arises, the High Court does not have power to entertain the proceedings. Otherwise it has jurisdiction in ordinary cases. This Court allowed the appeal and set aside the order of the High Court holding that the allegations do not fall outside the scope of the Act. 434. In Pete Darr v. C.P. Burford152 the Supreme Court of the United States of America in considering the question of issuing habeas corpus, the prisoner whether would come within the State Act or the federal constitution, it was held that the District Court must observe the doctrine of comity and stated thus: "[T]he doctrine of comity teaches that one court should defer action on causes properly within its jurisdiction until the court of another sovereignty with concurrent powers, and already cognizant of the litigation, has had an opportunity to pass upon the matter." This principle was reiterated in Evelle J. Younger v. John Harris153. In Lawrence S. Huffman v. Pursue Ltd. 154 it was held that federal courts confronted with requests to interfere with state civil functions should abide by standards of restraint that go well beyond those of private equity jurisprudence. In United States v. Edgar H. Gillock155 it was held that while principles of comity command careful consideration by federal courts, comity must yield where important federal interests are at stake, such as in the enforcement of federal criminal statutes. 435. Thus it could be seen that though the High Court has jurisdiction and power under Article 226 to issue appropriate writ or direction or order in exceptional cases at the behest of a person accused of an offence triable under the Act or offence jointly triable with the offenses under the Act, the High Court being amenable to appellate jurisdiction and judicial review under Article 136 to this Court, and this Court having been statutorily invested with the power and jurisdiction under Section 19 of the Act, judicial pragmatism, concomitance between this Court and the High Court, the latter must observe comity and self-imposed limitation on the exercise of the power under Article 226 and refuse to pass an order or to give direction which would inevitably result in exercising the jurisdiction and power

117 (1994) 2 SCC 664 152 339 US 200: 94 L Ed 761 (1949) 153 401 US 37: 27 L Ed 2d 669 (1971) 154 420 US 592: 43 L Ed 2d 482 (1975) 155 445 US 360: 63 L Ed 2d 454 (1980) conferred on this Court under Section 19 of the Act or sitting over the appellate orders passed by this Court. Instances are not wanting that when this Court declined to grant bail under Section 19, some High Courts did entertain proceedings under Article 226 and granted bail to the self same accused, in fact even though this Court already declined to grant relief. Exercise of the power even in exceptional cases or circumstances is, therefore, incompatible with or inconsistent with comity. Therefore, the only check up on a court's exercise of power is ones own sense of self-restraint and due respect to comity. Judicial pragmatism, therefore, poignantly point, per force to observe constitutional propriety and comity imposing self- discipline to decline to entertain proceedings under Article 226 over the matters covered under Section 19 or the matters in respect of which remedy under Section 19 is available or taken cognizance; issue of process or prima facie case in the complaint or charge-sheet etc., in other words all matters covered under the Act. Thus the High Court's jurisdiction got eclipsed and denuded of the powers over the matters covered under the Act. 436. I respectfully express my regrets for not falling in line with my Brethren that the High Court may in exceptional cases exercise such power for the reasons aforesaid. R.M. SAHAI, J.- To my utter regret, but with profound humility to Brother Pandian, J., for whose erudition and learning of criminal law I have the greatest regard and above all the respect for him as an elder brother, I am adding few words, more, by way of concurring opinion than, 'as an appeal to the brooding spirit of law to the intelligence of a future day', as the law which was enacted to tackle extraordinary problem in one or two States now stands extended to many States of the country and the alarming news which appears in press and the shocking instances which have come to notice of this Court require highlighting certain aspects for whatever worth they may be. 438. Various provisions of the Terrorists and Disruptive Activities (Prevention) Act, 1987 (Act 28 of 1987) and Act 31 of 1985 (hereinafter referred to as 'TADA') "enacted to make special provision for the prevention of, and for coping with, terrorists and disruptive activities and for matters connected therewith or incidental thereto", were assailed not only for infraction of fundamental rights guaranteed by the Constitution but also for being in violation of fair trial, the sine qua non of any civilised criminal jurisprudence. Validity of Act 31 of 1985 and the Terrorist Affected Areas (Special Courts) Act, 1984 (Act 61 of 1984) was also challenged. The attack varied from lack of legislative competence to enact these legislations to vague and wide definitions of expressions such as, 'terrorist activity' and 'abet'; to constitution of designated courts with persons who could continue even after superannuation, thereby reducing its credibility providing arbitrary procedure more to serve political purpose than to secure impartial justice for instance holding of courts in camera, non-disclosure of names of witnesses, recording of confession by police officers, presumption of guilt etc. and above all harsh provision of punishment with unfettered power to exercise it. 439. Terror according to dictionary means, 'extreme fear or fright'. But 'terrorist' and 'terrorism' have become associated with "ideology of overthrow-

