

**IMPACT ASSESSMENT OF COUNTER-TERRORISM LAW ON
HUMAN RIGHTS: A COMPARATIVE STUDY OF INDIA AND
THE USA**

Dissertation submitted to National Law University and Judicial Academy, Assam
in partial fulfilment for award of the degree of
MASTER OF LAWS /
ONE YEAR LL.M. DEGREE PROGRAMME

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DECLARATION

I, ARPITA SINHA, do hereby declare that the dissertation titled “IMPACT ASSESSMENT OF COUNTER-TERRORISM LAW ON HUMAN RIGHTS: A COMPARATIVE STUDY OF INDIA AND THE USA” submitted by me for the award of the degree of MASTER OF LAWS/ ONE YEAR LL.M. DEGREE PROGRAMME of National Law University and Judicial Academy, Assam is a bonafide work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise.

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TABLE OF CONTENTS

Acknowledgment.....	vii
Table of Cases.....	viii
Table of Statutes.....	ix
List of Abbreviations.....	x
CHAPTER 1- INTRODUCTION: TERRORISM AND COUNTERTERRORISM.....	(1-24)
1.1 Introduction to the Research Topic.....	1
1.1.1 History of terrorism.....	3
1.1.2 Meaning and essence of terrorism.....	5
1.1.3 Concept of counterterrorism regime.....	8
1.2 Statement of Problem.....	9
1.3 Literature Review.....	11
1.4 Aim.....	20
1.5 Objectives.....	20
1.6 Scope and Limitation.....	21
1.7 Research Questions.....	21
1.8 Hypotheses.....	22
1.9 Research Methodology.....	22
1.10 Research Design.....	23
CHAPTER 2- COUNTERTERRORISM AND HUMAN RIGHTS.....	(25-46)
2.1 How Successful Terrorism is?.....	25
2.2 Is it Possible to Defeat Terrorism?.....	29

2.3 Relationship Between Human Rights and Counterterrorism Regime....	32
2.3.1 Human rights protections.....	33
2.3.2 Protecting human rights while dealing with terrorism.....	36
2.4 Is it Possible to Defeat Terrorism Without Infringing Human Rights?...	44
CHAPTER 3- OVERVIEW OF GLOBAL COUNTERTERRORISM REGIME.....	(47-69)
3.1 Instrumental Framework.....	49
3.1.1 International Conventions and Protocols.....	49
3.1.2 General Assembly and Security Council Resolutions.....	54
3.2 International Organs and Agencies Working for Terrorism.....	58
3.3 Counterterrorism Measures: State Practice.....	62
3.3.1 Criminal profiling.....	62
3.3.2 De-radicalisation of terrorists.....	65
3.3.3 Decapitation of terrorist organizations.....	67
CHAPTER 4- STATE POLICY ON HUMAN RIGHTS IN COUNTERTERRORISM REGIME: INDIA AND THE USA.....	..(70-84)
4.1 International Framework.....	72
4.2 Specific Human Rights Protection Under the Legal System of India and the USA.....	76
4.2.1 Violation of right to life.....	76
4.2.2 Violation of right to protection against torture.....	79
4.2.3 Violation of the right to a fair trial and due process.....	82
4.2.4 Violation of right to privacy.....	83

CHAPTER 5- COUNTERTERRORISM REGIME IN INDIA AND THE USA: A COMPARATIVE STUDY.....(85-114)

5.1 Anti-Terror Regime in India.....88

5.1.1 Armed Forces (Special Powers) Act, 1958.....89

5.1.2 Unlawful Activities Prevention Act, 1967.....90

5.1.3 Terrorist and Disruptive Activities (Prevention) Act, 1987....91

5.1.4 Prevention of Terrorism Act, 2002.....94

5.1.5 Amendments to Unlawful Activities Prevention Act, 1967....96

5.1.6 National Security Act, 1980.....100

5.1.7 National Investigation Agency Act, 2008 and Administrative Regime.....101

5.2 Anti-Terror Regime in The USA.....104

5.2.1 Pre 9/11 regime.....104

5.2.2 Post 9/11 regime.....109

5.2.3 Court Stripping.....113

CHAPTER 6- CONCLUSION.....(115-124)

6.1 Findings.....119

6.2 Suggestions.....122

Bibliography.....xii

ACKNOWLEDGMENT

No great feat can be accomplished without the right environment, able guidance, hardwork and perseverance. Valuable contributions were drawn from great legal luminaries throughout the writing process. Their assistance deserves recognition and my sincere gratitude.

I owe much to **National Law University and Judicial Academy, Assam** for blessing me with a rare academic patronage. It is my heartfelt duty to acknowledge my gratitude to **Dr. Diptimoni Boruah**, Head of the Post Graduate course, for her support in the making of this dissertation. I extend my deep and sincere gratitude to my revered supervisor **Prof. (Dr.) Debasis Poddar**, Professor of Law, NLUJA, Assam for his continuous guidance and wisdom. He has not only discharged his formal duties of a supervisor but has also contributed substantially in a masterly manner towards the accomplishment of this work.

Besides my supervisor, I would like to thank all the faculty members, library staff and non-teaching staff of NLUJA, Assam for their constant encouragement and cooperation. This acknowledgement would be incomplete without extending gratitude to my family members and friends for their endless love, support and encouragement in my academic endeavours, which has always been invaluable.



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TABLE OF CASES

1. *Arup Bhuyan v. State of Assam*
2. *Ashim v. National Investigation*
3. *Association for Protection of Civil Rights (APCR) v. Union of India*
4. *Castillo Petruzzi et al. v. Peru*
5. *Chahal v. United Kingdom*
6. *City of Boerne v. Flores*
7. *Coeriel et al. v. the Netherlands*
8. *Felker v. Turpin*
9. *IR Coelho (dead) by Lrs v. State of Tamil Nadu*
10. *Irons v. Carey, United States Ninth Circuit*
11. *Jaffar Sathiq @ Babu v. the State*
12. *K.S. Puttaswamy and anr. v. Union of India*
13. *Kartar Singh v. State of Punjab*
14. *Kesavanada Bharti v. State of Kerela*
15. *Marbury v. Madison*
16. *Media Rights Agenda v. Nigeria, communication*
17. *Minerva Mills Ltd. v. Union of India*
18. *People's Union for Civil Liberties v. Union of India*
19. *Prosecutor v. Furundžija*
20. *Sajal Awasthi v. Union of India*
21. *Shoop v. Twyford*
22. *Soering v. United Kingdom*
23. *Sri Indra Das v. State of Assam*
24. *United States v. Jones*
25. *Waman Rao v. Union of India*

TABLE OF STATUTES

1789 - Constitution of United States.....	113
1791 - Bill of rights, USA.....	77
1947 - National Security Act.....	104
1950 - The constitution of India.....	76
1958 - Armed Forces (Special Powers) Act.....	89
1967 - Unlawful Activities Prevention Act.....	90
1980 - National Security Act.....	100
1987 - Terrorist and Disruptive Activities (Prevention) Act.....	91
1989 - Biological Weapons Anti-Terrorism Act.....	107
1990 - Armed Forces (Jammu and Kashmir) Special Powers Act.....	89
1995 - Omnibus Counterterrorism Act.....	107
1996 - Antiterrorism and Effective Death Penalty Act.....	108
2001 - Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act.....	110
2002 - Authorization for Use of Military Force.....	109
2002 - Homeland Security Act.....	110
2002 - Prevention of Terrorism Act.....	94
2005 - The Border Protection, Anti-terrorism, and Illegal Immigration Control Act..	110
2008 - National Investigation Agency Act.....	101

LIST OF ABBREVIATIONS

1.	ACLU	American Civil Liberties Union
2.	art	Article
3.	BWATA	Biological Weapons Anti-Terrorism Act
4.	CIA	Central Intelligence Agency
5.	COINTELPRO	Counterintelligence Program
6.	CTC	Counter-Terrorism Committee
7.	DTA	Division for Treaty Affairs
8.	ECOSOC	The Economic and Social Council
9.	EU	European Union
10.	FAIT	Families Against Intimidation and Terror
11.	FARC	Revolutionary Armed Forces of Colombia
12.	FBI	Federal Bureau of Investigation
13.	FLN	Front de Libération Nationale
14.	GOI	Government of India
15.	ICC	International Criminal Court
16.	ICCPR	International Covenant on Civil and Political Rights
17.	ICESCR	International Covenant on Economic, Social and Cultural Rights
18.	IRA	Irish Republican Army
19.	ISYF	International Sikh Youth Federation
20.	LTTE	Liberation Tigers of Tamil Eelam
21.	NIA	National Investigation Agency
22.	NSA	National Security Agency
23.	OAS	Organization of American States
24.	OUA	Organisation of African Unity

25.	OSCE	Organization for Security and Co-operation in Europe
26.	PLO	Palestinian Liberation Organization
27.	POTA	Prevention of Terrorism Act
28.	PRISM	Planning Tool for Resource Integration, Synchronization, and Management
29.	PTA	Sri Lanka Prevention of Terrorism Act
30.	RAF	Red Army Faction
31.	RAND	Research And Development
32.	s	Section
33.	SAARC	South Asian Association for Regional Cooperation
34.	TADA	Terrorist and Disruptive Activities (Prevention) Act
35.	TPB	Terrorism Prevention Branch
36.	UAPA	Unlawful Activities Prevention Act
37.	UDHR	Universal Declaration of Human Rights
38.	UNCCPCJ	UN Commission on Crime Prevention and Criminal Justice
39.	UNO	United Nations Organization
40.	UNODC	United Nations Office on Drugs and Crime
41.	USA	United States of America
42.	USA PATRIOT	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism
43.	v.	Verses.

CHAPTER - 1

INTRODUCTION: TERRORISM AND COUNTERTERRORISM

1.1 INTRODUCTION TO THE RESEARCH TOPIC

Over the past few decades, terrorism has made it to the headlines quite often which makes it one of the most dreadful global phenomena. The consequences of terrorism, including the loss of life, have been felt all across the globe. However, not all parts of the world are as troubled by terrorism as are others. According to the Global Terrorism Index 2022, there have been 7,142 deaths by terrorist attacks worldwide in 2021, which is one-third of the figure in 2015 and is 1.2% less than the previous year's count. However, there has been a 17% rise in terrorist attacks worldwide resulting in 5,226 attacks.¹ Though the report shows a decline in the impact of terrorist attacks in the last 5 years, it wouldn't be wise to turn a blind eye toward human rights violations caused due to such attacks.

Apart from the loss of life, there are other human rights violations emanating from various terrorist attacks which include but are not limited to the exploitation of the right to life, personal liberty, security, and physical integrity of the victims of such attacks. Today, a combination of techniques and tactics allows for terrorist attacks to have a wide-ranging impact as more people are watching. Terrorism now is growing

¹ Institute for Economics & Peace, *Global Terrorism Index 2022: Measuring the Impact of Terrorism* (IEP, Sydney, March 2022) < <http://visionofhumanity.org/resources> > accessed 25 June, 2022.

increasingly lethal in terms of the number of people targeted. This has not slipped by Mr. Brian Michael Jenkins, observing that present-era terrorists do not want a lot of people dead but a lot of people watching.² Thus, according to Mr. Jenkins, the objective behind such attacks is to instil fear among the masses; the degree of exploitation in terms of the right to life, liberty, security and physical integrity is much more as compared to loss of human life. Apart from individual human rights violations, terrorist attacks also erode the state's capacity to ensure welfare, destabilize the government, threaten peace and security, undermine civil society and hamper the social and economic development in a state.

