LAW RELATING TO TERRORISM and The system of prosecution: Challenges and issues involved vis-a-vis NIA

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LAW RELATING TO TERRORISM IN RECENT INDIA

Introduction

Terrorism as an offence does not figure in the Indian Penal Code of 1860 as amended from time to time. In India, the first special law which attempted to define terrorist act was the Terrorist and Disruptive Activities (Prevention) Act, 1985, which was followed by the Prevention of Terrorism Act, 2002 (POTA). With the repeal of the latter in 2004, the Unlawful Activities (Prevention) Act, 1967 was amended to include the definition of a 'terrorist act'.

Terrorist and Disruptive Activities (Prevention) Act, 1985 and 1987

- **The Terrorist and Disruptive Activities (Prevention) Act, 1985**
  - enacted in 1985
  - Background: escalation of terrorist activities in some parts of the country.
  - two new offences, namely, *"terrorist act" and "Disruptive activities" was* created.
  - established a system of special courts(Designated courts).
  - restrictions on the grant of bail were placed.
  - Detention period of accused enhanced to 180 days.
  - Provisions for protection of witness were incorporated.

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- It was to be repealed in 1987 (Sunset clause)
- However, various factors specially situation in Punjab forced to continue the said law. **Terrorist and Disruptive Activities (Prevention) Act, 1987 (commonly known as TADA)** was enacted.
- It strengthened the mechanism provided in TADA, 1985.
- Certain offences were redefined e.g. harbouring or concealing terrorist, being a member of terrorist gang or organisation etc.
- Police officers were given more powers in matters of seizure of property.
- Confession before a police officer not lower than the rank of SP was made admissible.

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- **Kartar Singh Vs State of Punjab [AIR 1995 SCC 1726]**
  - The constitutional validity of TADA, 1987 was challenged before Supreme Court
  - A constitution Bench of Supreme court upheld the law. Safeguards were introduced in Confession made before police officer:
    - accused be produced before magistrate within 48 hrs who shall again record confession.
- Validity of the TADA, 1987 was extended in 1989, 1991 and 1993.
- finally it was allowed to lapse in year 1995.

Case Law on TADA

- **Supreme court observations:**
- **Hitender Vishnu Thakur Vs State of Maharashtra 1994 AIR (SC) 2623:**
  - terrorism as use of violence when its most important result is not merely the physical and mental damage of victim but the **prolonged psychological effect it produces on the society as a whole**.
  - activity which is sought to be punished under Section 3 (1) of the TADA has to be such which cannot be classified as a mere law and order problem or disturbance of public order or disturbance of the even tempo of the life of the community of any specified locality. It is of such a nature as cannot be tackled as an ordinary criminal activity under the ordinary penal laws by the normal law enforcement agencies.

- **State Vs Nalini, 1999 (5) SCC253 the Rajiv Gandhi Assassination Case:**
  - the mere fact that the action of the accused resulted in the killing of 18 persons which would have struck a great terror in the people of India has been projected as evidence that they intended to strike terror in the people.
  - there was absolutely no evidence that any one of the conspirator even desired the death of any Indian other than Rajiv Gandhi.
  - the Apex Court ruled that it was not possible to sustained the conviction of offences under Section 3 of the TADA.

Prevention of Terrorism Act, 2002

- **Background:**
  - **TADA** Lapsed in 1995.
  - several terrorist incidents-including Hijacking of Indian Airlines Flight IC-814 to Kandahar in 1999 and Attack on Parliament on December 13, 2001 happened.
  - The Terrorist attack on World Trade Centre in the United States on September 11, 2001,
- **Prevention of Terrorism Ordinance (POTO)** was promulgated on 24 Oct. 2001.
- **The Prevention of Terrorism Act, 2002 (POTA**) came into force on 28 March 2002.
  - Safeguards introduced in Kartar Singh case incorporated in the act.

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- **Statements of Objects and Reasons of the Prevention of Terrorism Act:**
  - The country faces multifarious challenges in the management of its internal security. There is an upsurge of terrorist activities, intensification of cross –boarder terrorist activities and insurgent groups in different part of the country. Very often, organised crime and terrorist activities are closely inter-linked. Terrorism has now acquired global dimensions and has become a challenge for the entire world. The reach and methods adopted by terrorist groups and organisations take advantage of modern means of communication and technology using high-tech facilities available in the form of communication systems, transport, sophisticated arms and various other means. This has enabled them to strike and create terror among people at will. The existing criminal justice system is not designed to deal with the types of heinous crime with which the proposed law deals with.

- **People's Union for Civil Liberties Versus Union of India, 2004 (9) SCC 580:**
  - The constitutional validity of POTA was challenged in the case, on the ground that law violated basic human rights.
  - The Supreme Court upheld the constitutional validity of law while stipulating some restrictions on the arbitrary use of certain powers.
- POTA was repealed as
  - its provisions were misused and the Act had failed to serve its intended purpose.
- After repeal of POTA, 2002, some provisions to deal with terrorism were incorporated in the Unlawful(Prevention) Act, 1967 as amended by the Unlawful Activities (Prevention) Amendment Act, 2004.

