rights to armed forces and the Police to ensure proper discharge of their duties.

2. Under Article 34, during the operation of Martial law in any area, the Parliament may indemnify any person in the service of the Central or a State Government for acts for the maintenance or restoration of law and order.

3. During emergency proclaimed under Article 352 of the Constitution, the fundamental rights guaranteed to the citizens, will remain suspended. Article 358 authorize the Parliament to restrict fundamental rights guaranteed by Article 19 during the pendency of an emergency under Article 352.

Article 359 empower the President to suspend the right to move the Courts for the restoration of fundamental rights. In other words, Article 359 empowers the President to suspend Article 32 of the Constitution. Such an order however is to be submitted to the Parliament, and the Parliament has the right to disapprove the Presidential order.

NEED OF THE HOUR TO ENACT STRINGENT ANTI-TERROR LAW

By

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The primary justifications for the existence of the State and the Civil Government as envisaged under the Social Contract theory were the protection of the property and person of the individual. This view of the State coincides with the police functions traditionally associated with it. Conceptualized in this manner, the State necessarily retains monopoly over the use of legitimate force within its territory and over its residents. This exclusive right which the State obtains through a process of legitimation is exercised by it unparalleled. However, when such a context of a modern sovereign nation State with its centralized Government is imported into the milieu of the contemporary democratic welfare State, it gives rise to problems of great irreconcilability due to the radically different roles that the institution of the State adopts in two contexts. The existing State of the anti-terror legislation in India is a reflection of this problematic situation. This article proposes to analyze the major anti-terrorism enactments in India in the context of the bitter criticism and controversy surrounding them, thereby emphasizing the need for a reform within the framework of these legislations.

Terrorism may be conceptualized as inclusive of those acts of unjustified violence and war, imbued with a strong sense of a historical social or political wrong, often aimed against the State or the establishment. Violence is treated as a weapon generating fear and forcing an immediate, large scale political transformation. Historically terrorism was often employed as an extremist strategy or policy to overthrow the colonial Government during the British rule. However, in contemporary times, terrorism has altered greatly in terms of its manifestation and characteristics. The violence perpetrated in pursuance of terrorist activities

has increased enormously in terms of the extent of the target and disaster. The remarkable transformation in of the activities that constitute terrorism may be attributed to its complex inner dimensions its ability to rapidly adapt.[1]

As a direct challenge to the legitimacy and sovereign authority of the native State, the foremost issue to be addressed by the State in relation to terrorism is that of internal security. Nevertheless, the global proportions that the phenomenon of terrorism has acquired in the modern times have rendered the framework of the traditional criminal justice system inadequate in coping with the uncontrollable adaptations of the modes of generating terror. For this reason, enactment of a string of new anti-terror legislations became an immediate and pressing concern. The emergence of anti-terror legislations in India and their historical roots will be briefly examined hereunder.

The first of the nature of anti-terrorism legislation in India was the counter-terrorist measures adopted by the British colonial Government to violently curb the rising tide of opposition from the natives. In 1793, the first preventive detention law was introduced for the purpose of detaining any person who was perceived as a threat to the Government. The Bengal State Prisoner's Regulation was enacted in 1818. Despite the extreme nature of these measures, the revolutionary fervour among the natives could not be contained. This gave rise to a series of new legislations, highly draconian in nature such as, the Explosive Substances Act, Prevention of Seditious Meetings Act, the Anarchical and Revolutionary Crimes Act. A careful examination of the nature of these legislations reveals the flagrant denial of the same Constitutional rights and fundamental freedoms to the natives, which the same Government swore by for its own citizens.[2]

Several challenges confronted the Government of the Union of India in the wake of independence which posed a threat to the internal security of the nation thereby driving the Government of India to enact a string of counter-terrorist legislations such as the Preventive Detention Act of 1950, the Armed Forces Separate Powers Act (AFSPA), 1958, The Maintenance of Internal Security Act (MISA), 1971. Though these legislations were primarily enacted to deal with certain special circumstances, they were not specifically directed to confront the phenomenon of terrorism. They were not originally intended to be integrated with the permanent corpus of laws of the country.

The first legislation which was designed to deal directly with terrorism and organized crime in India was the Unlawful Activities (Prevention) Act, 1967 (UAPA). This enactment empowered the State to severely curtail the freedoms guaranteed under Article 19 of the Fundamental Rights of the Constitution to those citizens who were deemed to be acting against the national interest. It is to be noted that the political context in which this Act came into being is India emerging from devastating wars with Pakistan and China. The UAPA therefore sought to snuff any group with a secessionist agenda. Following this, the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) was enacted which entrusted more coercive powers to the State. It was the first enactment which attempted to define an act of terrorism with clarity. The Punjab insurgency and the Sikh riots during the reign of *Indira Gandhi* was the political context to the enactment of this

[1] *S. Charan Terrorism and Legal Policy in India*, Faultlines available at http://www.satp.org/satporgtp/publication/faultlines/volume15/Article6.html#11 (Last visited on January 27th, 2015).

[2] Anti-Terrorist Laws and Judicial Response: An Overview available at, http://shodhganga.inflibnet.ac.in:8080/jspui/bitstream/10603/10659/12/12_chapter%205.pdf (Last visited on January 31, 2015).

legislation. Despite the severe criticism that the draconian nature of various provisions under the Act attracted, the Supreme Court upheld the constitutional validity of TADA in the case of *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569. The urgent need for such a stringent legislation despite the immense scope of abuse of power by the law enforcement forces was upheld by the Supreme Court solely on the basis of their good faith in exercising them. Nevertheless, the gross misuse of the powers by the police forces taking advantage of the lack of adequate safeguards through indiscriminate arrests, custodial torture, elimination without trial brought the enactment under great controversy when it was ultimately repealed in 1995.