The concept of terrorism is not new and dates back to the pre-modern times when even though the term 'terrorism' wasn't used to connote the acts of political violence against the authorities by groups and individuals, the occurrence of such acts can't be denied. The modern-day concept of terrorism finds its roots in the anarchists that were associated with the French propaganda group or network that was active around the 1870s and 1880s and the internal Macedonian Revolutionary Organization that stood against the Ottoman rule in the late nineteenth and early twentieth centuries. Thus, even more than a century ago, there existed associations that indulged in the acts of terrorism ranging from extreme leftists to nationalist separatists.

² Brian Michael Jenkins, 'The new age of terrorism', in The McGraw Hill Companies, Inc. (ed), *The McGraw-Hill Homeland Security Handbook*, (ch. 8, 2006, Reprinted by RAND corporation).

1.1.1 History of terrorism

Many scholars have tried to trace the history and evolution of terrorism and discover the trends of operation of terrorist groups or individuals. David Rapoport is one such scholar who classified the evolution of terrorism into four segments or waves, based on their characteristics and modus operandi, starting from the anarchists in the 1880s, followed by the anti-colonial wave in the 1920s, followed by a new left wave or red terrorism in 1960s and finally, the religious wave that began in the year 1979.³

The formal birth of the term ‘Anarchism’ was marked in the mid-nineteenth century when a French political philosopher, Pierre-Joseph Proudhon called himself an anarchist, ergo establishing the concept, for which he is also referred to as the father of anarchism. However, the ‘anarchists’ wave, essentially, was established in Russia. The wave began when a number of Russian writers propounded the doctrine of terror. These include well-known writers such as Bakunin and Kropotkin. The anarchists made use of the new technology and available modes of communication such as telegraphs, mass media etc. in the course of their action. One of the most prominent groups of the era was the Russian ‘Narodnaya Volya’ translated as ‘the people’s will.’

The next wave that began in the 1920s was the anti-colonial wave which can be best described as the struggle for freedom or independence and self-determination. One of

³David C. Rapoport, ‘Four waves of Rebel Terror and September 11’ (*Anthropoethics*, vol. 8, no. 1, 2020).

the most noticeable features of this era is the use of guerrilla tactics and the fact that the rebels used to refer to themselves as freedom fighters instead of terrorists. Some well-known organizations of this era include the Irish Republican Army (IRA), struggling for an independent Irish state; Front de Libération Nationale (FLN), struggling for independent Algeria; Irgun, a Zionist militant group fighting against the British empire. The third wave or era was the new left wave, alternatively known as the red terrorism began in the 1960s for which the Vietnam war stood as the driving force. The terrorist organizations in this era resorted to techniques such as hostage taking or hijacking. Some prominent groups of this era include the Palestinian Liberation Organization (PLO), Weather Underground from North America, Autonomy from Germany etc.

The fourth and the last wave has been referred as the religious wave which began in the 1979 when Islamic revolution took place in Iran. Following 1979, many religious groups committed the acts of terrorism which included Jewish religious terrorists, Christian groups, Sikh groups and many Islamic groups. The modi operandi in this era were assassinations of political leaders, hostage takings, suicide bombing etc. Prominent organizations include Al Qaeda (The Base), Jaish-e-Mohammed (Army of Mohammed), Lashkar-e-Taiba (Army of Pure), Babbar Khalsa International, International Sikh Youth Federation (ISYF), Hizbollah (the “Party of God”) etc. Whereas academic scholars such as Tom Parker and Nick Sitter have argued that considering various waves as strains would better reflect the idea that every new form of terrorism emanates from the preceding form. They have identified four strains of terrorism which are: Socialist, Nationalist, Religious, and Exclusionist.⁴

⁴ Tom Parker & Nick Sitter, ‘The Four Horsemen of Terrorism: It's Not Waves, It's Strains’, (vol. 28 Issue 2, Terrorism and Political Violence, 2016).

1.1.2 Meaning and essence of terrorism

Terrorism, as per the Oxford dictionary, stands for “unofficial or unauthorized use of violence and intimidation in the pursuit of political aims”. The term is commonly used to refer to acts of violence committed against civilians to achieve certain political or ideological goals. The international community has yet not come across a suitable definition for the term which can be generally accepted. A judge from the International Court of Justice has observed that, “terrorism is a term without any legal significance. It is merely a convenient way of alluding to activities, whether of states or individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both.”⁵ The draft Comprehensive Convention on International Terrorism that is being considered by the UN since 1996, attempts to define terrorist action as: “Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes: (a) death or serious bodily injury to any person; or (b) serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or (c) damage to property, places, facilities, or systems referred to in paragraph 1(b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.”⁶ However, no consensus with respect to the definition, has been obtained as of yet due to lack of precision.

⁵ R. Higgins, The general international law of terrorism, in R Higgins, M. Flory (eds.), *Terrorism and international law* (London, 1997) 24.

⁶ UN General Assembly, ‘Report of the Ad Hoc Committee established by General Assembly Resolution 51/210’ (Sixth session, doc. A/57/37, 17 December 1996).

Alex Schmid has pointed out certain difficulties that are faced while determining a definition for the term, which are: firstly, terrorism is a contested concept i.e. ‘one person’s terrorist is another person’s freedom fighter’; secondly, it relates to de-legitimization or criminalization of certain groups which leads in conflicting opinions; thirdly, there are many forms and manifestations of terrorism; and lastly, since 200 years of its existence, terrorism has semantically shifted its focus and there have been changes in its meaning. However, a constant need to define the term has been felt to arrive at successful international cooperation, to avoid abuses due to vague definitions, to carry out research and to adopt judicial measures for its obliteration.

Due to the abovementioned reasons, Kofi Annan (Secretary General of UN, 1997-2006) tried to achieve consensus on the “deliberate killing of civilians or non-combatants for political purposes” which was rejected by the global community as nations did not regard state terrorism or foreign occupation as terrorism. In 1975, Brian Jenkins said that “terrorists want a lot of people watching and not a lot of people dead”⁷ as the violence is aimed at those who continue to live, for their main aim is to instil fear and secure reaction. Alex Schmid and Albert Jongman in 1988 came up with an academic consensus definition by enumerating 22 elements of terrorism which was later revised in 2011 to include just 12 elements. He also proposed a definition to the UN Commission on Crime Prevention and Criminal Justice (UNCCPCJ) in 1992, based on the already internationally accepted definition of war crimes, with the crucial words “peacetime equivalents of war crimes”, but his proposal was not accepted.⁸

⁷ Ibid 2.

⁸ Alex Schmid, ‘Terrorism - The Definitional Problem’ (Case Western Reserve Journal of International Law, vol. 36, Issue 2, 2004).

In 1994, the Declaration on Measures to Eliminate International Terrorism⁹, suggested that terrorism includes “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes” and those acts “are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.” The Security Council, subsequently, defined terrorism as “criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a Government or an international organization to do or to abstain from doing any act”¹⁰. Subsequently, in the same year, the High-level Panel on Threats, Challenges and Change described terrorism as “any action that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act”¹¹.

Although the international community couldn't obtain consensus on a particular definition, it has accepted a few characteristics that can very well describe terrorism which include use of tactics to achieve certain goals, use of force, fear mongering and the fact that direct targets are barely the actual targets since terrorism affects those who continue to live and it's their attention a terrorist organization seeks.

⁹ General Assembly Resolution 49/60.

¹⁰ Security Council Resolution 1566 (2004).

¹¹ Factsheet no 32; 'Human Rights, Terrorism and Counterterrorism'; Office of the United Nations High Commissioner for Human Rights, (ISSN 1014-5567, July 2008) 6.

1.1.3 Concept of counterterrorism regime

Terrorism has grave effects on the state's capacity to ensure peace and leads to major human rights violations which is why the states need to counter terrorism by suppression and prevention. Counterterrorism regime refers to the umbrella term for all such effective measures to prevent and suppress all forms and manifestations of terrorism, be it legislative, administrative or judicial. However, the laws and other measures adopted therein need to be to an extent they are necessary, as both poorly implemented and draconian measures can prove to be ineffective, for the former wouldn't be sufficient to obliterate or suppress terrorism while the latter would be counterproductive since it would sow the seeds for future attacks due to human rights violations in the course of implementations of the laws and policy measures within the regime.

1.2 STATEMENT OF PROBLEM

Human rights are such rights that are available naturally to human beings merely by virtue of them being humans. These rights are universal in nature and are fundamental to human existence such as the right to life, liberty, freedom etc. Terrorist activities have devastating effects on the human rights of the masses. Such activities lead to a wide-scale loss of life and property, forces the population to live in constant fear, jeopardize fundamental freedoms, destroy the fundamental bases of a democratic civil society, erode the capacity of the state to ensure peace and welfare and that it further aids other organized crime markets which weakens the state even more. The terrorist groups also get involved in heinous crimes such as murder, kidnapping or abduction, hostage-taking, assault and so on. Thus, it becomes essential to adopt an effective regime to prevent and suppress terrorist activities, to secure the national territory and prevent human rights violations. However, just as terrorism impacts human rights adversely, the counterterrorism regimes adopted by the state are capable of violating human rights which calls for the need to legislate enactments that are sound enough and at the same time not go too far by adopting draconian provisions that prove to be counterproductive. The state has a duty to protect human rights which also include the right to a fair trial, humane treatment in police custody, due process of law and so on which have to be preserved under all circumstances.

Therefore, the balance between suppressing human rights violations due to terrorism and those due to counterterrorism strategies is extremely essential but is difficult to maintain which generally leads to the states going too far to implement effective regimes, thereby violating human rights at the cost of securing the rights victims of

terrorist activities, which needs to be prevented or restricted to the optimum level. This research thus aims to analyse and compare the counterterrorism regime of India and USA, which face similar threats of terrorism, are constitutional democracies influenced by British common law, and foster respect to human rights by recognizing them in their legal systems; in order to suggest measures that can help obliterate terrorism with limited human rights violations necessary to preserve and protect state security and integrity. Since India imbibed the concept of fundamental rights from USA, comparing and adopting measures that are in the best interest of achieving equilibrium between state security and human rights protection would be of great utility.

1.3 LITERATURE REVIEW

- **Encyclopaedias, Books and Manuals**

OSCE Office for Democratic Institutions and Human Rights (ODIHR), *Countering terrorism, protecting human rights* (ISBN 83-60190-49-6, 2007)

This manual discusses the importance of protecting human rights while adopting a counterterrorism strategy, the core fundamental rights that get abrogated in the fight against terrorism and finally talks about the legislative framework for human rights and counterterrorism and how the two have to be harmoniously applied. It briefly touches upon the definitional issue of terrorism and why it is important to have a precise definition to ensure human rights protection.

Dr S.N. Yadav, *International Encyclopaedia of Anti-Terrorism Law*, Jnanada Prakashan (P&D), assisted by Text Book Promotion Society of India, (ISBN: 978-81-7139-272-8 vol 1-4 2009)

Dr S.N. Yadav, is an eminent political scientist who has specialised on the non-traditional security threats like terrorism, organized crime etc. The four volumes of the encyclopaedia serve as complete reference books on the subject area of laws related to counterterrorism. Volume 1 covers the international framework for counterterrorism including regional instruments for the same, volume 2 provides for USA's national regime on terrorism, likewise volume 3 provides for India's national regime on

terrorism, and volume 4 provides for an account of major terrorist attacks that took place all across the world.

Michael Chandler and Rohan Gunaratna, *Countering Terrorism: Can We Meet the Threat of Global Violence?*, Bibliovault OAI Repository (The University of Chicago Press, 2007)

The authors have discussed about the threat of Al-Qaeda in the USA post 9/11 attacks. While reflecting on the measures adopted by USA to defeat terrorism post the catastrophe, they have yielded that "United States and its allies have not appreciably reduced the threat, which is growing significantly across the world, stretching from Asia to Europe. Principally, America has failed by acting unilaterally and not cooperatively, for instance through the United Nations, and by seeking short-term political expediency, such as intervening in Iraq (termed a 'strategic defeat') and allowing Iran's geopolitical role to grow. To effectively meet the challenges contemporary terrorism poses, the authors recommend, it is necessary to develop a comprehensive understanding of the threat."