The Unlawful Activities (Prevention) Act, 1967

- The Unlawful Activities (Prevention) Act, 1967 was originally conceived only as an enactment to impose reasonable restrictions on:
    - freedom of speech and expression,
    - right to assemble peaceably and without arms
    - right to form associations.
- focus of the act was to tackle the growth of regionalism in the country.
- It was initially enacted in the context of the Naga rebellion as there was need to deal with "associations" whose activities were prejudicial to the maintenance of harmony between different groups on grounds of religion, race, place of birth, residence, language etc.

Amendments in 2004

- The Unlawful Activities (Prevention) Act, 1967 was comprehensively amended in 2004 to deal with terrorist activities.
- Amendments in Preamble: To provide for more effective prevention of certain unlawful activities of individuals and associations, and dealing with terrorist activities and for matters connected therewith.
- "terrorist act" and "terrorist organization" were defined.
- provides mechanism for forfeiture of proceeds of terrorism apart from providing stringent punishments for terrorism related offences.
- The act also incorporate provisions regarding seizure and forfeiture of property, enhanced punishments and listing of terrorist organization.
- The 2004 amendment inserted new chapters IV, V & VI in the original Act and chapter IV of the original Act was renamed as chapter VII

Amendments in 2008

- This amendment was made mainly to comply with FATF obligations on terrorist financing.
- The preamble of UAPA was amended and a reference was made to the Resolutions adopted by the Security Council of the United Nations on 2001.
- The Act was again amended in 2008 and the scope of terrorist acts was further enlarged by substituting, "likelihood of causing terror".

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- **The amendment in 2013**
  - expands the definition of "Terrorist Act" to incorporate offences that threaten the country's economic security including raising funds for terrorist activities and production and distribution of high quality counterfeit currency (Section 15 UAPA).
  - It further extends the period of ban on the unlawful associations from two years to five years (Section 6).
  - Offences committed under the Act by companies, societies, trusts and their officers are not covered under the ambit of the act (Section 22A or 22B).

Comparison

	TADA	POTA	UAPA
Definition of terrorist act:	Section 3: ❖ With intent to overawe, the government	Section 3: ❖ With intent to threaten the unity, integrity, security or sovereignty of India. ❖ Act of raising fund intended for the purpose of terrorism was included in the definition of Terrorist Act.	Section 15: ❖ With intent to threaten or likely to threaten the unity, integrity, security (including economic security) or sovereignty of India or with intention to strike or likely to strike terror in the people or any section of section of the people in India or in any foreign country. ❖ Act of raising fund for a terrorist act is a separate offence under section 17 and section 40 deals with raising fund for a terrorist organisation. ❖ Damage to monetary stability of India by production or smuggling or circulation of high quality counterfeit Indian currency/coin is included.

Comparison

	TADA	POTA	UAPA
Bail Provisions	Section 20 (8) ❖ No provision of anticipatory bail. ❖ No bail without giving opportunity to hear Prosecution.	Section 49 (6) & (7) ❖ No provision of Anticipatory Bail. ❖ No bail without giving opportunity to hear Prosecution.	Section 43D (4) – (7): ❖ No provision of anticipatory bail. ❖ No bail without giving opportunity to hear Prosecution. ❖ If the person is accused of an offence under chapter IV and VI, he shall not be released on bail **if prima facie case is made out** against the accused.
Enhanced period of detention of accused	❖ Period of 15 days, 90 days and 60 days were replaced by 60 days, 180 days and 180 days respectively.	❖ Period of 15 days, 90 days and 60 days were substituted by 30 days, 90 days and 90 days respectively. Extendable upto 180 days	❖ Period of 15, 90 and 60 days are substituted by 30, 90 and 90 days. ❖ Extendable upto 180 days

Comparison

	TADA	POTA	UAPA
Confession made before Police Officer	❖ Section 15: Confession to police officer is admissible	❖ Similar Provisions. ❖ It also incorporated salient features of the guidelines laid down by Supreme Court in kartar singh vs. state of Punjab.	❖ No Provision.
Review Committee	❖ No provision of Review Committee	❖ Review committee to review whether there is a prima facie case for proceeding against the accused under the act.	❖ Review committee under section 37 however role is limited to section 36, which provide for notification and de-notification of terrorist organisation.
Obligation to furnish information	❖ No such provision	❖ Section 14	❖ Section 43 (F)

The Scheme of the UA(P) Act,1967

1. UNLAWFUL ASSOCIATION
2. UNLAWFUL ACTIVITY
3. TERRORIST ACTIVITY
4. TERRORIST ORGANISATION

Chapter I

PRELIMINARY

1. Short title, extent and application

2. Definitions.

Extent, application and definitions.

- section 1: it extends to the whole of the India.
  - Any person who commits an offence beyond India which is punishable under this Act shall be dealt with according to the provisions of this Act in the same manner as if such act had been committed in India.
- Section 2 of the Act from clause (a) to (q) deals with various definitions that are relevant in the Act.
  - For example the term economic security is used in the definition of terrorist act provided under section 15 of the UA (P) Act. Its definition is provided under section 2 (ea).
  - Terrorist act, Terrorist organisation, Terrorist gang
  - Unlawful activity, Unlawful association

Chapter II

- UNLAWFUL ASSOCIATIONS
- S 3. Declaration of an association as unlawful.
- S 4. Reference to Tribunal.
- S 5. Tribunal.
- S 6. Period of operation and cancellation of notification.
- S 7. Power to prohibit the use of funds of an unlawful association.
- S 8. Power to notify places used for the purpose of an unlawful association.
- S 9. Procedure to be followed in the disposal of applications under this Act.