ing a government by resorting to violent fear inspiring methods", "opposition to government by methods which excite fear or any series of terrifying, unlawful deeds which tend to intimidate". Some "consider it as a desperate response of the growing number of weak or powerless groups challenging the rigidities of frontiers, powers and resource of distribution". An abused understanding of the terrorism is said to be "pejorative for freedom fighting or rebellion disapproved by the authorities". Terrorism politically is "coercive intimidation". Systematic use of murder and destruction to instill the feeling of fear and terror in one or all, individual or group, institutions or government is its acknowledged method. The most reprehensible part of it is that its victims are usually innocent persons having nothing to do either with politics or government. Whatever their ideology or coloring, terrorists are desperate people bitterly opposed to the prevailing regime. "They are fond of using romantic euphemism for their murderous crime. They claim to be revolutionary heroes yet they commit cowardly acts and lack the heroic qualities of humanity and magnanimity. They profess to be revolutionaries yet they attack only by stealth, murder and maim the innocent. They claim to bring liberation whereas in reality they seek power for themselves." [Terrorism and the Liberal State by Paul Wilkinson]. 440. Terrorism is a global phenomenon. Hijacking, diplomatic killings, bombing, kidnapping, innocent murders, destruction have become order of the day. It may be politically motivated or revolutionary in outlook or sponsored by one country against other in shape of proxy war. But in either case its method being violative of human rights it is neither legally justified nor ethically acceptable. In our country terrorism unlike European countries such as Baader-Meinh of gang of West Germany or the Japanese Red Army, or Italy's Red Brigades, or IRA in Ireland, is described as the, "classical manifestation of, sponsored terrorism". The objective of such unconventional war is to destabilise and weaken the Government and break up the social, political and economic order. It is adopted by one country against another by promoting use of violence and encouraging disruptive activities, feeding vague imaginations of the misguided, extending false hopes and promises, providing financial assistance, weapons, training and sanctuary. 441. Terrorism, irrespective of its slogans, personal glorification, is an evil which cannot be tolerated by any society. No State can put up with it as it is responsible to protect its citizens, their lives, property, institutions and their legitimate and democratically elected Government. Protest by minority is the essence of democracy. Strike, boycott, marches, demonstration are legitimate methods of expressing dissatisfaction and inviting attention of' Government to the demands. The extreme form of such political and moral pressure may be civil disobedience. But once the protest degenerates into violence it is opposed to basic democratic values. It shakes the rule of law the structural basis of any democracy. Whether such action is result of frustration or generated due to feeling of injustice or oppression it cannot be accepted as legitimate and legal by any civilised society, or any form of Government. It may be that founders of many nations were in a state of rebellion against existing order and were hailed as patriots on achieving their mission but that does not legitimise the methods adopted by terrorists or any political group as it largely depends on innocent

killing and attacking soft targets. 442. Such being the terrorist ideology and philosophy a State which is obliged not only to maintain the rule of law and peace, but to maintain social environment for cultural progress and development of the society is legally entitled and morally justified to take such measures as are necessary to combat such undesirable activity. Use of force by the State to overcome such inhuman menace invading State's monopoly to counter it cannot be seriously doubted. Killing of democracy by gun and bomb should not be permitted by a State but in doing so the State has to be vigilant not to use methods which may be counter-productive. Care must be taken to distinguish between the terrorist and the innocent. If the State adopts indiscriminate measures of repression resulting in obliterating the distinction between the offender and the innocent and its measures are repressive to such an extent where it might not be easy to decipher one from the other, it would be totally incompatible with liberal values of humanity, equality, liberty and injustice. A country where terrorism or militancy is becoming religion and creed of the frustrated, weak and the misguided the State has a constitutional duty to uphold the authority with firmness and determination by directing its repressive measures towards quelling terrorism without sliding into general repression or exploiting the crisis for its own political advantage or to destroy legitimate opposition. Measures adopted by the State should be to create confidence and faith in the Government and democratic accountability should be so maintained that every action of the Government be weighed in the scale of rule of law. No further need be said as Brother Pandian, J., has elaborately and lucidly dealt with the background of the legislation and its necessity. 443. Having prefaced the discussion it may now be examined if the three enactments can be declared as invalid for being, 'legislative tyranny' or 'State violence' of the fundamental rights guaranteed in Chapter III of the Constitution. But before entering upon an examination of different provisions of the Act it appears appropriate to deal, at the threshold, with the argument of legislative competence. In substance the submissions were twofold, one, that the subject-matter of the impugned legislation in pith and substance was public order, which fell in exclusive domain of State Legislature under Entry 1 of List II, therefore, the power could not have been exercised by the Parliament. And even if by straining the language of Entry 1 in List III it could be held to be criminal law the latter part of the entry operated as a bar on exercise of such power by the Parliament. Are these submissions well-founded? Power to frame or enact law for the governance of the country by the supreme body exercising the sovereign power is known as legislative power. In a democracy which has opted for federal structure of governance with a written Constitution the legislative powers either of the Central or the State Legislature are derived from the Constitution itself. In our Constitution the Legislatures under Article 246 have plenary powers. Both are supreme in their sphere. But the field of legislative activity of the two sovereign Legislatures is regulated and is exercised in consonance with entries in List I and List II of the Seventh Schedule. Apart from exclusive field of activity provision is made empowering both the Legislatures to exercise legislative power in respect of any of the matters enumerated in List III in the Seventh Schedule known as Concurrent List.