Paul Wilkinson, *Political Terrorism* (The Macmillan Press Ltd., 1st ed., 1974)

The author has investigated the question of participation of terrorists in terrorist activities despite a substantially low possibility of success in terms of their long stated political goals. He has concluded that terrorists continue in their struggle in the hope that they will eventually succeed. His work contradicts the claim that terrorists are irrational actors.

Ramanand Garge, *Jurisprudence of Anti-Terrorism Laws: An Indian Perspective*,
(Vivekananda International Foundation, 2019)

The author explores the legal aspects of counter-terrorism practices in India. He traces the evolution of anti-terror legislations in the country, the complexities that arise while dealing with terrorism in a federal structure, procedural issues during investigation and prosecution of offences of terrorism.

Seth G. Jones & Martin C. Libicki, *How Terrorist Groups End: Lessons for Countering Al Qa'ida* (ISBN 978-0-8330-4465-5, 1972)

Seth Jones and Martin Libicki from RAND corporation in their study, analysed if terrorism gets defeated by systematically studying 648 terrorist groups that were active from 1968 to 2006. In their study, they yielded four major reasons because of which terrorist groups cease to exist which are suppression and prevention of terrorist activities by the local police and intelligence services, the use of military force to kill or capture members of the terrorist groups or to fight states that aid these organisations, the terrorists joined political processes which is cost effective and has greater benefits for the groups and lastly, they succeed in their political goals.

- **Reports**

American Civil Liberties Union, Ronald Weich, Esq., *Upsetting Checks and Balances: Congressional Hostility Toward the Courts in Times of Crisis* (October 2001)

The report talks about how the legislative enactments in USA that deal with terrorism have provisions that limit the ability of court to review those legislations which is referred to as ‘court stripping’. It further discusses the impact of court stripping on basic civil liberties especially right provided by writ of habeas corpus, immigration rights, right to freedom from torture and arbitrary detention.

Brian Michael Jenkins, ‘The New Age of Terrorism’, *The McGraw-Hill Homeland Security Handbook* (The McGraw Hill Companies, Inc., ch 8, 2006) Reprinted by RAND corporation

The author observed that there has been a considerable increase in the level of professionalism of terrorists and the degree of casualties or violence. The organizations have developed better and efficient communication strategies, new ways of financing their operations and their structural models however, they very often fail to achieve their long stated political goals. He concluded that though the terrorists succeed tactically, by creating alarm or fear and by attracting media attention, they are yet to achieve their primary goals for which they are formed. He has called this phenomenon ‘the paradox of terrorism’.

Fact Sheet No. 32, *Human Rights, Terrorism and Counter-terrorism*, Office of the United Nations High Commissioner for Human Rights

The report discusses the inter-relationship between terrorism, counter-terrorism and human rights and suggests that observance of human rights is essential while countering terrorism giving reasons. It further deals with specific human rights violations due to counterterrorism regime of most states.

Human Rights Watch, *In the Name of Counter-Terrorism: Human Rights Abuses Worldwide*, 59th Session, United Nations Commission on Human Rights (March 2003)

The report is a detailed account of the human rights abuses by administrative regimes of various countries post 9/11 attacks. The report very articulately describes the unjust conditions of detention for terrorist activities in USA under the presidency of George Bush in the aftermath of 9/11, especially the detention at Guantánamo Bay.

Report of the Secretary-General, *Uniting against terrorism: recommendations for a global counterterrorism strategy*, sixtieth session, United Nations General Assembly, (A/60/825 27 April 2006)

This report reflects upon the significance of human rights in the fight against terrorism by concluding that terrorism often thrives in environments where there is no respect for human rights and fundamental freedoms. The Secretary General, in his report, further asks the state members to enact human rights friendly legislations in order to deal with terrorism.

- **Articles**

Anil Kalhan, Gerald P. Conroy, Mamta Kaushal, Sam Scott Miller, and Jed S.Rakoff, 'Colonial continuities: human rights, terrorism, and security laws in India'

This article briefly discusses the significance of human rights while dealing with terrorism, the relationship between counterterrorism and human rights and then proceeds to discuss the impact of security measures and laws in India for counterterrorism on human rights.

Axel Dreher, Martin Gassebner and Lars-H. Siemers, 'Does Terrorism Threaten Human Rights? Evidence from Panel Data', The Journal of Law & Economics, vol 53 no 1 (February 2010)

The article carries out an empirical research to determine if terrorism impacts human rights and the extent of such an impact. Eventually, the article concludes that terrorism significantly diminishes states' respect for basic human rights such as the absence of extrajudicial killings, political imprisonment, and torture. For this research, the authors analysed panel data for 111 countries from 1982-2002.

Bruce, Gregor. 'Definition of Terrorism – Social and Political Effects', Journal of Military and Veterans' Health, vol 21 no 2 (May 2013).

This article talks about the meaning and essence of terrorism and how it impacts the lives of the civilians.

Dr. Alex P. Schmid, 'Radicalisation, De-Radicalisation, Counter-Radicalisation: A Conceptual Discussion and Literature Review, International Centre for Counter-Terrorism' (Hague March 2013)

De-radicalisation is a program or process by which individuals or groups are counselled in order to help them disengage themselves from radical or extremist groups they are a part of. The research paper discusses stances taken by various research scholars on the success of de-radicalisation as a counterterrorism measure. The article examines various counter-radicalisation and de-radicalisation programmes. It concludes with a series of policy recommendations.

Kenneth Yeo Yaoren, 'Leadership Decapitation and the Impact on Terrorist Groups, Counter Terrorist Trends and Analyses', International Centre for Political Violence and Terrorism Research, vol 11 no 3 (March 2019) 7-12

Decapitation or detaining or killing the leaders of terrorist groups has been practiced by various security agencies to eliminate or weaken the terrorist groups however, there isn't any certainty that the measure is always effective. This article discusses instances of leadership decapitation in the past to reach to a conclusion that the success of decapitation depends on the context i.e. it works in one case and proves to be counterproductive in the other and that there isn't any single solution that fits all. Thus, the success is determined by the kind of organisation that is attacked and its modus operandi.

Martha Crenshaw, 'The causes of terrorism', Comparative Politics vol 13 no. 4 (July 1981)

This article analyses the psychology of the terrorists and presents them as rational actors who participate in terrorist activities to achieve or attain certain long stated political goals and discards the claim that terrorists are insane.

Rapoport, David, C. 'Four Waves or Rebel Terror and September 11' (*Antropoethics*, vol. 8, no. 1 2002)

This article throws light on the history and evolution of terrorism. This research shows how the trends in the acts of terror have changed over time and how terrorism has taken various shapes and forms. The article classifies four waves of terrorism based on the modus operandi and other characteristics of the terrorist groups and organizations.

Schmid, Alex. 'Terrorism: The Definitional Problem' (*Case Western Reserve Journal of International Law* vol 4 2004)

This article describes how and why no consensus has been obtained on a particular definition of terrorism. This research advocates for a prescribed definition giving reasons for the same and talks about presence of certain elements in the acts of terror. Alex Schmid's determination of the difficulty in arriving at a definition is based upon responses to a questionnaire he circulated in 1985. The most striking feature of this academic consensus over the meaning of terrorism is the virtual absence of references to the psychological element, heretofore widely thought to be at the heart of the concept.

Sinai, Joshua. 'How to Define Terrorism', Perspectives on Terrorism (vol 2 no 4 2008)

This article also seeks to explain the holistic meaning and essence of the term 'terrorism' and focuses on characteristics of terrorism that would eventually define the term. The article discusses about the proposals made by various scholars and international organizations for the definition of terrorism providing reasons for their rejection by the global community.

1.4 AIM

This research aims to check the possibility of enacting right sensitive effective counterterrorism laws and to carry out a comparative analysis of the impact of legislative framework and judicial pronouncements for defeating terrorism on human rights in India and USA.

1.5 OBJECTIVE

This research addresses the following research objectives:

- To understand the meaning and essence of terrorism.
- To understand the concept of counterterrorism.
- To critically examine the possibility of right sensitive counterterrorism laws.
- To analyse the impact of statutory laws and judicial pronouncements of India and USA, for countering terrorism, on human rights and carry out a comparative study.
- To offer suggestions for ensuring human right protection while countering terrorism.

1.6 SCOPE AND LIMITATION

The scope of this research is majorly limited to the analysis of legislative frameworks and judicial decisions for annihilating terrorism. Nevertheless, it touches upon administrative frameworks that are established in India and USA by way of legislative enactments. The research would first deal with the need to device human rights sensitive legislative regime and would proceed to analyse the regime of USA and India in terms of human rights violations and would further seek to suggest reforms that would accommodate human rights considerations in the legislative framework.

Further, due to limitation of time, exhaustive data collection may not have been possible which may have rendered results that cannot be held scientifically relevant. However, the results and the suggestions afforded may be educationally sound.

1.7 RESEARCH QUESTIONS

This research seeks to deal with the following research questions:

- Is it possible to defeat terrorism without infringing upon human rights?
- Do counterterrorism legislations violate Human Rights?
- Does judiciary take a pro-human rights approach while dealing with terrorism?

1.8 HYPOTHESES

- It is possible to defeat terrorism without infringing upon human rights.
- Counterterrorism legislations are written with human rights violations.
- The role of judiciary has been significant in safeguarding human rights while dealing with terrorism.

1.9 RESEARCH METHODOLOGY

The methodology that the researcher has used to carry out this research is doctrinal research methodology. This research is primarily analytical, applied and conceptual legal research as this report is a qualitative inquiry into the legal problems that involves critical thinking and the evaluation of facts and information relative to the issue of human rights violation while dealing with terrorism, this research aims to find a solution to a pressing practical problem at hand i.e., terrorism and this research has been conducted by observing and analysing already present information on the research problem respectively.

The primary data is collected from conventions and treaties of international organizations, statutory laws and judicial pronouncements whereas the secondary data has been collected from the works of various esteemed scholars in the field of terrorism and the reports of national and international organizations.

1.10 RESEARCH DESIGN

This work is spread out in six different chapters. The research design of this research is as follows:

Chapter 1: Introduction- terrorism and counterterrorism

This segment explains the meaning and essence of terrorism, touches upon history and evolution of the same and explains what counterterrorism stands for. This consists of a brief introduction, statement of problem, aim and objective of research, scope and limitation, research questions, hypothesis, literature review, methodology and finally the research design.

Chapter 2: Human rights and counterterrorism

This segment deals with the relationship between human rights and counterterrorism regime and the importance of securing the former while executing the latter. This chapter also analyses the possibility of defeating terrorism without infringing upon human rights.

Chapter 3: Overview of global counterterrorism regime

This deals with the global practices of countering terrorism and the focus areas while framing the legislative policies. It also consists of an overview of the international

regime for countering terrorism which includes the treaties and conventions in this regard.

Chapter 4: State policy on human rights

This segment analyses the international framework and laws within domestic jurisdictions with special focus on India and USA vis-à-vis human rights protection.

Chapter 5: Counterterrorism regime in India and USA: a comparative study

This chapter deals with the comparative study of the legislative framework and judicial pronouncement on terrorism in India and USA and their impact on human rights.

Chapter 6: Conclusion

This chapter consists of the findings of the research and the suggestions to ensure right sensitive counterterrorism regime.