- The chapter 2 of the act deals with the procedure for the declaration of the associations as unlawful associations and various consequential issues.
- Section 2 of the UA(P) Act provides that Central Government may by notification in the official gazette declare an association as Unlawful.
- It is further provided that no such notification shall have affect until the tribunal by an order made under Section 4 confirmed the declaration.
- Proviso provided that the Central Government may declare an association to be unlawful with immediate effect if circumstances exist which render if necessary but such opinion is subject to any order that may be made under Section 4.

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- In **Jamat-e-Islami Hind Vs Union of India (1995) 1 SCC 428** it was held that it is only on the conclusion so reached in an objective determination that an unlawful activity is the object of the association or the object is any activity punishable under Section 153 A or Section 153 B of the IPC, a declaration can be made by the Central Government under Sub-Section (1) of Section 3
- Section 4 deal with reference to the tribunal of the notification by the Central Government for the purpose of adjudicating whether or not there is sufficient cause for declaring the association as unlawful.
- On receipt of reference, the tribunal shall call upon the association affected to show cause why it should not be declared unlawful.
- The tribunal shall within a period of six months beside regarding the issue of notification either confirming the declaration or cancelling the same.

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- Section 5 of the UA(P) Act deals with tribunal which consist of 1 person to be appointed by the Central Government. It is also provided that no person shall be so appointed unless he is a judge of High Court.
- The tribunal for the purpose of making an inquiry under this act have the same power as are vested in the civil court under the code of civil procedure.
- Section 6 provides that if declaration made under Section 3 is confirmed by the tribunal, it shall remain in force for a period of 5 years.

Chapter III

Offences and Penalties

S 10. Penalty for being a member of an unlawful association etc.

S 11. Penalty for dealing with funds of an unlawful association.

S 12. Penalty for contravention of an order made in respect of a notified place.

S 13. Punishment for unlawful activities.

S 14. Offences to be cognizable.

- Originally, Chapter III alone contained the offences and penalties.
- Later, the amendment of the Act in 2004, also brought Chapter IV, VI and VII containing various other offences and penalties.
- This Chapter contains various provisions related to the consequences that the member of an association have to face when the association is declared as an unlawful one.

- Section 10 of the UA (P) Act makes the membership of an unlawful association a criminal offence – 2 years, 5 years, death, life imprisonment
- A person who is a member of an association which has been declared unlawful under section 3, or takes part in the meeting of such associations or contributes to, receives or solicits any contribution for such association or in any way assist the operations of such association is punishable with imprisonment which may extent to 2 years.
- Section 11 provide penalty of imprisonment standing up to 3 years of fine for dealing with funds of unlawful association.

- **The unlawful activity is defined in section 2 (1) (o) of the Act.**
  - It is an act by which a person or an association intends to or supports any claim, or to bring about the **cession** of a part of the territory of India or the **secession** of the part of territory of India of the union.
  - Or which incites any individual or group of individuals to bring about such cession or secession.
  - Or which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India.
  - Or which causes or is intended to cause disaffection against India.
- An act of unlawful activity can be committed by words, either spoken or written, or by signs or by visible representation or otherwise.
- Section 13 provide punishment for unlawful activities – up to 7 years
- Section 14 provides that an offence punishable under this Act shall be cognizable.

Chapter IV

PUNISHMENT FOR TERRORIST ACTIVITIES

S 15. Terrorist act.

S 16. Punishment for terrorist act.

S 16A. Punishment for making demands of radioactive substances, nuclear devices, etc.

S 17. Punishment for raising funds for terrorist act.

S 18. Punishment for conspiracy, etc.

S 18A. Punishment for organising of terrorist camps.

S 18B. Punishment for recruiting of any person or persons for terrorist act.

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- S 19. Punishment for harbouring, etc.
- S 20. Punishment for being member of terrorist gang or organisation.
- S 21. Punishment for holding proceeds of terrorism.
- S 22. Punishment for threatening witness.
- S. 22A. Offences by Companies.
- S. 22B. Offences by societies or trusts.
- S. 22C. Punishment for offences by companies, societies or trusts.
- S 23. Enhanced penalties.

- The Chapter IV provides punishment for terrorist activities.
- This chapter contains an important area of this Act, where offences of terrorism, where other offences like conspiracy, raising funds for terrorist activity, organising terrorist camps, harbouring of terrorists, enhancement of punishments etc. are dealt with. Most of the parts are imported either from TADA or from POTA.

Definition of Terrorist Act

- **The Section 15 defines the terrorist act.**
- Any act with intent to threaten or likely to threaten
- The emphasis is not only on the unity, integrity, security, sovereignty of India in general but also people of any foreign country.
- Any act, therefore, done, with an intent <u>to threaten or likely to threaten</u> the unity, integrity, security or sovereignty of India or <u>to strike terror or likely to strike terror</u> in the people or any section of the people in India or in any foreign country.

- By the amendment act of 2008 there is an inclusion of action of overawing by means of criminal force or causing the death of public functionary or attempts to do so, in the definition of terrorist act.
- Additionally the amendment act of 2013 has inserted damage to monetary stability of India by way of production or smuggling or circulation of High Quality Counterfeit India Paper currency etc. in the definition under section 15 (1) (iiia).
- Section 16 provides punishment for a terrorist act.