How these entries should be construed, what is the effect of their overlapping marginally have been discussed and explained by this Court time and again. Therefore, it is not necessary to recount all that. Although the learned Additional Solicitor General attempted to urge that the exercise of power could be traced to Entries 1, 2 and 2-A of List I and it has been accepted by Brother Pandian, J., but I would confine it to the alternative submission made by the learned counsel that the legislation could be upheld under Entry 1 of List III which is extracted below : "Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offenses against law with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power." 444. In Harakchand Ratanchand Banthia v. Union of India156 it was observed: (SCC p. 174, para 8: AIR at p. 145 8) "The power to legislate is given to the appropriate legislatures by Article 246 of the Constitution. The entries in the three Lists are only legislative heads or fields of legislation; they demarcate the area over which the appropriate legislatures can operate. It is well established that the widest amplitude should be given to the language of the entries. But some of the entries in the different lists or in the same list may overlap or may appear to be in direct conflict with each other. It is then the duty of this Court to reconcile the entries and bring about a harmonious construction." 445. From the language used it is apparent that the entry is couched in very wide terms. The words following the expression 'criminal law' enlarge the scope to any matter which can validly be considered to be criminal in nature. The exercise of power under thi s entry, therefore, has to be construed liberally so as to give full play to the legislative activity. The width of the entry, however, is controlled by the latter expression which takes away the power of either legislature to legislate in respect of offenses against laws with respect to any of the matters specified in List I or List II. Since this part 156 (1969) 2 SCC 166: AIR 1970 SC 1453 restricts and narrows the ambit of the entry it has to be construed strictly. Since under the federal structure the law made by the Parliament has supremacy (See Union of India v. H.S. Dhillon157) any enactment made in exercise of power under entry in Concurrent List shall have overriding effect subject to restrictions that may be spelt out from the entry itself. A legislation by Union Parliament to be valid under this entry must satisfy two requirements; one, that it must relate to criminal law and the offence should not be such as has been or could be provided against laws with respect to any of the matters specified in List II. What is a criminal law? Any Act or rule dealing with crime, "(The) criminal justice system is a firmly societal defensive reaction to intolerable behavior. From the beginning it was considered as a tool designed to protect an established order of values attuned to the political organisation of the community. Transgression of some important norms reflecting these values was seen as a crime and, as such, demanded punishment." 446. What is a crime in a given society at a particular time has a wide connotation as the concept of crime keeps on changing with change in political, economic and social set-up of the country. Various legislations dealing with economic offenses or offenses dealing with violation of industrial activity

or breach of taxing provision are ample proof of it. The Constitution-makers foresaw the eventuality, therefore they conferred such powers both on Central and State Legislatures to make laws in this regard. Such right includes power to define a crime and provide for its punishment. Use of the expression, "including all matters included in the Indian Penal Code at the commencement of the Constitution" is unequivocal indication of comprehensive nature of this entry. It further empowers the legislature to make laws not only in respect of matters covered by the Indian Penal Code but any other matter which could reasonably and justifiably be considered to be criminal in nature. Terrorist or disruptive activity is criminal in content, reach and effect. The Central and State Legislature both, therefore, are empowered to legislate in respect of such an activity in exercise of the power conferred under Entry I of the Concurrent List. But this wide power is otherwise controlled and restricted by the latter part of the entry. It carves out an exception by precluding either of the legislatures from exercising the power if it is in respect of "offence against laws with respect to any of the matters specified in List I or II". The controversy, narrows down to whether the offenses under the TADA are such in respect of which the State Legislature could make a law. In other words if the legislation relating to TADA can fall in Entry 1 of List II then the State Legislature would have competence to make a law under this entry and create offenses for violation of such law under Item 64 of List II and the Central Legislature would be precluded from making any law. But that would happen if it is held that law relating to TADA is either in fact or in pith and substance a law relating to, 157 (1971) 2 SCC 779: AIR 1972 SC 1061 'public order'. This expression was construed in Romesh Thappar v. State of Madras3. It was held : "Now 'public order' is an expression of wide connotation and signifies that state of tranquility prevailing among the members of a political society as a result of the internal regulations enforced by the Government which they have instituted." In Ram Manohar Lohia v. State of Bihar' 9 it was observed as under: "It will thus appear that just as 'public order' in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting 'security of State', 'law and order' also comprehends disorders of less gravity than those affecting 'public order'. One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State." Can it be said that offenses dealt under TADA relate to public order? Is the distinction between public order as visualised in Entry 1 List II and TADA of degree only or are they substantially different? "Terrorism constitutes a direct repudiation of liberal and human values and principles, and that terrorist ideology is ... and constantly deployed in a struggle to defame and discredit democracy." The terrorism with which our country is faced has been described as explained earlier is sponsored terrorism. Terrorism whether it is sponsored or revolutionary or even political by its nature cannot be considered to be public order as explained by this Court. Conceptually public order and terrorism are different not only in ideology and philosophy but also in cause