CHAPTER – 2

COUNTERTERRORISM AND HUMAN RIGHTS

“The best — the only — strategy to isolate and defeat terrorism is by respecting human rights, fostering social justice, enhancing democracy and upholding the primacy of the rule of law.” **Late Sergio Vieira de Mello, Former UN High Commissioner for Human Rights (2002)**

As discussed in the previous chapter, both draconian and poorly implemented counterterrorism regimes can be counterproductive. This calls for the need to critically decide on the degree of harshness with which the legislations to counter terrorism ought to be written and for this, factoring in the success rate of terrorism and the possibility of defeating terrorism become extremely vital or integral.

2.1 HOW SUCCESSFUL TERRORISM IS?

The universally accepted essence of terrorism includes the use of force or intimidation to achieve certain political goals. Ergo, the parameters for determining the success rate of terrorist organizations are twofold i.e. use of violence or intimidation and political goals. Therefore, the criteria to determine if a terrorist organization is successful might be the amount of fear and attention that organization causes or the degree of casualties, and whether or not that organization achieved its political goals for which it was

formed. However, academicians while determining the success rate, primarily factor in the political goals since they consider terrorism as an instrument to achieve those goals. Nonetheless, the level of media coverage and attention a terrorist group attains are important intermediate goals, if not the primary ones, that need to be taken into account while determining the success rate of terrorism.

Max Abrahams, in his publication ‘Why terrorism doesn’t work?’¹², has analysed 28 terrorist organizations mentioned in the list of designated terrorist organizations prepared by the United States Department of State and has yielded two major findings with respect to the success of those terrorist organizations. His research concluded that it was only in 7% of the time that terrorist organizations succeeded in their political goals. Another important finding of his research was that the target selection under tactical choices of those organizations as to their operation plays a vital role in determining the level of success of those organizations i.e. those groups whose attacks on civilian targets outnumber those on military targets tend to fail in their political agendas. His theory even contradicts the scholarly opinion that terrorists are rational actors¹³ since the political returns of engaging in terrorism are substantially low to attract participation in such activities.

There are many other researches as well that suggest a lack of success of terrorist groups in terms of their political goals, which raises the question as to why these groups continue with their struggle when it doesn’t benefit them? Paul Wilkinson has tried to

¹² Max Abrahams, ‘Why terrorism doesn’t work’ (2006) vol 31 no 2 International Security 42,78.

¹³ Martha Crenshaw, ‘The causes of terrorism’ (July 1981) Comparative Politics vol. 13, no. 4 379-399.

answer this question with his work, *Political Terrorism*¹⁴, wherein he concluded that terrorists continue with their struggle because some of them believe that terrorism will eventually work for them and their opponents would submit to their demands. He however, yielded that terrorists very rarely succeed in their goals. According to him, only a few of the terrorist groups in the anti-colonial period succeeded in their struggles against the British and the French, for an instance ‘Front de la Liberation Nationale’ in Argentina. Nevertheless, whether or not that amounted to terrorism hasn’t been settled universally and academic scholars hold contradictory opinions in this regard.

Brian Jenkins, the senior advisor to the president of RAND corporation, is yet another academic scholar who, in his article, has observed that there has been a considerable increase in the level of professionalism of terrorists and the degree of casualties or violence. The organizations have developed better and more efficient communication strategies, new ways of financing their operations and their structural models however, they very often fail to achieve their long stated political goals. He concluded that though the terrorists succeed tactically, by creating alarm or fear and by attracting media attention, they are yet to achieve their primary goals for which they are formed. He has called this phenomenon ‘the paradox of terrorism’.¹⁵ Moreover, according to a study carried out by Iyengar and Kinder in 1987¹⁶, there was more news on terrorism during 1981-1986 than there was on poverty, unemployment, racial inequality and crime altogether.

¹⁴ Paul Wilkinson, *Political Terrorism* (ISBN 978-0-333-17469-2, 1st edn, The Macmillan Press Ltd, 1974).

¹⁵ Ibid 2, 117,130.

¹⁶ S. Iyengar & D.R. Kinder, ‘News that matters: Television and American opinion’ [1987] UCP 2010.

The empirical data collected in the US Gallup poles on worries over terrorism suggested fear amongst 58% and 59% of the Americans in the aftermath of 9/11, and in early 2022 this figure dropped to 38% which is still high¹⁷, and in Europe's Eurobarometer¹⁸ which showed similar results are also suggestive of the fact that terrorism has succeeded in its intermediary goal of creating fear or dread among people and getting media attention. Therefore, in terms of the dread terrorism creates, it can be labelled as successful however, in terms of long stated political goals of the organizations, terrorism can't be labelled as successful.

¹⁷ Terrorism, US Gallup Poles <<https://news.gallup.com/poll/4909/Terrorism-United-States.aspx>> accessed 25 June 2022.

¹⁸ Terrorism, Eurobarometer <<https://europa.eu/eurobarometer/surveys/browse/all;search=terrorism>> accessed 25 June 2022.

2.2 IS IT POSSIBLE TO DEFEAT TERRORISM?

Defeating terrorism implies defeating both the phenomenon of terrorism as well as individual terrorist groups. It becomes essential to investigate the possibility of defeating terrorism in order to have an effective counter terrorism regime since if it isn't possible to defeat terrorism, the resources would be channelized to minimize the impact of terrorism instead of obliterating the phenomenon. The idea that terrorism can't be defeated originated when a few experts, public figures and significant political leaders suggested that the war on terror can't be won over. In 2010, the chief of the defence staff of the British armed forces, General Sir David Richards said that "first of all you have to ask, do we need to defeat it in the sense of a clear cut victory and I would argue that it is unnecessary and would never be achieved."¹⁹ The former US president George W. Bush in 2004 said that "I don't think you can win it but I think you can create conditions so that those who use terror as a tool are less acceptable in parts of the world. So there's no winning of the war on terror." Moreover, in 2010 King Abdullah II of Jordan said that "we're never going to be able to get rid of terrorism because there is always going to be evil in the world."²⁰

Many scholars have carried out research to answer the question of the possibility of defeating terrorism by devising a strong and effective counterterrorism regime. David

¹⁹ Hasan Suroor, 'West can't defeat Al-Qaeda, says UK army chief' *The Hindu* (14 November 2010) <<https://www.thehindu.com/news/international//article60589303.ece>> accessed 25 June 2022.

²⁰ Course on 'Terrorism and counterterrorism: Comparing theory and practice', Universiteit Leiden, Coursera.

Rapaport, while distinguishing the four waves of terrorism concluded that each wave came to an end after a few decades as they petered out gradually and were not defeated as a result of counterterrorism regime. However, he also gave example of a particular form of terrorism i.e. the revolutionary terrorism that was defeated in one country after another. Nonetheless, he did not give an account of the source of this information.²¹ Seth Jones and Martin Libicki from RAND corporation in their study, analysed if terrorism gets defeated by systematically studying 648 terrorist groups that were active from 1968 to 2006. In their study, they yielded four major reasons why terrorist groups cease to exist which are suppression and prevention of terrorist activities by the local police and intelligence services, the use of military force to kill or capture members of the terrorist groups or to fight states that aid these organisations, the terrorists joined political processes which is cost effective and has greater benefits for the groups and lastly, they succeed in their political goals.

Out of the abovementioned reasons, it was only because of policing and use of military force that the terrorist organizations were defeated which, according to the report, happened in 40% and 7% of the cases respectively. In 43% of the cases, the members of terrorist groups joined political process which despite being a defeat of terrorism as an instrument wasn't essentially a defeat of those groups. On the contrary, in 10% of the cases, the terrorist groups were successful in their long stated primary political goals that ceased their activities upon achieving those goals.²²

²¹ Ibid 3.

²² Jones Seth and Martin Libicki, *How terrorist groups end: implications for countering Al Qaida* (RAND corporation, 2008) 1,45.

Therefore, it can be concluded from the research in the field that it is in fact possible to defeat terrorism by adopting an effective counterterrorism regime however, although not impossible, it might be difficult to obliterate powerful organizations such as Al Qaida or the FARC in Columbia.

2.3 RELATIONSHIP BETWEEN HUMAN RIGHTS AND COUNTERTERRORISM REGIME

Human rights are such rights that are available naturally to human beings merely by virtue of them being humans. These rights are universal in nature and are fundamental to human existence such as the right to life, liberty, freedom etc. Terrorist activities have devastating effects on the human rights of the masses. Such activities lead to a wide-scale loss of life and property, forces the population to live in constant fear, jeopardize fundamental freedoms, destroy the fundamental bases of a democratic civil society, erode the capacity of the state to ensure peace and welfare and that it further aids other organized crime markets which weakens the state even more. The terrorist groups also get involved in heinous crimes such as murder, kidnapping or abduction, hostage-taking, assault and so on. Thus, it becomes essential to adopt measures to prevent and suppress terrorist activities to secure the national territory and prevent human rights violation. However, just as terrorism impacts human rights adversely, the counterterrorism measures adopted by the state are capable of violating human rights which calls for the need to adopt such measures that are sound enough and not go too far by adopting draconian measures that prove to be counterproductive. The state has a duty to protect human rights which also include the right to a fair trial, humane treatment in police custody, due process of law and so on which have to be preserved under all circumstances. This section will cover the significance of human rights while countering terrorism, impact of counterterrorism on human rights, working of basic principles of human rights and application of human rights in counterterrorism.

2.3.1 HUMAN RIGHTS PROTECTIONS

United Nations Secretary-General, Mr. Ban Ki Moon said at a conference that “when we stand up for human rights, combat poverty and marginalization, when we seek to resolve conflicts, support good governance and the rule of law, we do so because these activities have intrinsic value and should be pursued in their own right. But as we do, we also work to counter terrorism by addressing the very conditions that can be conducive to it.”²³ The Part IV of United Nations Global Counterterrorism Strategy states that “we resolve to undertake the following measures, reaffirming that the promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy, recognizing that effective counterterrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing, and stressing the need to promote and protect the rights of victims of terrorism.”²⁴

Human rights found their basis in the UN charter which pins down under article 55 that “with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: [...] universal respect for, and observance of, human rights and fundamental

²³ Mr Ban Ki Moon, UN Secretary General, Address to the International Conference on Terrorism, Dimensions, Threats and Counter-Measures (Tunisia, 15 November 2007) <www.un.org/apps/news/infocus/speeches/search_full.asp?statID=149> accessed 25 June 2022.

²⁴ The United Nations Global Counterterrorism Strategy <<https://www.un.org/counterterrorism/un-global-counterterrorism-strategy#:~:text=The%20UN%20Global%20Counter%2DTerrorism,operational%20approach%20to%20fighting%20terrorism>> (A/RES/60/288) accessed 26 June 2022.

freedoms for all without distinction as to race, sex, language, or religion.” Thus, human rights and fundamental freedoms are considered to be the prerequisites for ensuring peace and stability. The Universal Declaration of Human Rights, 1948 serves as the primary instrument that provides for protection of human rights and fundamental freedoms and provides for a “a common standard of achievement for all peoples and all nations.”²⁵ Human rights, as provided under the declaration are regarded as customary international laws or peremptory norms from which no deviation is permissible. Therefore, human rights treaties obligate all the states irrespective of whether or not that state is signatory to the treaties that ensure human rights protection. UDHR serves as the parent instrument for two major covenants on human rights i.e. International Covenant on Civil and Political Rights (ICCPR)²⁶ and International Covenant on Economic, Social and Cultural Rights (ICESCR)²⁷. In addition to the covenants there are optional protocols to these covenants such as optional protocol to ICCPR adopted in 1966 and second optional protocol to ICCPR to abolish death penalty etc. Rights such as the right to life²⁸, freedom from torture²⁹, the right to liberty and security of the person³⁰, the right of detained persons to be treated humanely³¹, the right to a fair trial³², the right to private and family life and protection of reputation³³, equal protection of the law³⁴ and right to an effective remedy³⁵ are protected under ICCPR which often get jeopardized while implementing counter terrorism measures.