- **In the Mumbai terrorist attack case Mohd. Azmal Amir Kasab Vs. State of Maharashtra (2012) 9 SCC 1,** the actions of Azmal Kasab, of indiscriminate firing on innocent civilians and security forces, the acts of causing explosion in busy civilian areas were acts, which were intended to strike terror in the minds of people and pose a threat to the security of India.
- Now in prosecution of these acts as terrorist acts within the meaning of the section 15 of the UA (P)Act, it is not necessary for the prosecution to prove that Azmal is a member of any "unlawful association" or that Azmal is associated with any terrorist organisation.
- It was held by the Court the charge under section 15 of the UA (P) Act can be said to be proved if the ingredients of section 15 are proved against him.

Section 17 of the UA (P) Act
Punishment for raising funds for terrorist act

- **Ingredients:** Whoever, in India
- Or in a foreign country,
- Directly or indirectly
- Raises or collects funds
- Or provides funds to any person or persons
- Or attempts to provide funds to any person or persons
- Knowing that such funds are likely to be used by such person or persons to commit a terrorist act
- **Punishment:** 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.

- In **Redaul Hussain Khan Vs. NIA (2010) 1 SCC 521**, it was held by the Supreme Court that the contention that in order to make a person liable under section 17 of the UA (P) Act, he must know as to what terrorist act would be committed by the fund, which he raises, provides or collects, is not in tune with the provisions as stand embodied in section 17 and cannot, therefore, be accepted.
- Section 17 of the UA (P) Act provides punishment for raising funds for a terrorist act and section 40 also deals with terror financing, it deals with offence of raising funds for terrorist organisation.

Section 40 of the UA (P) Act- Offence of raising fund for a terrorist organisation

A person commits the offence of raising fund for a terrorist organisation, who, with intention to further the activity of a terrorist organisation.

(a) Invites another person to provide money or other property, and intends that it should be used, or has reasonable cause to suspect that it might be used, for the purposes of terrorism; or

(b) Receives money or other property, and intends that it should be used, or has reasonable cause to suspect that it might be used, for the purposes of terrorism; or

(c) Provides money or other property, and knows, or has reasonable cause to suspect, that it would or might be used for the purposes of terrorism.

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Explanation:- For the purpose of this sub-section a reference to provide money or other property includes of its being given lend or otherwise made available, whether or not for consideration.

(2) A person, who commits the offence of raising fund for a terrorist organisation under sub-section (1), shall be punishable with imprisonment for a term not exceeding fourteen years, or with fine, or with both.

Section 18: Conspiracy

- Section 18 of the UA (P)Act provides punishment for conspiracy, etc. Conspiracy is only one among the constituents for the punishment under this section.

Sec. 18 UA(P) Act Vs Sec. 120B IPC

- Section 120B of the IPC will not slap a liability to a person unless he is not in agreement with the other conspirators in respect of the fulfilment of its mission.
- But, to constitute the offence under section 18 of UA (P) Act, 1967, a person need not to be agreement with the others. Any of the other acts mentioned in the section is enough.
- In **Oinam Moniton Singha Vs. NIA 2013 (2) GLT 980**, the Division Bench of Guwahati High Court observed that plain reading of the section 18 makes it clear that not only conspiracy to commit terrorist act is made punishable but attempting, advocating, abetting, advising, inciting the commission of terrorist act is also made punishable. It also goes further by adding the term knowledge.

- **Section 20** makes the membership of a terrorist organisation or a terrorist gang which is involved in terrorist acts, punishable with imprisonment which may extend to life and also fine.
- Mere membership in a terrorist organisation is not an offence and the necessary ingredient of this section is that the organisation must be involved in terrorist acts. **Ms. Jyoti Babasaheb Chorge Vs. State of Maharashtra MANU/MH/1637/2012** it was held that the membership of terrorist gang or organisation as contemplated as section 20 cannot be a passive membership.
- It has to be treated as an active membership which results in participation of the acts of the terrorist gang or organisation which are performed for carrying out the aims and objects of such gang or organisation by means of violence or other unlawful means.

Chapter V

FORFEITURE OF PROCEEDS OF TERRORISM
S 24. Forfeiture of proceeds of terrorism.
S 25. Powers of investigating officer and Designated Authority.
S 26. Court to order forfeiture of proceeds of terrorism
S. 27. Issue of show cause notice.
S 28. Appeal
S 29. Order of forfeiture.
S 30. Claims by third party.
S 31. Powers of Designated Authority
S 32. Certain transfers to be null and void.
S 33. Forfeiture of property of certain persons.
S 34. Company to transfer shares to Government.

- Section 24 of the UA (P) Act provides that all references to “proceeds of terrorism” shall include property intended to be used for terrorism.
- Section 24a which deals with forfeiture of proceeds of terrorism provides that proceeds of terrorism, whether held by a terrorist organisation or a terrorist gang or by any other person and whether or not such terrorist or other person is prosecuted or convicted for any offence under chapter IV or chapter VI shall be liable to be forfeited to the central or state government as the case may be.
- Where proceedings have been commenced the court may pass an order directing attachment or forfeiture.