or the mens rea, the manner of its commission and the effect or result of such activity. Public order is well understood and fully comprehended as a problem associated with law and order. Terrorism is a new crime far serious in nature, more graver in impact, and highly dangerous in consequence. One pertains to law and order problem whereas the other may be political in nature coupled with unjustifiable use of force threatening security and integrity of the State. The submission thus advanced on legislative competence, more as a matter of form than with any feeling of conviction and belief in its merit, does not appear to be sound. 447. TADA having been enacted under Entry 1 of List III of the Seventh Schedule, it did not suffer from lack of legislative competence, yet the question is if any of the provisions impinges upon the fundamental right guaranteed under the Constitution and is, therefore, ultra vires. Before embarking upon this exercise it may be worthwhile examining the depth of Article 21 of the Constitution as any law of punitive or preventive detention has to be tested on the touchstone of the constitutional assurance to every person that he shall not be deprived of his liberty except in accordance with procedure established by law. It is declaration of deep faith and belief in 3 1950 SCR 594: AIR 1950 SC 124: 51 Cri LJ 1514 19 (1966) 1 SCR 709: AIR 1966 SC 740: 1966 Cri LJ 608 human rights. In the "pattern of guarantee woven in Chapter III of the Constitution, personal liberty of a man is at the root of Article 21". Modem history of human rights is struggle for freedom and independence of the man. One may call the right guaranteed under Article 21 as, 'natural right' or 'basic human right' but a society, committed to secure to its citizens "justice social, economic and political; liberty of thought, equality of status and liberty to promote amongst themselves fraternity" the foundation on which edifice of the Constitution has been structured could not have done otherwise than to provide for the human dignity and freedom as has been done by Article 21 of the Constitution which reads as under: "21. Protection of life and personal liberty. No person s hall be deprived of his life or personal liberty except according to procedure established by law." Each expression used in this article enhances human dignity and value. It lays foundation for a society where rule of law has primacy and not arbitrary or capricious exercise of power. 'Life' dictionarily means, "state of functional activity and continual change peculiar to organised matter, and especially to the portion of it constituting an animal or plant before death; animate existence; being alive". But used in the Constitution it may not be mere existence. As far back as 1877 Field, J. in Munn v. Illinois158 construed similar expression in the American Constitution as "more than animal existence". It has been approved by our Court in Kharak Singh v. State Of U. P. 159 and reiterated in Sunil Batra v, Delhi Administration (1)23. It Was given new dimension in Maneka Gandhi v. Union of India21 and extended in Francis Coralie Mullin v. Administrator, Union Territory of Delhi74 when it was held: (SCR p. 529: SCC pp. 618-619, para 8) "... protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms,

freely moving about and mixing and commingling with fellow human beings." 448. Liberty is the most cherished possession of a man. "Truncate liberty in Article 21 and several other freedoms fade out automatically". Edmond Burke called it 'regulated freedom'. Liberty is the right of doing an act which the law permits. This article instead of conferring the right, purposely uses negative expression. Obviously because the Constitution has recognised the existence of the right in every man. It was not to be guaranteed or created. One inherits it by birth. This absolutism has not been curtailed or eroded. Restriction has been placed on exercise of power by the State by 158 94 US 113 (1877) 159 (1964) 1 SCR 332: AIR 1963 SC 1295: (1963) 2 Cri LJ 329 23 (1978) 4 SCC 494: 1979 SCC (Cri) 155: (1979) 1 SCR 392 21 (1978) 1 SCC 248: (1978) 2 SCR 621 74 (1981) 1 SCC 608; 1981 SCC (Cri) 212: (1981) 2 SCR 516 using the negative. It is State which is restrained from interfering with freedom of life and liberty except in accordance with the procedure established by law. Use of the word 'deprive' is of great significance. According to the dictionary it means, "debar from enjoyment; prevent (child etc.) from having normal home life". Since deprivation of right of any person by the State is prohibited except in accordance with procedure established by law, it is to be construed strictly against the State and in favour of the person whose rights are affected. Article 21 is a constitutional command to State to preserve the basic human rights of every person. Existence of right and its preservation has, thus, to be construed liberally and expansively. As a corollary to it the exercise of power by the State has to be construed narrowly and restrictively. It should be so understood and interpreted as not to nullify the basic purpose of the guarantee. No legislative or executive action can be permitted to get through unless it passes through the judicial scanning of it being not violative of the cherished right preserved constitutionally. If the article is construed as empowering the State to make a law and deprive a person as the Constitution permits it then the entire concept of personal liberty shall stand frustrated. A political party voted to power may adopt repressive measures against its political foes by enacting a law and it may well be said that deprivation being in accordance with procedure established by law it is within the constitutional frame. The procedure adopted by State either legislatively or executively must therefore satisfy the basic and fundamental requirement of being fair and just. The word 'except' restricts the right of the State by directing it not to fiddle with this guarantee, unless it enacts a law which must withstand the test of Article 13. Today it appears wellnigh settled that procedure established by law, extends both to the substantive and procedural law. Further mere law is not sufficient. It must be fair and just law. Even in absence of any provision as in American Constitution fair trial has been rendered the basic and primary test through which a legislative and executive action must pass. 449. How fundamental is the guarantee under Article 21 of the Constitution can be well appreciated when one looks at the constitutional amendment made in the year 1978. By the 44th Amendment Act, 1978, Article 359 was amended and it was provided that Articles 20 and 21 could not be suspended even during emergency. The occasion for it arose due to narrow construction placed by this Court in Additional District Magistrate, Jabalpur