²⁵ Universal Declaration of Human Rights (1948) <www.un.org/Overview/rights.html> accessed 25 June 2022.

²⁶ Entry to force (16 December 1966).

²⁷ Entry to force (16 December 1966).

²⁸ ICCPR 1966, art 6.

²⁹ ICCPR 1966, art 7.

³⁰ ICCPR 1966, art 9.

³¹ ICCPR 1966, art 10.

³² ICCPR 1966, art 14.

³³ ICCPR 1966, art 17.

³⁴ ICCPR 1966, art 26.

³⁵ ICCPR 1966, art 2.

ICESCR provides for certain economic rights which also get sabotaged due to socio-economic marginalization or political exclusion while implementing counterterrorism regime as terrorism often gets associated with a particular racial or religious community leading to their exclusion. ICCPR too recognizes under article 2 that “each state party to the present covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” which ought to be respected under all circumstances. Other core treaties that protect human rights and are relevant in the context of counterterrorism include International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)³⁶, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)³⁷ and Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT)³⁸. Apart from these, there are regional treaties as well that guarantee human rights which include the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, American Convention on Human Rights 1969, African Charter on Human and Peoples’ Rights 1981 and European Union Charter of Fundamental Rights and Freedoms 2000.

³⁶ Entry to force (21 December 1965).

³⁷ Entry to force (10 December 1984).

³⁸ Entry to force (18 December 2002).

2.3.2 PROTECTING HUMAN RIGHTS WHILE DEALING WITH TERRORISM

There is no doubt about the fact that inflicting harm on civilians is a clear violation of human rights laws that regard human dignity as its centric concern. However, both the civilians who are at risk of getting harmed due to terrorism and persons who would be suspected of terrorist activities are protected under human rights laws and therefore, the state can't cherry pick obligations and protect the rights of only the former and turn a blind eye towards the latter. "If one were to judge from the public debates, and the stance was taken by many governments, there is a tension between upholding human rights or ensuring people's security in the face of the terrorist threat. It is a basic tenet of this report that any implied dichotomy between securing people's rights and people's security is wrong. Upholding human rights is not a matter of being 'soft' on terrorism. On the contrary, countering terrorism is itself a human rights objective, since states have a positive obligation to protect people under their jurisdiction against terrorist acts. This positive duty on states requires them to prevent, punish, investigate, and redress the harm caused by such acts. At the same time, States must accept that this positive duty to protect applies both to those who may be at risk from terrorism and to those who may be suspected of terrorism. The state has no authority in law to determine that some people do not qualify to have their rights respected".³⁹

³⁹ Eminent Jurists Panel, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (ISBN: 978-92-9037-138-2, Geneva, 2009).

The human rights regime has strengthened from the 1960s to 90s with the adoption of new instruments such as treaties, covenants, optional protocols etc. and development of institutional framework for preservation and protection of human rights however, the fear of terrorism for most states, supersedes the obligation of human rights protection in practice. “One of the arguments made by some states for having to side-line human rights in the face of the terrorist threat is that rights are a luxury that, unfortunately, must be dispensed with (normally only on a temporary basis) at times of extreme crisis. Yet this claim ignores why the modern framework of international human rights and humanitarian law came into being. The 1948 Universal Declaration of Human Rights, and the many mechanisms and treaties that flowed from it thereafter, had their genesis in cataclysmic war and genocide. States adopted a comprehensive human rights system and a new codification of international humanitarian law (the laws of war) in order to prevent a recurrence of the nightmare that saw millions die. Over the years, procedures and mechanisms have been established to ensure effective accountability for international crimes, violations of human rights and international humanitarian law, and for ensuring reparation for victims. Human rights and humanitarian law were not drafted with peace and political stability in mind. Rather, the very *raison d’être* of this legal system is to provide states with the framework that allows them to respond effectively to even the most serious of crises. Accordingly, human rights are not, and can never be, a luxury to be cast aside at times of difficulty. International law is the bulwark that will help states respond effectively to whatever difficulties arise.”⁴⁰

⁴⁰ Ibid.

Whereas, others argue that the current human rights regime would not suffice considering terrorism has evolved over the years, both in nature and intensity, leading to unprecedented and exceptional threat of terrorism, and that in a state of such an emergency, individuals should forego some of their rights for the greater good. Therefore, according to this school of thought, certain human rights violations are ineluctable. However, “there are certain core rights, such as the right to life and the prohibition on torture and other cruel, inhuman and degrading treatment, that are non-derogable. In other words, regardless of the nature or the severity of the threat, there are some human rights that are considered to be non-negotiable. For example, in no circumstances whatsoever, can states ever engage in torture, or arbitrarily deprive people of their right to life. It is clearly significant that the world community has determined that there is no conceivable circumstance in which their infringement is considered acceptable”.⁴¹

Further, it was also argued by some states that terrorism in its current state is exceptional, their operation is transnational, they have adopted new tactics such as suicide bombing and have better and developed technologies which make it difficult for the states to curb terrorism without infringing upon human rights. However, past experiences suggest that the states, in the guise of ‘exceptional or unprecedented’ terrorism, have violated human rights. Historically, the counterterrorism regime of the states, particularly, “the exclusion or limitation of access to courts, have encouraged prolonged arbitrary and incommunicado detention, and created an environment prone to abuse. The implementation of such laws in countries including Turkey, South Africa,

⁴¹ Ibid.

and India illustrates the point. A particularly telling example is that of Sri Lanka, which still faces a long-standing internal armed conflict with the Liberation Tigers of Tamil Eelam (LTTE or Tamil Tigers). The Sri Lanka Prevention of Terrorism Act (PTA) was adopted, first as a temporary measure in 1979, and then as permanent legislation in 1983. The PTA contains far-reaching powers to detain, arrest, hold incommunicado, and to limit access to courts. Torture and other gross violations have resulted from the undermining of these important safeguards. One commentator predicted in advance that the legislation would inevitably lead to serious human rights violations, noting at the time of the enactment of the PTA: ‘A power to detain suspects for long periods, without the opportunity for access by friends, family, or lawyers, or for regular judicial review, notoriously carries the danger that the detainees will be maltreated while in custody: it provides an open invitation for deprivation, assault, and worse – especially if the suspects may be detained by their interrogators in police stations or army camps – and more especially still, if no real control is exercised over the periods for which that they are detained.’^{42,43}

Moreover, it is often perceived that state security and protection of human rights are two extremities that need to be balanced by the state however, state security can only be ensured when human rights are protected in the civil society and therefore, they should not be treated as being antithesis of each other and efforts shall be made by the state to accommodate the two.

⁴² Paul Sieghart, *Sri Lanka, A Mounting Tragedy of Errors, Report of a Mission to Sri Lanka in January 1984*, on behalf of the International Commission of Jurists and its British Section, JUSTICE, International Commission of Jurists (London, 1984) 37,38.

⁴³ Ibid 39.

A similar stance was taken in the sixtieth session of General Assembly when it was yielded by the Secretary General that “terrorism often thrives in environments in which human rights are violated and where political and civil rights are curtailed. Indeed, terrorists may exploit human rights violations to gain support for their cause. Persecution and violent government crackdowns often radicalize opposition movements. The absence of non-violent channels to express discontent and pursue alternate policies may lead some groups to resort to violent means and terrorism. Past cases show that governments that resort to excessive use of force and indiscriminate repression when countering terrorism risk strengthening the support base for terrorists among the general population. Such measures generally invite counter-violence, undermine the legitimacy of counter-terrorism measures and play into the hands of terrorists. I therefore call on governments to avoid excessive use of force and to comply with international human rights law”.⁴⁴

It is for this reason that the states undertook to preserve the principles of rule of law and human dignity by way of the Charter on Preventing and Combating Terrorism, OSCE. The Charter states that the states: “[...] 5. Consider of utmost importance to complement the ongoing implementation of OSCE commitments on terrorism with a reaffirmation of the fundamental and timeless principles on which OSCE action has been undertaken and will continue to be based in the future, and to which participating States fully subscribe; 6. Reaffirm their commitment to take the measures needed to protect human rights and fundamental freedoms, especially the right to life, of everyone

⁴⁴ Report of Secretary General, *Uniting against terrorism: recommendations for a global counterterrorism strategy*, Agenda items 46 and 120, sixtieth session, United Nations General Assembly (27 April 2006).

within their jurisdiction against terrorist acts; 7. Undertake to implement effective and resolute measures against terrorism and to conduct all counter-terrorism measures and co-operation in accordance with the rule of law, the United Nations Charter and the relevant provisions of international law, international standards of human rights and, where applicable, international humanitarian law;[...]"⁴⁵

In November 2001, a joint statement by the OSCE's Office for Democratic Institutions and Human Rights (ODIHR), the UN High Commissioner for Human Rights, and the Council of Europe sought compliance by the states by stating that: "While we recognise that the threat of terrorism requires specific measures, we call on all governments to refrain from any excessive steps which would violate fundamental freedoms and undermine legitimate dissent. In pursuing the objective of eradicating terrorism, it is essential that States strictly adhere to their international obligations to uphold human rights and fundamental freedoms."⁴⁶

In 2005, UN Secretary General, Kofi Annan emphasized that: "Human rights law makes ample provision for counter-terrorist action, even in the most exceptional circumstances. But compromising human rights cannot serve the struggle against terrorism. On the contrary, it facilitates achievement of the terrorist's objective — by ceding to him the moral high ground, and provoking tension, hatred and mistrust of

⁴⁵ The Charter was adopted at the Tenth Meeting of the Ministerial Council (2002 Porto Charter) <www.osce.org/documents> accessed 28 June 2022.

⁴⁶ Joint statement by Mary Robinson, UN High Commissioner for Human Rights, Walter Schwimmer, Secretary General of the Council of Europe, and Ambassador Gérard Stoudmann, Director of the OSCE Office for Democratic Institutions and Human Rights (29 November 2001) <<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/4E59333FFC5341A7C1256B13004C58F5>> accessed 28 June 2022.

government among precisely those parts of the population where he is most likely to find recruits. Upholding human rights is not merely compatible with a successful counter-terrorism strategy. It is an essential element.”⁴⁷

The sixtieth session of General Assembly also came up with certain recommendations that embraced certain goals which had promoting rule of law, ensuring respect for human rights and creating an effective criminal justice system under priority area. It was stated in the report that “the fundamental basis for our common fight against terrorism is respect for human rights and the rule of law. Strengthening the international legal architecture within which we strive to prevent and combat terrorism must therefore be a priority. The Security Council in resolution 1373 (2001) contributed to this end by deciding that all States should ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts is brought to justice, and that such terrorist acts are established as serious criminal offences in domestic laws and regulations. States need to be able to implement and enforce these laws and bring perpetrators to justice, with due respect for human rights.”⁴⁸

This view was taken by the General Assembly keeping in mind the fact that violations of human rights while dealing with terrorism prove to be counterproductive since it sows the seeds for further attacks and as acknowledged in the session itself, terrorism

⁴⁷ UN (former) Secretary General Kofi Annan, ‘Keynote Address’ Closing Plenary of the International Summit on Democracy, Terrorism and Security, Madrid, 8-11 March 2005) ‘A Global Strategy for Fighting Terrorism’ <<http://summit.clubmadrid.org/keynotes>> accessed 29 June 2022.

⁴⁸ Ibid.

often thrives in environments where human rights are violated. Therefore, violating human rights is doing no good for the states, it is undermining human dignity by affecting the fair and impartial criminal justice system and it isn't even effective for the purpose for which violations are being made. Ergo, protecting and preserving human rights while dealing with terrorism is of utmost significance and states ought to practice human rights protection while framing their counterterrorism regime.