- Section 25 deals with power of investigating officer and designated authority.
- If an officer investigating an offence has reason to belief that any property represents proceeds of terrorism he shall with prior approval in writing of the director general of the police of the state in which property is situated make an order seizing such property.
- Designated authority shall either confirm or revoke the order within period of 60 days.
- Any officer aggrieved by order of designated authority may prefer an appeal to the court within period of 30 days and the court may either confirm or revoke such order.
- Section 26 provided that when the court confirms the order it may order forfeiture of such property.
- Section 27 provides that show cause notice be issued to the person holding or in possession of such proceed.
- Section 28 provides that person aggrieved by an order of forfeiture may within one month appeal to the high court.

- Section 33 of the UA(P) A act provides for forfeiture of property of certain person.
- The section gives power to the court to pass an order of attachment of both movable or immovable property of the person accused of an offence under chapter iv or vi , BUT ON CONVICTION THE COURT MAY ORDER THE FORFEITURE OF SUCH PROPERTY TO THE GOVERNMENT.
- SECTION 33 (5) PROVIDES FOR A SPECIAL PROVISION WHERE THE PROPERTY OF AN ACCUSED PERSON, WHO IS DEAD, CAN ALSO BE CONFISCATED EVEN WITHOUT TRIAL, BASED ON THE MATERIAL EVIDENCE PRODUCED IN THE CASE.
- SECTION 33 (3) provides that where any person is an accused of an offence concerning high quality counterfeit Indian currency, the court may pass an order directing attachment of forfeiture as the case may be of property equivalent to the value of such high quality counterfeit Indian currency including the face value of such currency which are not defined to be of high quality, but are part of the common seizure along with high quality counterfeit Indian currency.

Chapter VI

TERRORIST ORGANISATIONS
S 35.Amendment of Schedule, etc.
S 36. Denotification of a terrorist organisation.
S 37. Review Committees.
S 38. Offence relating to membership of a terrorist organisation.
S 39. Offence relating to support given to a terrorist organisation.
S 40. Offence of raising fund for a terrorist organisation.

- Section 35 provides that central government may by notification in the official gazette add or remove a terrorist organisation from the first schedule.
- The central government may by notification add to or remove or amend the second or third schedule.
- Section 36 provides for de-notification of terrorist organisation by the central government from the schedule.
- Where an application for DE notifying is rejected, the applicant may apply to the review committee constituted under section 37.
- The review committee consist of chairperson who is or has been a judge of high court and such other members not exceeding three.

- Section 38 deals with offence relating to membership of a terrorist organisation.
- What is made punishable under this section is a association of any person with any terrorist organisation or his professing to be associated with that organisation when it is done with the intention of furthering the activities of that organisation so, mere membership in terrorist organisation is not an offence.
- Oinam moniton singha vs. nia 2013 (2) GLT 980, It was held that a person, who is ideologue of a terrorist organisation and distributes literatures and pamphlets to publicise the activities of such an organisation with intention to further the activities of such an organisation, can be termed as a member.
- Section 38 further provides that it will not be an offence if the person charged is able to prove that the organisation was not declared as a terrorist organisation at the time when he became a member or began to profess to be member.

- Section 39: deals with the offence relating to support given to the terrorist organisation which is punishable with imprisonment for a term not exceeding 10 years with fine or both.
- The support may be given to terrorist organisation with intention to further its activities and the support is not restricted to provide money or other property within the meaning of section 40. in people's union for civil liberties and anr vs. Union of India AIR 2004 SC 456, it was held that with respect to question of element of mens rea to constitute an offence under section 21 of the pota (which is similar to 39 uapa), that it is the cardinal principle of criminal jurisprudence that mens rea element is necessary to constitute a crime and in the light of that decision, in section 39 of the uapa, 1967, the factum of mens rea is explicitly incorporated.

- In **Arup Bhuyan vs. State of Assam (2011) 3 scc 377**, the supreme court held that mere membership of banned organisation cannot incriminate a person unless he is proved to have resorted to acts of violence or incited people to eminent violence, or does an act intended to create disorder or disturbance of public peace by resort to eminent violence.
- Later, on 26.08.2014, based on the application filed by the Government of India for the review of the judgment in Arup Bhuyan, the division bench of the Supreme Court has ordered to place the papers before the chief justice of India for appropriate order for hearing by a larger bench. Manu/sc/0814/2014.

Chapter VII

- Chapter VII from Section 41 to 53 deals with miscellaneous matters like Section 43A provide for power to arrest, search etc and section 43B provides for procedure of arrest, seizure etc.
- Another important section under this chapter is section 43D which provides for modified application of certain provisions of the Code of Criminal Procedure.
- Section 43E deals with presumption as to offences under section 15.
- The provision relating to protection of witnesses is provided under section 44.
- Admissibility of evidence collected through interception of communications is provided under section 46.

Officers competent to investigate offences under chapters iv and vi

- Notwithstanding anything contained in the Code, no police officer,—(a) in the case of the Delhi Special Police Establishment, constituted under sub-section (1) of section 2 of the Delhi Special Police Establishment Act, 1946, (25 of 1946), below the rank of a Deputy Superintendent of Police or a police officer of equivalent rank;
- (When NIA is investigating such cases, the Inspectors are considered competent, by way of the latest amendment.
- (b) in the metropolitan areas of Mumbai, Kolkata, Chennai and Ahmedabad and any other metropolitan area notified as such under sub-section (1) of section 8 of the Code, below the rank of an Assistant Commissioner of Police;
- (c) in any case not relatable to clause (a) or clause (b), below the rank of a Deputy Superintendent of Police or a police officer of an equivalent rank, shall investigate any offence punishable under Chapter IV or Chapter VI.