v. Shivakant Shuklal6O denying a citizen his right to challenge even arbitrary detention and arrest. 450. Having analysed the scope of Article 21 and traced its history, judicially and legislatively, it is proposed to take up few provisions of 1987 Act as I have nothing to add to what has been said by Brother Pandian, J., on 1984 Act and 1985 Act with which I respectfully agree. Taking up 1987 Act 1 may mention at the very outset that fully agree with the reasoning and conclusions arrived at by Brother Pandian, J., in respect of most of the sections. For instance, I agree with him that sub-clause (i) of the definition of 160 (1976) 2 SCC 521: AIR 1976 SC 1207 'abet' should be amended in order to avoid the ambiguity and make it immune from arbitrariness. As regards Sections 3 and 4 they are not liable to be struck down for vagueness. Their scope has been elaborately discussed by Brother Pandian, J. But the one section with which I could not reconcile, even though it was raised in written submissions, only, is Section 5 which is extracted below : "5. Possession of certain unauthorised arms, etc. in specified areas.- Where any person is in possession of any arms and ammunition specified in Columns 2 and 3 of Category 1 or Category III(a) of Schedule 1 to the Arms Rules, 1962, or bombs, dynamite or other explosive substances unauthorisedly in a notified area, he shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine." 451. Mere possession of arms and ammunition specified in the section has been made substantive offence. It is much serious in nature and graver in impact as it results in prosecution of a man irrespective of his association or connection with a terrorist or terrorist activity. A comparison of this section with Sections 3 and 4 demonstrates the arbitrariness inherent in it. Section 3 operates when a person not only intends to overawe the Government or create terror in people etc. but he uses the arms and ammunitions which results in death or is likely to cause death and damage to property etc. In other words, a person becomes a terrorist or is guilty of terrorist activity when intention, action and consequence all the three ingredients are found to exist. Similarly Section 4 applies to those activities which are directed towards disrupting sovereignty and territorial integrity of the country. Thus a terrorist or a disruptionist and a person possessing any of the arms and ammunition mentioned in the section have been placed on a par. In Sections 3 and 4 the offence arises on the act having been done whereas in Section 5 it is founded only on possession. Even under sub- section (3) of Section 3 a person is liable to be prosecuted for abetting the offence if he assists or communicates with a terrorist. Sub-sections (5) and (6) inserted by Act 43 of 1993 to Section 3 also require that a person can be prosecuted only if he is found to be a member of a terrorist gang or terrorist organisation etc. The Act, therefore, visualises prosecution of the terrorist or disruptionist for offenses under Sections 3 and 4 and of others only if they are associated or related with it. That is in keeping with the objective of the Act. The legislation has been upheld as the legislature is competent to enact in respect of a crime which is not otherwise covered by any Entry in List II of the Seventh Schedule. The definition of the crime, as has been discussed earlier, is contained in Sections 3 and 4 of the Act and it is

true that while defining the crime it is open to the legislature to make provision which may serve the objective of the legislation and from a wider point of view one may say that possession of such arms, the use of which may lead to terrorist activity, should be taken as one of the offenses as a preventive or deterrent provision. Yet there must be some inter-relation between the two, howsoever, remote it may be. The harshness of the provisions is apparent as all those provisions of the Act for prosecuting a person including forfeiture of property, denial of bail etc., are applicable to a person accused of possessing any arms and ammunition as one who is charged for an offence under Sections 3 and 4 of the Act. It is no doubt true that no one has justification to have such arms and ammunitions as are mentioned in Section 5, but unjustifiable possession does not make a person a terrorist or disruptionist. Even under Ireland Emergency Provisions Act, 1978 on which great reliance was placed by learned Additional Solicitor General there is no such harsh provision like Section 5. Since both the substantive and procedural law apply to a terrorist and disruptionist or a terrorist act or a disruptive act, it is necessary, in my opinion, that this section if it has to be immune from attack of arbitrariness, may be invoked only if there is some material to show that the person who was possessed of the arms intended it to be used for terrorist or disruptionist activity or it was an arm and ammunition which in fact was used. 452.I agree with Brother Pandian, J., in respect of Sections 8, 9, 10 and II except that I would like to add that no one should be appointed as a Designated Court who has retired from the service. I also agree with him on construction of other sections but coming to Section 15 the then Hon'ble Minister who piloted the Bill while advocating for conferring power on police officer to record the confession and for making it admissible supported the departure from age-old law in Evidence Act by taking illustration of England and America where confessions are permitted to be recorded by police constable. He made an appeal that a confession made to a police constable in those countries was admissible and, therefore, a time has come when this country should depart from what Sir James Fitz Stephen felt when Indian Evidence Act, 1872 was enacted and a policeman was not treated as worthy of trust. In support of giving power to higher police officers to record confession he stated : (Parliamentary Debates, p. 724) "Perhaps it is correct and good among many levels of Police Officers. But are we going to live with that kind of a slur on the entire police for 120 years? Are we going to say for ever and ever there will be nobody in the police force, no Indian, no son, no daughter in India, if he or she joins the police force will ever be fair just and objective? All our children will join the police force. They will rise to be the SP of Police. They will rise to be DIG of Police and IG of Police. Yet, is Parliament going to say for ever and ever that this will be the only country in the world where a confession to a high police officer, whatever the safeguards, will be an untrustworthy statement? Are we going to live with that kind of a slur? What we are trying to do is, for a period of two years, in an extraordinary situation, dealing only with one kind of offence namely, terrorist offenses, we say, that a confession made to a high police officer of the rank of Superintendent of Police and above, under very restricted conditions, will be admissible in a court of law." The appeal made by the then