The next major anti-terrorism legislation to be enacted was the Prevention of Terrorist Activities Act (POTA), 2002. The unabashed violation of fundamental rights of the citizens including the right to life and personal liberty under Article 21 of the Constitution of India which the POTA allowed reflected the complete lack of introspection on the part of the Government that enacted it. The 2001 attack on the Parliament was the immediate cause for the enactment of the legislation. In the case of *People's Union for Civil Liberties v. Union of India (UOI)*, (2004) 9 SCC 580, the Supreme Court discussed the constitutional validity of the POTA and held that by the powers vested in the Parliament under Article 248 and Entry 97, List I of Schedule Seven of the Constitution, it is within the capacity to enact such a legislation. Moreover, the possibility of a potential abuse of powers granted by such a legislation, does not render the Act unconstitutional. However, the abuse of this legislative device in the hands of the police continued unabated due to the retention of the provisions of the TADA under POTA to a large extent. The arrest of the MDMK MP Vaiko and his subsequent exoneration following criticism of the Government in power depicts the whimsical interpretation of the Act by the Government. The disastrous repercussions of the Act for the Muslims and Sikhs in Gujarat during the Godhra riots demonstrates the pitiable violation of due process. The UAPA enacted in 2004 following the repeal of the POTA in 2002 further worsened the situation by increasing the detention of the accused in police custody from 90 to 180 days without producing him before the Magistrate[3].

The clamour against the draconian provisions of the law continues unabated as the UAPA, 2004 remains the only anti-terrorism legislation in force today. However, a significant change may be traced in the nature of the Supreme Court's approach in interpreting the law in this regard. The attitude of the highest Court in the country has remained in support of the State in upholding the extreme measures undertaken by it, upon various justifications. The cases of *State v. Nalini*, AIR 1999 SC 2640 and *Jameel Ahmed and another v. State of Rajasthan*, (2003) 9 SCC 673, the Supreme Court has justified the usage of the confessions of the accused against the co-accused and the abettors, under Section 15(1) of the TADA[4] by dismissing its apparent inconsistency with Section 30 of the Indian Evidence Act, 1872.[5] In the case of *State (N.C.T. of Delhi) v. Navjot Sandhu alias Afsan Guru*, AIR 2005 SC 3820, the Supreme Court upheld the application of the POTA on various counts by the police by dismissing the manipulation of the FIR to include charges under POTA offences, allowing conviction on the basis of retracted confessions *etc.* As regards the matter of hundreds of prisoners

[3] Submissions to the Review Committee on POTA by Commonwealth Human Rights Initiative, available at http://www.humanrightsinitiative.org/artres/pota_submission.pdf (Last visited on 29th January, 2015).

[4] Section 15(1), Terrorists and Disruptive Activities (Prevention) Act, 1987.

[5] Section 30, Indian Evidence Act, 1872.

on death row languishing in jails, the case of *Devinder Pal Bhullar v. State of NCT of Delhi*, (2013) 6 SCC 195, where the Supreme Court repeatedly dismissed the review petitions to quash the commutation of his death sentence filed on grounds of inordinate delay in disposing of mercy petition, due to its inapplicability to convictions under TADA. It was in 2013 when the matter came before the Supreme Court again, that it allowed the commutation and laid down the principle that such commutation is permitted even for prisoners convicted under TADA in the instance of *"unexplained and inordinate delay in the disposal of the mercy petition."*[6] The Supreme Court has also been seen to have adopted a considerate approach in its recent judgments over the Surat Bomb Blast Case of 1993[7] where it acquitted the accused on grounds of misuse of the provisions of the TADA. Similarly, it acquitted the accused in the Akshardham Temple Attack Case of 2002 and severely reprimanded the investigation team for their misuse of powers vested on them by the POTA[8].

The legal community in India is faced with an enormous task ahead of it in carrying out thorough reforms in the anti-terrorism legislation of the country. The Government must recognize the changes in time where citizens are becoming increasingly conscious and assertive of their fundamental rights and constitutional guarantees. It is too late in the day for the democratic republic of India to be allowing such unreasonable laws to escape scrutiny. A concerted effort must also be carried out with the UN and its special agencies by playing an active role in the global efforts at fighting terrorism. This may be done by ratifying various counter-terrorism conventions of the UN. An important consequence of this is that the reading of the international law into the domestic law on terrorism will ensure harmonization with the international community and also guarantee adherence with the Declaration of Human Rights. The NHRC must remain vigilant in this ensuring this and in taking to task any violation of human rights with immediate effects. A strong Center-State co-ordination is also of paramount importance in this regard to prevent bureaucratic hierarchies or institutional blocks from hindering justice. Above all, a great amount of candour is essential for the Government of the Center in order to deal with a matter of such sensitivity and grave political implications.

Therefore, there is a need to carryout a holistic inquiry into the nature of the existing anti-terrorism law in order to identify its lapses at the level of policy or implementation and this can best be achieved by a co-ordinated effort between the makers of policy and the law enforcers. It is the need of the hour, not for a more stringent and oppressive law to counter-terrorism but a rigorous reform in the existing laws, learning from the experience of the horrors unleashed by extreme measures taken by the State in the past.

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[6] Id

[7] *SC Acquits All Accused in the 1993 Surat Bomb Blast Case*, The Hindu available at http://www.thehindu.com/news/national/sc-acquits-all-accused-in-1993-surat-bomb-blast-case/article6224656.ece (Last visited on January 27th, 2015).

[8] *R. Nair*, *Akshardham Judgment-I* : The Law at work 49(25), Economic and Political Weekly, (June 21, 2014).