Provisions for Bail

CrPC Vs. UA (P) Act

- The chapter XXXIII of the Cr.PC under section 436 to 450 deals with provisions as to bail and bonds. The Section 436 Cr.PC deals with cases when bail may be taken in bailable offences. Section 437 Cr.PC deals with cases when bail may be taken in case of non-bailable offences. Section 438 Cr.PC deals with anticipatory bail. Section 439 Cr.PC deals with special power of High Court or court of session regarding bail.
- In UAPA Section 43 D sub-section 4 to 7 deals with the provisions relating to bail.

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- Section 43 D(4) of the UAPA provides that nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person accused of having committed an offence punishable under this Act.
- Section 43 D(5) of the UAPA provides that notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release: Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.

- Section 43 D (6) of the UAPA provides that the restrictions on granting of bail in sub-section (5) is in addition to the restrictions under the court or any other law for the time being in force.
- Section 43 D (7) of the UAPA provides that notwithstanding anything contained in sub-section 5 and 6, no bail shall be granted to a person accused of an offence punishable under this act, if he is not an Indian citizen and has entered the country unauthorizedly or illegally except in very exceptional circumstances and for reasons to be recorded.
- Therefore, under UAPA Act no anticipatory bail can be provided to the accused and on regular bail no accused person can be released unless public prosecutor is heard and court on perusal of the case diary and report under Section 173 of the CrPC is of the opinion that the accusation against the accused is not prima facie true.

SECTION 167 CR.P.C. AND SECTION 43 D (2) OF UA (P) ACT

- Section 167 provided that the Magistrate to whom an accused person is forwarded may authorized the detention from time to time for a term not exceeding 15 days in the whole.
- Proviso to section 167 (2) provided that the Magistrate may authorize the detention otherwise than in the custody of the Police, beyond the period of 15 days up to 90 days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years and up to 60 days where the investigation relates to any other offence.

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- Section 43 D (2) of the UA (P) Act provides that section 167 shall apply to offences punishable under this Act subject to following modification:-

(a) The reference to 15 days or 90 days or 60 days wherever they occur shall be construed as reference to 30 days, 90 days and 90 days respectively.

Applying the above modification Police custody under UA (P) Act can be obtained up to 30 days and detention of the accused in Police custody or Judicial custody may be authorized by the Special Judge, NIA for a term not exceeding 30 days in the whole.

Where the investigation relates to an offence punishable with death, imprisonment for life and imprisonment for a term not less than 10 years. The detention of the accused can be authorized up to 90 days.

And where the investigation relates to any other offence, even then the detention in custody can be authorized up to 90 days.

Contd.

- The following proviso are inserted to section 167 (2) through section 43D (2b):-
- Provided that if it is not possible to complete the investigation within the said period of 90 days, the Court may if it is satisfied with 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 90 days, stand the said period up to 180 days.
- Provided also that if the Police Officer making the investigation under this Act, requests, for the purposes of investigation, for Police Custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody.

43E Presumption as to offences under section 15

- In a prosecution for an offence under section 15, if it is proved—(a) that the arms or explosives or any other substances specified in the said section were recovered from the possession of the accused and there is reason to believe that such arms or explosives or other substances of a similar nature were used in the commission of such offence; or
- (b) that by the evidence of the expert the finger-prints of the accused or any other definitive evidence suggesting the involvement of the accused in the offence were found at the site of the offence or on anything including arms and vehicles used in connection with the commission of such offence,
- the Court shall presume, unless the contrary is shown, that the accused has committed such offence.

Section 43F UA (P) Act- Obligation to furnish information

- Officer investigating any offence under this Act, with the prior approval in writing of an officer not below the rank of a Superintendent of Police, may require any officer or authority of the Central Government or a State Government or a local authority or a bank, or a company, or a firm or any other institution, establishment, organisation or any individual to furnish information in his or their possession in relation to such offence, on points or matters, where the investigating officer has reason to believe that such information will be useful for, or relevant to, the purposes of this Act.
- Failure to furnish the information called for under sub-section (1), or deliberately furnishing false information shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.
- An offence under sub- section (2) shall be tried as a summary case and the procedure prescribed in Chapter XXI of the said Code [except sub-section (2) of section 262] shall be applicable thereto.]

Schedules provided under the UA (P) Act.

- Section 2 (m) provides that "terrorist organisation means an organisation listed in the schedule or an organisation operating under the same name as an organisation so listed". Section 35 provides that central government may by notification in the official gazette add an organisation in the first schedule.
- The first schedule contains the list of banned terrorist organisations. Total 39 terrorist organisations are added to this list till date.
- Section 15 (2) of the UA (P) Act provides that terrorist act includes an act which constitute an offence within the scope of and as defined in any of the treaties specified in the second schedule.
- The Second schedule contains the list of 9 international conventions dealing with the terrorist acts.

Contd....

- Clause (b) of Explanation to Section 15 (1) provides that High Quality Counterfeit Currency means the counterfeit currency as may be declared after examination by an authorized or notified forensic authority that such currency imitates or compromises key security features as specified in the third schedule.
- The third schedule provides the security features to define High Quality Counterfeit Currency Notes.