Hon'ble Minister might appear plausible. There may be no difficulty in even sharing his views that at some point of time the distrust with which the police is looked upon has to be given up. But has the time come for that? Was the political, administrative and social climate of the country mature for it? What should not be forgotten is that it is not the efficiency or honesty of the police force at higher level which was relevant for taking such a momentous decision. What was required to be considered was if the approach of the police force has undergone a change. It would not be out of place to extract a paragraph from Fifth National Police Commission Report: "41.30 We find that policemen have a tendency to become cynical. We also find that frequently such cynicism is developed, within very few years of service. Policemen very rapidly pick up the knowledge that what the law requires is one thing but what has actually to be done in practice is another. Once this dichotomy takes root in their minds, all training, all exhortations are a waste. Thus, the law is that third degree is not permitted, but in practice that is the only way. Very often people themselves expect the police to beat up goondas and when this is not done charges of bribery and corruption are hurled at the police. People complain that police are partial in their conduct, but policemen learn that while under the law all are equal, as things happen, a rich man is more equal than a poor man, a common citizen different from a politician or one who has the support of a politician, a bureaucrat different from an ordinary government employee the list is endless." 453. When Evidence Act of 1872 was passed it was enacted by a Parliament which was committed to rule the country and not govern. Yet the power to record confession was not entrusted to police officer. The rationale is not far to seek. There is a basic difference between the approach of a police officer and a judicial officer. A judicial officer is trained and tuned to reach the final goal by a fair procedure. The basis of a civilized jurisprudence is that the procedure by which a person is sent behind the bars should be fair, honest and just. A conviction obtained unfairly has never been countenanced by a system which is wedded to rule of law. A police officer is trained to achieve the result irrespective of the means and method which is employed to achieve it. So long the goal is achieved the means are irrelevant and this philosophy does not change by hierarchy of the officers. A Sub-Inspector of the Police may be uncouth in his approach and harsh in his behavior as compared to a Superintendent of Police or Additional Superintendent of Police or any higher officer. But the basic philosophy of the two remains the same. The Inspector of Police is as much interested in achieving the result by securing confession of an accused person as the Superintendent of Police. By their training and approach they are different. Procedural fairness does not have much meaning for them. It may appear unfortunate that even after independence a force which was created to implement harsh and Draconian laws of imperial regime, ruthlessly and mercilessly, has not changed much even in people regime. Dignity of the individual and liberty of person the basic philosophy of Constitution has still not percolated and reached the bottom of the hierarchy as the constabulary is still not accountable to public and unlike British police it is highly centralised administrative instrumentality meant to wield its stick and spread awe by harsh voice more for the executive

than for the law and society. One of the reasons for it may be, as observed by the National Police Commission, the political set-up of the country which has used it more to serve its purpose than to serve the society. 454. The police constable in England and America is duty-bound to inform the accused not only that whatever he was going to state could be treated as confession in a court of law but he was entitled-to have his lawyer and any relative he desired. Section 62 of Criminal Law Act of 1973 of England made it mandatory for the police officer arresting a person to send information to his relative about arrest and place of detention. Circular No. 74 of 1978 issued in England permitted the accused to have assistance of lawyer. In America same safeguards are provided by judicial decisions. In Section 24 of the Evidence Act a confession obtained by threat or inducement or by force is rendered inadmissible. By Section 25 a confession made to a police officer is deemed to be inadmissible ipso facto. But if the same confession is made in presence of a Magistrate then by Section 26 it is not treated as suspect. The obvious reason for these provisions is to ensure fair trial. A confession made to a police officer is suspect even in England and America. But it has been made admissible subject to the safeguards mentioned above. Why? Because what is provided by Section 26 of the Evidence Act stands substituted by presence of lawyer or near relative. A confession to a police officer in presence of a Magistrate is admissible as it having been recorded in presence of judicial authority it becomes credible. Same credibility attaches if the confession is recorded in England and America before a lawyer or near relative. Presence of Magistrate under Section 26 of the Evidence Act and of lawyer or relative in England and America lend credibility to the confession recorded by a police officer as the element of inducement, threat, duress or force stands removed. The inadmissibility attaches to a confession recorded by a police officer not because of him but because of uncertainty if the accused was not made a witness against himself by forcing out something which he would not have otherwise stated. Further a confession made to a police officer for an offence committed irrespective of its nature in non-notified area is inadmissible. But the same police officer is beyond reproach when it comes to notified area. An offence under TADA is considered to be more serious as compared to the one under Indian Penal Code or any other Act. Normally graver the offence more strict the procedural interpretation. But here it is just otherwise. What is inadmissible for a murder under Section 302 is admissible even against a person who abets or is possessed of the arms under Section 5 of the Act. How the methods applied by police in extracting confession has been deprecated by this Court in series of decisions need not reproduced. But all that changed overnight when TADA was enacted. Giving power to police officer to record confession may be in line with what is being done in England and America. But that requires a change in outlook by the police. Before doing so the police force by education and training has to be made aware of their duties and responsibilities, as observed by Police Commission. The defect lies not in the personnel but in the culture. In a country where few are under law and there is no accountability, the cultural climate was not conducive for such a drastic change. Even when there was no Article 21, Article 20(3) and Article 14 of the Constitution any confes-