2.4 IS IT POSSIBLE TO DEFEAT TERRORISM WITHOUT INFRINGING HUMAN RIGHTS?

It is generally believed that violation of human rights is inevitable while dealing with terrorism. However, with the development of legal instruments and infrastructure for protection of human rights, human rights of terrorists or the persons suspected for terrorist activities are also being recognized which has been a concern for deliberations at numerous occasions.

The idea that it is possible to defeat terrorism without infringing upon human rights originated when representatives from international organizations made claims in this regard. In 2002, the Secretary General, Walter Schwimmer from Council of Europe exclaimed that "it is precisely in situations of crisis, such as those brought about by terrorism, that respect for human rights is even more important, and that even greater vigilance is called for. At the same time, as I have continually stressed since the attacks, the need to respect human rights is in no circumstances an obstacle to the efficient fight against terrorism. It is perfectly possible to reconcile the requirements of defending society and the preservation of fundamental rights and freedoms."⁴⁹ UN Secretary General, Kofi Annan also stated that "[...]compromising human rights [...] facilitates achievement of the terrorist's objective - by ceding to [them] the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits. Upholding human rights is

⁴⁹ Committee of Ministers, *Guidelines on Human Rights and the Fight Against Terrorism* (11 July 2002), 804th meeting of the Ministers' Deputies (ISBN 92-871-5021-4).

not merely compatible with successful counter-terrorism strategy. It is an essential element.”⁵⁰

It is essential to investigate whether terrorism can be countered without any infringement of human rights for it will have serious legal and ethical implications, and will help shape an effective counterterrorism regime as well. In his work ‘Should national security trump human rights in the fight against terrorism?’, Robert P. Barnidge has analysed the legal procedures that were followed in various cases concerning terrorism and has concluded that “there should be a balance between counter terrorism activities and 'human rights' for fighting terrorism without infringing the rights of a terrorist is not completely possible but to a large extent possible.”⁵¹ This serves as an academic evidence for the claim that it is possible to defeat terrorism without infringing human rights.

Other academic evidences for the claim can be found in the human rights fact sheet 32, wherein it has been quoted that “A human rights analysis of the impact of these counter-terrorism measures merits particular consideration in the light of the serious consequences they may have for the individual, as well as for his or her family and community.”⁵² Moreover, the argument given by Ted Lapkin in his work says that “[...] despite their inherent limitations [...] ability of western democracies to fight terrorism— lies in their ability to establish a clear differentiation between licit and illicit means of

⁵⁰ Ibid 42.

⁵¹ Robert P. Barnidge, Jr. ‘Should National Security Trump Human Rights in the Fight Against Terrorism?’ <<http://ssrn.com/abstract=1156775>> accessed 30 June 2022.

⁵² Ibid 7.

conducting armed conflict. To blur this distinction and to unnecessarily apply the Geneva conventions to illegal combatants would erode that distinction and constitute not only a legal mistake, but an ethical one as well.”⁵³

Therefore, from the claims of international organisations and academic evidences, one can draw the conclusion that it is possible to limit the violation of human rights to an extent, if not curb it entirely, while combating terrorism.

⁵³ Ted Lapkin ‘Does Human Rights Law Apply to Terrorists?’ (2004) Middle East Quarterly (vol. 11, no. 4) 3,13. < <http://www.meforum.org/651/does-human-rights-law-apply-to-terrorists>> accessed 30 May 2022.

CHAPTER – 3

OVERVIEW OF GLOBAL COUNTERTERRORISM REGIME

“Terrorism is a global threat with global effects; its consequences affect every aspect of the United Nations agenda from development to peace to human rights and the rule of law. By its very nature, terrorism is an assault on the fundamental principles of law, order, human rights, and the peaceful settlement of disputes upon which the United Nations is established. The UN has an indispensable role to play in providing the legal and organizational framework within which the international campaign against terrorism can unfold.”

Kofi Annan, Former UN Secretary General, 4th October, 2002

United Nations has been actively involved in the fight against terrorism in order to obliterate, both the phenomenon of terrorism and groups that indulge in such activities. United Nations Organization and its subsidiary agencies have together developed a wide range of international instruments that provide for suppression and prevention of terrorism covering various aspects including seizure of aircrafts, hostage taking, financing of terrorist organizations etc.

Terrorism has been of major concern to the international community ever since the League of Nations came up with the Convention for Prevention and Punishment of Terrorism in the year 1937 and the United Nations has been working on terrorism since 1963. Apart from conventions, the UN General Assembly and Security Council have

passed various resolutions to curb terrorism. UNO, its organs and agencies together have also undertaken, in mutual partnerships, to assist states in implementing all the international instruments for counterterrorism. Furthermore, the judicial framework has also been established in the international community to deal with matters concerning terrorism. This chapter discusses all the instruments that have been adopted by the international community to combat terrorism including the conventions, regional treaties, and resolutions passed by the Security Council and General Assembly; how the international bodies work to fight terrorism; and globally accepted measures to combat terrorism.

3.1 INSTRUMENTAL FRAMEWORK

The instrumental framework for terrorism includes international conventions including the regional conventions, General Assembly resolutions and Security Council resolutions.

3.1.1 INTERNATIONAL CONVENTIONS AND PROTOCOLS

International conventions are broadly of two kinds: the international conventions that are open to ratification by all the states and the regional conventions which are basically multilateral conventions that are region specific. Currently, there are 13 international conventions that are open to all the states. These include:

1. Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963
This Tokyo Convention of 1963 provides for safety inside aircrafts. The convention permits the aircraft commanders to impose upon a person who has committed or is likely to commit an act that would jeopardize safety, such measures that would be required to prevent that person from committing such an act or from causing any more harm, including restraint. The convention requires member states to take custody of the offender.

2. Convention for the Suppression of Unlawful Seizure of Aircraft, 1970

This Hague Convention of 1970 makes hijacking of aircrafts a seriously punishable offence along with exercising or attempting to exercise seizure or control of an aircraft by using unlawful force, threat or intimidation. The convention requires the state parties to take custody of the offenders to either extradite them or to prosecute them. This convention also requires the state parties to assist one another in criminal proceedings.

3. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971

This Montreal Convention of 1971 makes acts of aviation sabotage such as acts of violence against a person likely to endanger the safety inside the aircraft, planting explosives inside the aircraft, attempting or being an accomplice to any such act a punishable offence with severe penalties. The convention requires the state parties to take custody of the offenders to either extradite them or to prosecute them. This convention also requires the state parties to assist one another in criminal proceedings.

4. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973

This convention defines internationally protected persons as the head of a state, a foreign minister of a state, diplomat or any representative of a state or any official of international organizations who are protected under the international law from any attack against them. It thus requires the member states to criminalize any act of violence against such internationally protected persons. The convention requires the state parties

to take custody of the offenders to either extradite them or to prosecute them. This convention also requires the state parties to assist one another in criminal proceedings.

5. International Convention against the Taking of Hostages, 1979

The Hostages Convention of 1979 provides that if any person detains another person in order to compel a third party such as the state or any international organization to do any act or abstain from doing an act, commits an offence of hostage taking and makes such an act punishable. The convention requires the state parties to take custody of the offenders to either extradite them or to prosecute them. This convention also requires the state parties to assist one another in criminal proceedings.

6. Convention on the Physical Protection of Nuclear Material, 1980

This convention criminalizes unlawful use, possession or threats to use a nuclear weapon to cause damage to any person or property of a person or state. The convention requires the state parties to take custody of the offenders to either extradite them or to prosecute them. This convention also requires the state parties to assist one another in criminal proceedings.

7. Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1988

This convention extended the ambit of the Montreal Convention, 1971 to include terrorist acts at airports catering international civil aviation services.

8. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988

The legal regime, as provided under this convention, is similar to that of the legal regime for international aviation services. This convention makes acts of sabotage such as acts of violence against a person likely to endanger the safety inside the ship, planting explosives inside the ship, attempting or being an accomplice to any such act a punishable offence with severe penalties. The convention requires the state parties to take custody of the offenders to either extradite them or to prosecute them. This convention also requires the state parties to assist one another in criminal proceedings.

9. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988

The legal regime, as provided under this convention, is similar to that of the legal regime for international aviation services and is applied on the unlawful acts on continental shelf. The protocol requires the state parties to take custody of the offenders to either extradite them or to prosecute them. This convention also requires the state parties to assist one another in criminal proceedings.

10. Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991

This convention was adopted in the aftermath of Pan Am 103 bombing in order to limit the use of unmarked and undetectable plastic explosives and required the state parties to ensure effective control over 'unmarked' plastic explosives. Unmarked plastic explosives are the ones that do not contain any detection agents as stipulated under the

technical annex which is an integral part of this convention. The convention does not itself create offences that are subject to prosecution and extradition however, it requires the state parties to make provisions in that regard.

11. International Convention for the Suppression of Terrorist Bombings, 1997

This convention requires the member states to criminalize unlawful and intentional use of explosives or an attempt to use such explosives in order to kill, cause bodily injury or to cause destruction of a public place. The convention does not itself create offences that are subject to prosecution and extradition however, it requires the state parties to make provisions in that regard.

12. International Convention for the Suppression of the Financing of Terrorism, 1999

This convention requires the state parties to hold persons that financially aid terrorism, criminally, civilly or administratively liable for such an act. This financing can be either direct or indirect through groups claiming to have charitable or social causes or through illicit groups engaged in drug or gun trafficking. This convention also provides for identification, freezing and seizure of such funds which can't be prevented or concealed under the bank secrecy clause.

13. Convention on the Suppression of Acts of Nuclear Terrorism, 2005.

It provides for a legal regime designed to effectively prevent and suppress criminal conduct that involves the use of nuclear and other radioactive materials. The convention

requires the state parties to establish a robust and substantive legal regime to prevent and combat nuclear terrorism.⁵⁴

Apart from these instruments, there are certain regional conventions that were adopted under the auspices of various regional organizations such as EU, OAS, OAU, SAARC etc. Regional conventions to which USA or India have subscribed to include Organization of American States Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance (1971), Inter-American Convention Against Terrorism (2002), SAARC Regional Convention on Suppression of Terrorism (1987) and its Additional Protocol (2004).

3.1.2 GENERAL ASSEMBLY AND SECURITY COUNCIL RESOLUTIONS

The UN charter⁵⁵ provides for the powers and functions of all the organs of UN for the fulfilment of the purposes for which UNO was formed. These purposes, as stated under Article 1 of the said charter, include maintenance of international peace and security, development of friendly relations among nations and increasing international cooperation and assistance in solving international problems. The Security Council, under Article 24 and Chapter VII of the UN Charter and the General Assembly, under

⁵⁴ Terrorism Conventions <http://www.unodc.org/unodc/terrorism_conventions.html> accessed 24 May 2022.

⁵⁵ UN Charter <<https://www.un.org/en/about-us/un-charter>> accessed 24 May 2022.

Article 11 and 12 of the charter, are empowered to make recommendations and pass resolutions on matters that affect international peace and security.

Based on the current approach of the UN, there are certain key resolutions passed by the General Assembly and Security Council.⁵⁶ “These include the following:

1. The Security Council Resolution 1269 of 1999: This resolution makes it obligatory for the states to prevent and combat terrorist attacks and bring perpetrators to justice.
2. Security Council Resolution 1373 of 2001: This resolution obligates states to implement more effective counter-terrorism measures at the national level and to increase international co-operation in the struggle against terrorism. This resolution also asked the member states to become parties to the international treaties, conventions and protocols that deal with terrorism and increase mutual assistance in implementing the provisions of such instruments.
3. Security Council Resolution 1456 of 2003: This resolution obligates states to ensure that ‘any measure is taken to combat terrorism comply with all their obligations under international law, and [to] adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law’.
4. Security Council Resolution 1624 of 2005: This resolution calls on states to ‘prohibit by law incitement to commit a terrorist act or acts’, as well as prevention of such acts and the denial of safe haven to perpetrators. It also calls upon states to ‘continue international efforts to enhance dialogue and broaden understanding between

⁵⁶ Each document and further details <<http://www.un.org/terrorism>> accessed 24 May 2022.

civilisations in an effort to prevent the indiscriminate targeting of different religions and cultures [...]