Section 46- Admissibility of Evidence collected through the interception of communication:

- Not with standing anything contained in the Indian Evidence Act, 1872 (1 of 1872) or any other law for the time being in force, the evidence collected through the interception of wire, electronic or oral communication under the provisions of the Indian Telegraph Act, 1885 (13 of 1885) or the Information Technology Act, 2000 (21 of 2000) or any other law for the time being in force, shall be admissible as evidence against the accused in the court during the trial of a case:
- Provided that the contents of any wire, electronic or oral communication intercepted or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing or other proceeding in any court unless each accused has been furnished with a copy of the order of the competent authority under the aforesaid law, under which the interception was directed, not less than ten days before trial, hearing or proceeding:
- Provided further that the period of ten days may be waived by the judge trying the matter, if he comes to the conclusion that it was not possible to furnish the accused with such order ten days before the trial, hearing or proceeding and that the accused shall not be prejudiced by the delay in receiving such order.

Three schedules provided under the UA (P) Act.

- Section 2 (m) provides that "terrorist organisation means an organisation listed in the schedule or an organisation operating under the same name as an organisation so listed". Section 35 provides that central government may by notification in the official gazette add an organisation in the first schedule.
- The first schedule contains the list of banned terrorist organisations. Total 39 terrorist organisations are added to this list till date.
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Contd....

- Clause (b) of Explanation to Section 15 (1) provides that High Quality Counterfeit Currency means the counterfeit currency as may be declared after examination by an authorized or notified forensic authority that such currency imitates or compromises key security features as specified in the third schedule.
- The third schedule provides the security features to define High Quality Counterfeit Currency Notes.

Protected Witness

- SECTION 17 OF THE NIA ACT, 2008 CONTAINS THE PROVISIONS RELATED TO PROTECTION OF WITNESSES. A PROVISION SIMILAR TO SECTION 17 OF THE NIA ACT IS FOUND IN SECTION 30 OF THE POTA AND SECTION 44 OF THE UAPA. THE CONSTITUTIONAL VALIDITY OF SECTION 30 POTA WAS UPHELD IN THE CASE OF PUCL VS. UNION OF INDIA. (2004) 9 SCC 580.
- Section 22 of the UAPA provide punishment for threatening witness.
- Section 44 of the UAPA provides that
- (1) notwithstanding anything contained in the Code, the proceedings under this Act may, for reasons to be recorded in writing, be held in camera if the court so desires.
- (2) A court, if on an application made by a witness in any proceeding before it or by the Public Prosecutor in relation to such witness or on its own motion, is satisfied that the life of such witness is in danger, it may, for reasons to be recorded in writing, take such measures as it deems fit for keeping the identity and address of such witness secret.

Contd….

- (3) In particular, and without prejudice to the generality of the provisions of sub-section (2), the measures which a court may take under that sub-section may include—(a) the holding of the proceedings at a place to be decided by the court;
- (b) the avoiding of the mention of the name and address of the witness in its orders or judgments or in any records of the case accessible to public;
- (c) the issuing of any directions for securing that the identity and address of the witness are not disclosed;
- (d) a decision that it is in the public interest to order that all or any of the proceedings pending before such a court shall not be published in any manner.
- (4) Any person, who contravenes any decision or direction issued under sub-section (3), shall be punishable with imprisonment for a term which may extend to three years, and shall also be liable to fine.

Procedure followed in case of protected witnesses

- During investigation the IO/CIO of the case take the protected witness to the concerned Magistrate for recording his statement under 164 Cr.P.C.
- The application is given to the Court mentioning that he/she is a protected witness and his/her identity, name, address may not be disclosed in the statement. The code x ,y or z is given to the protected witness.
- The name and address of the protected witness is given to the Magistrate in a sealed cover for the perusal of the Court. The IO identifies the protected witness before the Court. After recording of the statement by the Magistrate, the same is sent to the Special Court, NIA in a sealed cover.
- During the trial, protected witness is brought to the Court by covering his face and during his examination in chief his face is not shown to the accused and the defense counsel. The cross examination of the witness is also done in the same manner.

Voice Sample

In Ritesh Sinha vs State of Uttar Pradesh and Anothers, MANU –SC/1072/2012 - Whether Article 20(3) of the constitution of India which protects a person accused of an offence from being compelled to be a witness against himself.

- NOW IT IS DECIDED BY A LARGER BENCH THAT VOICE SAMPLES SHOULD BE GIVEN BY ACCUSED AS IT IS NOT VIOLATIVE OF ART 21 OF THE INDIAN CONSTITUTION
  - 25. In the light of the above discussions, we unhesitatingly take the view that until explicit provisions are engrafted in the Code of Criminal Procedure by Parliament, a Judicial Magistrate must be conceded the power to order a person to give a sample of his voice for the purpose of investigation of a crime. Such power has to be conferred on a Magistrate by a process of judicial interpretation and in exercise of jurisdiction vested in this Court under Article 142 of the Constitution of India. We order accordingly and consequently dispose the appeals in terms of the above.