sion to police officer was inadmissible. It has been the established procedure for more than a century and an essential part of criminal jurisprudence. It was, therefore, necessary to bring about change in outlook before making a provision the merits of which are attempted to be justified on law existing in other countries. 455. Since for justifying various provisions of the Act reliance was placed on Ireland Emergency Provisions Act, 1978 and it was attempted to be argued that the provisions in the TADA were fair and just it appears necessary to say few words. In 1971 in England an internment operation of provisions was made which led to many arrests which were challenged in High Court. And the High Court held that those exercising emergency powers were nonetheless required to fulfill ordinary common law requirement of informing the person arrested of the reason for his arrest. This led to constitution of Diplock Committee which resulted in Northern Ireland (Emergency Provisions) Act of 1973. This empowered the army to arrest any suspected terrorist for a period of four hours for establishing identity after which it was required to hand over the accused to the police. This led to abuse of power what came to be called, "military security" approach. And the survey made in that country noticed, "that the procedure for arrest and questioning and for extra judicial detention has been abused. The security authorities have in some areas mounted a 'dredging' operation based on widespread screening. This has resulted, in our view, in large numbers of wholly innocent persons being arrested and large numbers whose involvement in terrorist activities is relatively unimportant being detained" (Terrorism and Criminal Justice by Ronald D. Crelinsten). This led to replacement of 1973 Act by the new Act which is in force. Various safeguards were made in the Act. Subsection (2) of Section 8 of the Act excludes any statement obtained by torture or inhuman treatment from admissibility. But Section 15 of the TADA throws all established norms only because it is recorded by a high police officer. In my opinion our social environment was not mature for such a drastic change as has been effected by Section 15. It is destructive of basic values of the constitutional guarantee. 456. A confession is an admission of guilt. The person making it states something against himself, therefore it should be made in surroundings which are free from suspicion. Otherwise it violates the constitutional guarantee under Article 20(3) that no person accused of an offence shall be compelled to be a witness against himself. The word 'offence' used in the article should be given its ordinary meaning. It applies as much to an offence committed under TADA as under any other Act. The word, 'compelled' ordinarily means 'by force'. This may take place positively and negatively. When one forces one to act in a manner desired by him it is compelling him to do that thing. Same may take place when one is prevented from doing a particular thing unless he agrees to do as desired. In either case it is compulsion. A confession made by an accused or obtained by him under coercion suffers from infirmity unless it is made freely and voluntarily. No civilised democratic country has accepted confession made by an accused before a police officer as voluntary and above suspicion, therefore, admissible in evidence. One of the established rule or norms accepted everywhere is that custodial confession is presumed to be tainted. The mere fact that the Legislature was competent to make the law, as the offence under TADA

is one which did not fall in any State entry, did not mean that the Legislature was empowered to curtail or erode a person of his fundamental rights. Making a provision which has the effect of forcing a person to admit his guilt amounts to denial of the liberty. The class of offenses dealt by TADA may be different than other offenses but the offender under TADA is as much entitled to protection of Articles 20 and 21 as any other. The difference in nature of offence or the legislative competence to enact a law did not affect the fundamental rights guaranteed by Chapter III. If the construction as suggested by the learned Additional Solicitor General is accepted it shall result in taking the law back once again to the days of Gopalan161, Section 15 cannot be held to be valid merely because it is as a result of law made by a body which has been found entitled to make the law. The law must still be fair and just as held by this Court. A law which entitles a police officer to record confession and makes it admissible is thus violative of both Articles 20(3) and 21 of the Constitution. 457. Section 19 provides for an appeal as a matter of right from any judgment, sentence or order not being an interlocutory order of a Designated Court to the Supreme Court both on facts and law. Such provision existed in 1984 and 1985 Act as well. It may be mentioned that when 1984 Act was passed by the Legislature, it was primarily made due to grave situation prevailing in the State of Punjab. Today the 1987 Act has been extended even to far off States. The effect of such extension is that for every sentence, may be under Section 3 or 4 or any other section, one has to approach this Court. In many cases, the remedy of appeal may be illusory. For instance, one may be prosecuted under Sections 3, 4 and 5 or under any other section and provision. He may be acquitted for the offenses under Sections 3 and 4 and yet may be convicted under other sections or provisions for minor offenses which were tried by the Designated Court by virtue of Section 12 of the Act. He may not be able to approach this Court because of enormous expenditure and exorbitant legal expenses involved in approaching this Court. It should not be forgotten that ours is a vast country with majority on the poorer side. The knowledge of economic inability of sizeable section of the society to approach this Court by way of appeal may result in arbitrary exercise of power and excesses of the police. A provision for appeal to this Court in minor cases may result in defeating the remedy itself. Inability to file appeal due to financial reasons in petty matters may amount to breach of 161 A.K. Gopalan v. State of Madras, AIR 1950 SC 27: 1950 SCR 88: 51 Cri LJ 1383 guarantee under Articles 14 and 21 of the Constitution. It may in many cases be denial of justice. I would, therefore, suggest that it may be examined if a proviso to sub-section (1) of Section 19 can be added that a person convicted of any offence other than Sections 3 and 4 of the Act shall be entitled to file an appeal in the High Court under whose jurisdiction the Designated Court is situated. Further in case the State files an appeal against acquittal of the accused under Sections 3 and 4 in this Court then the appeal of the accused filed in the High Court shall stand, automatically, transferred to this Court and shall be connected and heard along with appeal filed by the State. The State on such transfer should allow the accused to have a counsel of his choice the expenses for which should be home by the State. 458. Coming to sub-section