5. General Assembly Resolution 58/187 (2004): ‘States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law’ [and] raise awareness about the importance of these obligations among national authorities involved in combating terrorism.”⁵⁷

Out of these abovementioned resolutions, the UN Security Council Resolution 1373 is extremely significant for it provides for the basis of the national regime for counterterrorism to the state parties. The resolution states that the states shall “ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.”⁵⁸ The resolution also requires the state parties to co-operate amongst one another and provide mutual legal assistance to bring the perpetrators to justice. It also provides that states shall be attentive enough to not let the perpetrators abuse refugee status. Furthermore, the resolution requires the member states to accede to all the core conventions and protocols for counterterrorism and establishes organizational framework that seeks compliance from state parties and assists them throughout the process.

⁵⁷ OSCE Office for Democratic Institutions and Human Rights (ODIHR), *Countering terrorism, protecting human rights* (2007, ISBN 83-60190-49-6).

⁵⁸ UN Security Council Resolution 1373 (28 September 2001) doc. S/RES/1373, para 2(e).

Further, following the rising concerns over Taliban, the UN in 1999 introduced the ‘designation mechanism’ to enlist organizations or people who are believed to be involved in terrorism or its promotion. This list requires the member states to freeze all the assets and resources associated with the designated organizations and individuals. It also provides that states are obliged to refrain from “providing any form of support, active or passive” to “entities or persons involved in terrorist acts.”⁵⁹

⁵⁹ Ibid 56.

3.2 INTERNATIONAL ORGANS AND AGENCIES WORKING FOR TERRORISM

The Security Council resolution 1373⁶⁰ which was passed in the aftermath of the 9/11 attack, besides seeking participation from the member states, established Counter-Terrorism Committee in order to increase the level of capability of member states to fight terrorism and to assist the states in effective implementation of the conventions and protocols for terrorism. The committee plays a significant role in ensuring collective action against international terrorism.

The United Nations Office on Drugs and Crime (UNODC) too has a technical assistance programme for counterterrorism within its auspices. This programme is based on mandates recommended by UN Commission on Crime Prevention and Criminal Justice which are later approved by General Assembly. This programme includes provisions for technical assistance and advisory services to states to help them fight terrorism which is carried out by the Terrorism Prevention Branch (TPB) of UNODC which works under the Division for Treaty Affairs (DTA). This programme primarily aims at strengthening the legal regime against terrorism by providing legislative assistance to countries in their compliance of international instruments for counterterrorism. Thus, UNODC assists the states in accordance with priorities that are set together by the CTC and UN Commission on Crime Prevention and Criminal Justice by “reviewing domestic legislation and providing advice on drafting new laws, providing in-depth assistance on the ratification and implementation of new legislation

⁶⁰ Ibid 56.

against terrorism through a mentorship programme or other follow-up action, and facilitating and providing training to national criminal justice systems with regard to practical implementation of universal instruments against terrorism.”⁶¹ This technical assistance provided by UNODC is based on the Security Council Resolution 1373, General Assembly Resolutions 59/153, 58/81, 58/136 and 58/140 and ECOSOC Resolution 2005/19.

This is achieved by effective liaising between UNODC and CTC. The CTC analyses reports submitted by the states and facilitate the provision of technical assistance and UNODC carries out the process of technical assistance. CTC and UNODC also coordinate with one another to identify countries that are on a priority basis, in need of technical assistance. UNODC also shares mission reports with CTC. Through this program, many national officials have been provided with training or briefing, specific national action plans have been developed jointly with government or legislative drafting committees, regional and sub-regional workshops have been conducted that helped nation states to compare progress, develop better relations, learn from each other’s legislative regime and to harmonize legislative efforts.

The Terrorism Prevention Branch of UNODC is also committed to building effective coordination and cooperation between and among relevant entities dedicated to counterterrorism at different levels. The purpose this serves is manifold including

⁶¹ Report of the Secretary General, *Strengthening International Cooperation and Technical Assistance in Promoting the Implementation of the Universal Conventions and Protocols Related to Terrorism within the Framework of the Activities of the United Nations Office on Drugs and Crime*, submitted to Commission on Crime Prevention and Criminal Justice (2005) session 14 (E/CN.15/2005/13).

increased complementarities, avoidance of duplication of efforts or resources, increased cost effectiveness, broader reach due to involvement of multiple entities etc. Other than coordinating with CTC, the TPB also coordinates with the Office of Legal Affairs which affords its expert opinions on relevant matters such as organized crime, drug or weapon trafficking, money laundering, corruption etc. The Counter-Terrorism Implementation Task Force was also established by the Secretary General in 2005 in order to carry out the coordination between and among the United Nation entities engaged in the efforts to counter terrorism. This implementation task force has developed a program and appointed working groups in order to assist the member states in compliance with the global strategy. The International Criminal Court is the judicial organ under the international framework that has jurisdiction over international crimes. However, ‘terrorism’ per se isn’t a specific offence under the list of crimes over which the ICC has jurisdiction. A proposal in this regard was made to the international community during the negotiations on the Rome Statute of ICC. However, this proposal wasn’t accepted. Nevertheless, certain acts carried out by the terrorist organisations or individual terrorists that constitute some other offence fall within the jurisdiction of the court. This is because some acts of terrorism constitute ‘crime against humanity’ which is an international crime and very well falls within the jurisdiction of ICC. The ICC statute under Article 7 defines ‘crime against humanity’ as “various acts, including murder, extermination, persecution of various groups, when committed as a part of a widespread or systematic attack directed against any civilian population, with knowledge of the act.”⁶² Acts of terrorism carried out by parties to an armed conflict constitutes ‘war crimes’ which also fall within the purview of the court.

⁶² Statute of ICC <https://legal.un.org/icc/statute/99_corr/cstatute.htm> accessed 27 May 2022.

3.3 COUNTERTERRORISM MEASURES: STATE PRACTICE

Since terrorism has evolved over many years and is a constantly changing phenomenon, the measures adopted under the counterterrorism regime by the states play a very significant role owing to their flexible nature as opposed to legislative enactments that are comparatively more rigid, for flexible measures can be changed in accordance with the changing trends of terrorism. This section will evaluate the core measures that are followed by majority of the states currently and analyse how effective these measures are.

3.3.1 CRIMINAL PROFILING

Owing to the secretive nature of terrorism and terrorists and the fact that they operate underground or in the dark, it becomes really difficult to study them. This makes preventing terrorists before they strike extremely difficult. Scholars have often connoted this situation as being the same as ‘looking for a needle in a haystack. This makes it seem like locating terrorists is highly unlikely. However, there have been quite a few instances wherein terrorists have been caught before they could strike and some have been caught afterward based on certain clues or signs. This tool or process of gathering clues or signs is referred to as profiling, also known as criminal or offender profiling.

Broadly, there are two kinds of profiling, one of them involves key focus on the individual characteristics of a person whereas the other involves a focus on behavioural patterns. Therefore, the two kinds of profiling are personality profiling and behavioural profiling. Further, the method of profiling which is prevalent involves identification of a set of psychological, socio-economic, behavioural or physical attributes that set terrorists apart, based on past experiences i.e. identification of indicators that describe what a terrorist looks like, or what are his or her personality or behavioural traits, what circumstances do they live in etc. that altogether make up a profile for terrorists. This process is then followed by data mining that uses various sources for security screening of groups and individuals that are found to have profiles with the largest number of indicators. Thus, the process of criminal profiling is a two-step process that firstly involves the identification of indicators, followed by data mining in order to find individuals that might be terrorists.

This method was revived with the advancement of information technology nevertheless profiling isn't a new concept. The method is purely based on past experiences which, if effective, would serve as the perfect tool for counterterrorism since terrorist attacks cost a lot of casualties, and destruction of life and property and a tool that identifies terrorists before they could even strike would prevent all the above-mentioned losses. However, if this doesn't work then the resources that are being invested in this mechanism can be used for an alternate effective measure. The process of profiling is based on an assumption that criminals or terrorists are different from the rest of the population. Now, it is well settled that terrorists are rational actors and no evidence

proves the contrary i.e. they are insane or crazy⁶³. However, there can be certain personal or behavioural characteristics that might set them apart. In the 19th century, profiling was used to locate ‘Jack the Ripper’ who was responsible for killing of a number of women in London which is believed to be the origin of profiling as a tool to identify terrorists.

Profiling was used in another historical case when from 1940 to 1956 more than 30 bombs were placed by an individual who was referred to as ‘Mad Bomber’ in public places. He escaped authorities and alluded the investigators for 16 years until 1956 when a psychiatrist, James Brussel drew up a profile of the suspect that helped the investigators catch him when he was in his 50s. Early examples of profiling and data mining can also be found in Germany when the German Federal Criminal Police Office along with President, Horst Harold in the 1970s made efforts to identify terrorists from Red Army Faction. After a lot of efforts on the part of the federal police, only one member of the organization was arrested which can’t be labelled as a success⁶⁴. The academic evidences also suggest that it is impossible to carry out personal profiling and that terrorists besides being rational are not very different from rest of the population.⁶⁵

⁶³ Ibid 26.

⁶⁴ Ibid 29.

⁶⁵ Dr. Randy Borum, *Psychology of Terrorists*, University of South Florida tampa Department of Mental Health Law and Policy (14 December 2007).

3.3.2 DE-RADICALISATION OF TERRORISTS

De-radicalisation as defined by John Horgan⁶⁶ means “a social and psychological process whereby an individual’s commitment to, and involvement in violent radicalization is reduced to the extent that they are no longer at risk of involvement and engagement in violent activity.” Thus, de-radicalisation is a program or process by which individuals or groups are counselled in order to help them disengage themselves from radical or extremist groups they are a part of. In 2010, a report was compiled by Angel Rabasa and his colleagues at RAND corporation which advocated in favour of de-radicalisation and stated that “this is a simple fact that can be observed. Just as there are processes through which an individual becomes an extremist, there are processes through which an extremist comes to renounce violence, leaves a group or movement, or even rejects a radical worldview.”⁶⁷ However, whether this process of de-radicalisation is effective is contested.

There are nonetheless individuals who have been de-radicalised in the past. Daveed Gartenstein-Ross who worked for Wahhabi charity which was an organization that used to provide financial aid to Al-Qaeda has now mastered the art of de-radicalisation and is a scholar in the field of terrorism and counterterrorism studies. He is currently the senior advisor on asymmetric warfare at the Foundation for Defense of Democracies (FDD) based in Washington. Another example of a successful de-radicalisation process

⁶⁶ John Horgan, ‘Beyond Terrorism: Deradicalization and Disengagement from Violent Extremism’ (IPI publications, International Peace Institute, 2008).

⁶⁷ Angel Rabasa, Stacie L. Pettyjohn, Jeremy Ghez, Christopher Boucek, ‘Deradicalizing Islamist extremist’ (ISBN 978-0-8330-5090-8, National Security Research Division, RAND corporation, 2010).

is that of Norman Benotman who was involved as a leading figure in the Libyan Islamic Fighting Group active in Afghanistan. After the success of his de-radicalisation process, he wrote an open letter to Osama Bin Laden in 2010 suggesting him to hold back on violence and reconsider his goals and strategy. He is currently a senior analyst at the British Quilliam Foundation. Further, Henry Robinson, who was a part of Official Irish Republican Army in 1979 left the group and co-founded the foundation of Families Against Intimidation and Terror (FAIT) in 1990. Apart from individual processes, there are de-radicalisation programs aimed at collective de-radicalisation.