THE SYSTEM OF PROSECUTION:

CHALLENGES AND ISSUES INVOLVED

Issues in Evidence Collection

- DOCUMENTARY
- ORAL
- CYBER FORIENSIC
- MATERIAL OBJECTS

Methods of Collection of evidence by NIA

- Witness Statements
- Collection of Documentary Evidence
  - Lab reports
  - Cyber Forensics
  - Expert Evidence
- Collection of Material Evidence
- Sec 27 recoveries
  - Digital
  - Non Digital
- MLAT Requests
- LRs
- Anything under Sec 5 to 55 of the IE Act

- CONFESSION - WEAK
- LOOK FOR ADMISSIONS MORE THAN CONFESSIONS
- WHILE CHARGING - LOOK FOR NARROW DEFINITION MORE THAN WIDER DEFINITION
- CONSTITUTIONAL REVERANCE

Trial through Video Conference

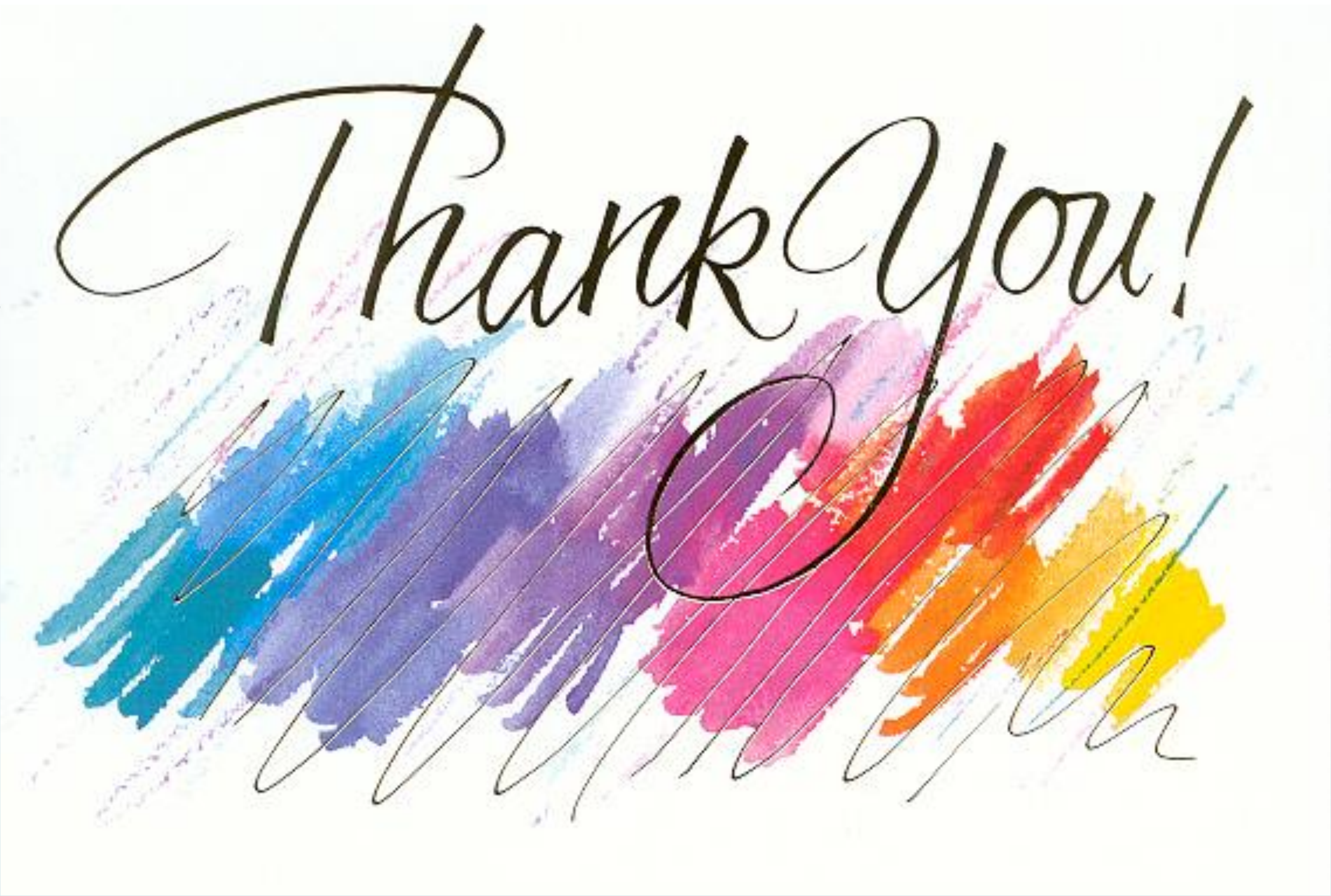
- Praful B. Desai Vs. State
- Deposition from Abroad
- Administration of Oath and verification of Identity.

Protecting Witnesses

- Requirements u/s 207 CrPC
- Privilege u/s 173(6) CrPC
- Protection u/s 17 of NIA Act and u/s 44 of UA (P) Act.
- Protection of Statements

Success so far ..

- Professor Hand Chopping Case 2012 - 2015
- Bangalore LeT Case 2016
- Manjeri FICN Case 2017
- Yasmeen Mohammed Zayed ISIS Case 2018
- Kanakamala ISIS Case 2019
- Subahani Haja ISIS Case 2020
- Kasaragod ISIS Case 2021
- Kalamassery Bus burning case 2021
- Presently on a Terrorist Act case by CPI Maoists



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