(8) of Section 20 one of the issues debated was if a person accused of an offence under the TADA was entitled to invoke extraordinary jurisdiction of the High Court either for quashing of the proceedings as on facts no offence was made out and the proceedings were invoked as an abuse of process of court or for extraneous reason and whether the order rejecting the bail by the Designated Court could be subjected to judicial review under Article 226. 459. Law on the subject is fairly settled. In State of Haryana v. Bhajan Lal162 a Bench of this Court of which one of us (Pandian, J.) was a member, after detailed examination of the judicial decisions held, "where the allegations made in the first information report or the complaint, even if they were taken at their face value and accepted in their entirety did not prima facie constitute any offence or make out a case against the accused", or " where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person could ever reach a just conclusion that there was sufficient ground for proceeding against the accused", or"where a criminal proceeding was manifestly attended with mala fides and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge", then the proceedings were liable to be quashed. In Usmanbhai53 it was conceded that a petition under Article 226 was maintainable. It was urged that the observation made by this Court in Usmanbhai case53 in relation to exclusion of High Court's jurisdiction under Sections 439 and 482 were squarely applicable to Article 226. Reliance was placed on Narcotics Control Bureau v. Kishan Lal123 also. It was urged that as far back as Waryam Singh v. Amamath118 it having been observed by this Court that power of superintendence conferred by Article 227 was to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds and their authority and not in correcting errors. The High Court should not be permitted to entertain a petition against rejection of bail under 162 1992 Supp (1) SCC 335: 1992 SCC (Cri) 426 53 (1988) 2 SCC 271 :1988 SCC (Cri) 318 123 (1991) 1 SCC 705: 1991 SCC (Cri) 265 118 1954SCR565:AIR1954SC215 Article 226 and 227. Reliance was also placed on State of Gujarat v. Vakhtsinghji Suringhji Vaghela119 and Mohd. Yunus v. Mohd. Mustaqiml 21. The power given to High Court under Article 226 is an extraordinary power not only to correct the manifest error but also to exercise it for sake of justice. Under the scheme of the Constitution a High Court is the highest court for purposes of exercising civil, appellate, criminal or even constitutional jurisdiction so far that State is concerned. The jurisdiction possessed by it before coming into force of the Constitution was preserved by Article 225 and by Articles 226 and 227 an extraordinary jurisdiction was conferred on it to ensure that the subordinate authorities act not only in accordance with law but they also function within the framework of law. That jurisdiction of the High Court has not been taken away and in fact could not be taken away by legislation. In England even in absence of Constitution whenever an attempt was made by Parliament to provide that the order was final and no writ of certiorari would lie the High Court always struck down the provision. Since the High Court under the Constitution is a forum for en-

forcement of fundamental right of a citizen it cannot be denied the power to entertain a petition by a citizen claiming that the State machinery was abusing its power and was acting in violation of the constitutional guarantee. Rather it has a constitutional duty and responsibility to ensure that the State machinery was acting fairly and not on extraneous considerations. In State of Maharashtra v. Abdul Hamid Haji Mohammed"' this Court after examining the principle laid down in State of Haryana v. Bhajan Lal159 and Paras Ram v. State of Haryanal63 held that the High Court has jurisdiction to entertain a petition under Article 226 in extreme cases. What are such extreme cases cannot be put in a strait- jacket. But the few on which there can be hardly any dispute are if the High Court is of opinion that the proceedings under TADA were an abuse of process of court or taken for extraneous considerations or there was no material on record that a case under TADA was made out. If it be so then there is no reason why should the High Court not exercise its jurisdiction and grant bail to the accused in those cases where one or the other exceptional ground is made out. 460. Since I am agreeing with Brother Pandian, J. except on one or two issues it appears appropriate to record my conclusions in brief: (1) That the three Acts Act 61 of 1984, Act 31 of 1985, and Act 28 of 1987 have been validly enacted by the Parliament in exercise of its power under Entry 1 of List III of the Constitution. (2) Even though no opinion has been expressed by Brother Pandian, J., on Section 5 1 am of the opinion that the provisions of this section can be invoked only when the prosecution is able to establish that there was 119 (1968) 3 SCR 692: AIR 1968 SC 1481 121 (1983) 4 SCC 566 117 (1994) 2 SCC 664 159 (1964) 1 SCR 332: AIR 1963 SC 1295: (1963) 2 Cri LJ 329 163 (1992) 4 SCC 662: 1993 SCC (Cri) 13 some material on record to show that the arms and ammunition mentioned in the section were likely to be used for any terrorist or disruptive activity or that they had been used as such. (3) Although the provisions relating to appointment of a person as Designated Court are clear yet in the written arguments it was pointed out that some of them were appointed even after retirement. Such appointments would be in teeth of the express provisions in the statute. Therefore, no one should be appointed as Designated Court who has retired from service. (4) As regards Section 15 of the Act which provides for recording of confession by Superintendent of Police, for the detailed reasons given by me I am of the opinion that it is violative of Articles 20 and 21 of the Constitution and, therefore, is liable to be struck down. (5) As regards provisions of appeal I have suggested that it may be examined by the appropriate authority if a proviso could be added to Section 19 that where convictions are for offenses other than Sections 3 and 4 of Act 28 of 1987 the accused may be entitled to file an appeal in the High Court itself and in case an appeal against conviction is filed by the Government in this Court then the appeal filed by the accused in the High Court should stand automatically transferred. I am further of the opinion that in such cases the accused should be provided a counsel of his choice and the payment of fee should be either made by the State or if made by the accused it should be reimbursed. (6) As regards jurisdiction of the High Court to entertain an application for bail under Article 226 of the Constitution I am of the opinion that the High Courts being con-

stitutionally obliged to ensure that any authority which exercises judicial and quasi- judicial powers in its jurisdiction functions within the framework of law, are entitled to entertain the petition to determine if the proceedings were not an abuse of process of court. But while exercising discretion the court must not be oblivious of the sensitivity of the legislation and the social objective inherent in it and, therefore, should exercise it for the sake of justice in rare and exceptional cases the details of which cannot be fixed by any rigid formula.