De-radicalisation is broadly of two kinds: one that focuses on individuals using psychological and religious counselling approaches to de-radicalisation and the other that aims at collective de-radicalisation by employing political negotiation techniques in order to obtain a change of mind and seek abstinence from violence in any form. This includes measures such as ceasefires, decommissioning arms etc. Many de-radicalisation programs are being carried out in Europe that are aimed at de-radicalisation of right wing extremists, especially in Sweden, Germany, Norway, Denmark etc. The exit model that is used in Sweden and Norway is a five phase process beginning with motivation and ending with disengagement. In Indonesia, the de-radicalisation programs are aimed at the prisoners while in Colombia, members of the FARC are also de-radicalised along with the prisoners.

A survey conducted by the Institute for Strategic Dialogue wherein the institute studied 30 different cases of de-radicalisation from all across the world, revealed that, under

certain conditions, de-radicalisation programs can be effective.⁶⁸ The de-radicalisation programs are primarily aimed at disengagement of terrorists from radical activities and although there are few graduates of such programs that return to violence, these programs are somewhat successful since they process a large number of detainees and only a few of them return to radical means.

3.3.3 DECAPITATION OF TERRORIST ORGANIZATIONS

Decapitation is regarded as a harsher and more violent form of counterterrorism measure. This involves arresting and sometimes killing the key leaders or individuals of a terrorist organization. Many states including the United States and Israel regard this measure as an effective strategy to combat terrorism since it is believed that successful terrorist organisations highly depend on effective leadership and when the leaders are obliterated from these organisations, it weakens them. This is because looking for a new leader demands a lot of time and energy, there are high chances that the leader might be ineffective due to lack of experience and because of the idea of charismatic leadership, especially in cases of religiously motivated terrorist organisations for these leaders play a significant role in explaining and safeguarding the ideologies of those groups. Some examples of charismatic leaders include Osama Bin Laden, leader of the Japanese Aum Sect etc. Thus, many think that decapitation would destabilize a terrorist organization leading to its withdrawal from radical activities.

⁶⁸ Institute for Strategic Dialogue, *Tackling Extremism: De-radicalization and Disengagement* (Conference Report, Copenhagen, 8-9 May 2012).

In 2012, one of the prominent scholars who looked into decapitation strategy, Brian Price wrote that "decapitation tactics which are designed to kill or capture the key leaders of a terrorist group feature prominently in counterterrorism strategies of many states. It's a widely practiced counterterrorism measure that has been used around the globe, and after successful arrests or killing of key leaders, very often politicians claim this success by stating that terrorist organisation has been dealt with a big blow."⁶⁹ There are a few groups that have been confronted with this strategy. In 2011, Alfonso Cano who was the leader of a rebellious terrorist organisation, FARC that was active in Colombia was arrested and killed; a number of leaders were killed in France and Spain; the leader of the Basque separatist organization; in 2012, many leaders including Izaskun Lesaka were arrested; and the famous Neptune Spear operation of 2011 that killed Al-Qaeda leader Osama Bin Laden in Pakistan are a few examples of success of this counterterrorism strategy.

In 2009, Jenna Jordan studied 300 cases where decapitation strategy was used to fight terrorism during the period starting from 1945 and ending in 2004. She concluded that the age, size and the type of the groups are determinants of the effectiveness of this measure. The older and larger the group, the lesser would be the impact whereas smaller and newer groups would be destabilized if confronted with this strategy. It was also yielded in her research that religiously inspired terrorist organisations are to an extent resilient to decapitation and separatist groups weren't affected by this strategy almost 90% of the time. However, ideological organizations such as the left or right wing terrorist organizations were destabilized in 17% of the cases. It was only in 7% of the

⁶⁹ Price, Bryan C. 'Targeting Top Terrorists: How Leadership Decapitation Contributes to Counterterrorism' (2012) vol. 4 no. 36, *International Security*) 9-46.

cases that decapitation worked and that too didn't lead to rise in the decline rate of these terrorist organisations and therefore, she concluded that decapitation as a counterterrorism strategy stands ineffective.⁷⁰ In 2012, Brian Price said that this measure holds a significant place in many counterterrorism strategies. He further stated that many academicians found this strategy to be ineffective or counterproductive because they studied the consequences in short run, he however analysed the impacts of this measure in long run. He yielded that the strategy led to a significantly higher mortality rate of the terrorist group even though only 30% of the groups ceased to operate. Further, contrary to Jenna Jordan's research, he says that religious terrorist organisations were found to be less resilient to the measure and according to him they were easier to destroy when compared with nationalist groups.⁷¹

Since the two researches present contrasting analysis, it can be concluded that the success of decapitation depends on the context i.e. it works in one case and proves to be counterproductive in the other and that there isn't any single solution that fits all. Thus, the success is determined by the kind of organisation that is attacked and its modus operandi. Unsuccessful attempts at this strategy include Rote Armee Fraktion in Germany and Israel of Hamas while the successful attempts include Aum Sect from Japan, Shining Path in Peru and Real Irish Republican Army.

⁷⁰ Jordan, Jenna. 'When Heads Roll: Assessing the Effectiveness of Leadership Decapitation' (2009) vol. 18 no. 4 (Security Studies, Clingendael Institute, 2006) 719–755.

⁷¹ Ibid 68.

CHAPTER – 4

STATE POLICY ON HUMAN RIGHTS IN COUNTERTERRORISM REGIME: INDIA AND THE USA

Terrorism, which has a devastating impact on the exercise of rule of law, natural rights and human rights, is a complicated problem to address owing to the multifaceted and contested nature of terrorism; and the governments have an obligation to secure their subjects from the horrendous effects of terrorism. While responding to terrorism, however, the governments must foster respect to human rights obligations so as to secure the spirits of both the rule of law and principles of natural justice, as future acts of terrorism might emanate from such violations. As discussed in Chapter – 2, terrorism thrives in environments where human rights aren't respected⁷² which makes it essential to accommodate human rights protections under counterterrorism regimes, that aren't to be considered as being located at opposite poles. Rather in order to achieve in the fight against terrorism, human rights protection is a must. Further, human rights are for all, even the persons suspected of acts of terror or the convicted terrorists and the states can't turn a blind eye to that.

Realizing this, the international community has been making efforts to ensure human rights protection in the domestic counterterrorism regime of the member states by way of resolutions and other instruments. Many states, however, have enacted draconian

⁷² Secretary-General, High-level Panel on Threats, Challenges and Change, *A Secure World: Our Shared Responsibility* (2004) session 59 agenda item 55 (A/59/565) para 21.

regimes to counter terrorism stating that in times of emergency and a threat to national security, certain human rights violations are ineluctable. This is because under no circumstances, states are willing to risk their national security and go soft on the issue of terrorism even if it would sabotage human rights. Unfortunately, in much of the former colonial states, including India, the post-independence governments have majorly preserved the authoritarian aspects of the colonial legislation while formulating their security and counter-terrorism laws.⁷³ The USA as well, following the cold war, turned out to be authoritarian.⁷⁴

⁷³ Anil Kalhan, Gerald P. Conroy, Mamta Kaushal, Sam Scott Miller and Jed S.Rakoff, *Colonial Continuities: Human Rights, Terrorism, And Security Laws In India* (2005) ABCNY India Report.

⁷⁴ Osita G. Afoaku, U.S. Foreign Policy and Authoritarian Regimes, 'Change and Continuity in International Clientelism, journal of third world studies' (Political and Economic Developments in the Third World, 2000) vol 17 no 2.

4.1 INTERNATIONAL FRAMEWORK

Following the 9/11 terror attack, the international community has been actively enacting resolutions to counter terrorism. Resolution 1373 was one such resolution that even established Counter Terrorism Committee to assist and supervise the member states in their adoption of the guidelines prescribed in the resolution. Ever since the adoption of this resolution, there has been a significant proliferation of security legislations to fight terrorism all across the globe. The majority of the countries, in order to comply with the obligations that were set forth in the resolution have gone too far and have created negative implications for fundamental freedoms and civil liberties. The international community has therefore been making an effort to ensure that counterterrorism legislations and other measures of the states comply with their human rights obligations under international law, particularly under refugee law, humanitarian law and human rights law. It is due to the committed efforts of the international community that the “member states have resolved to take measures aimed at addressing the conditions conducive to the spread of terrorism, including lack of rule of law and violations of human rights, and ensure that any measures taken to counter terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law.”⁷⁵

In 2005, the General Assembly adopted the World Summit Outcome wherein the question of human rights protection while countering terrorism held place. The international community, reflecting upon the significance of respecting human rights in

⁷⁵ United Nations Global Counter-Terrorism Strategy, Resolution 60/288, General Assembly.

order to effectively obliterate terrorism, concluded that the states have to draft regimes to fight terrorism that is in conformity with international law, including the regime for human rights protection. The Security Council has also played its part in ensuring respect for human rights by the state parties while complying with their obligations under the international counterterrorism framework. In 2003, the Security Council passed a resolution that stated that “states must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.”⁷⁶ In 2005, the Security Council reaffirmed this position in another resolution.⁷⁷

Starting from 1972, the General Assembly has passed a series of resolutions asking the state parties to comply with obligations stipulated under the human rights law while dealing with terrorism.⁷⁸ Security Council too, exercising the power entrusted with the council by the UN Charter under chapter VII, has passed resolutions that require state parties to comply with their human rights obligations while combatting terrorism in order to ensure international peace and security.⁷⁹ The Counter-Terrorism Committee reiterated this position in its report to the Security Council.⁸⁰ The Counter-Terrorism Implementation Task Force was also established by the Secretary General in 2005 in order to carry out the coordination between and among the United Nation entities engaged in the efforts to counter terrorism. This implementation task force has developed a program and appointed working groups in order to assist the member states

⁷⁶ Security Council Resolution 1456 (2003).

⁷⁷ Security Council Resolution 1624 (2005).

⁷⁸ General Assembly Resolution 60/158, para. 1.

⁷⁹ Security Council Resolution 1456 (2003) para 6; Security Council Resolution 1624 (2005) para 4

⁸⁰ CTC report to Security Council (S/2005/800).

in compliance with the global strategy. One of the working groups is devoted to the protection of human rights which aims to support the member states in their efforts to promote and protect human rights while enacting the measures to counter terrorism and its functions include facilitating cooperation in terms of information on priority concerns of human rights⁸¹.

Further, the Counter-Terrorism Strategy was adopted by the General Assembly in 2006. It's a comprehensive global strategic framework that was passed in an attempt to preserve and protect human rights and the rule of law while combatting terrorism along with the provisions to counter terrorism and develop individual and collective capacity to tackle terrorism. The strategy requires the member states to comply with its provisions along with providing for assistance of the United Nations to the member states in their effort to comply with the provisions of the strategy⁸²

Moreover, there are other universal treaties under the international framework that require state parties to comply with their human rights obligations at all times. These include article 15 of the international convention against providing financial aid to terrorism or terrorist groups⁸³ that says "states are permitted to refuse extradition or legal assistance if there are substantial grounds for believing that the requesting State intends to prosecute or punish a person on prohibited grounds of discrimination"; the article 17 requires "the 'fair treatment' of any person taken into custody, including enjoyment of all rights and guarantees under applicable international human rights

⁸¹ Ibid 7 57, 58.

⁸² Lisa Oldring, *Human Rights and Criminal Justice Responses to Terrorism* (Vienna, August 2014) Counter-Terrorism Legal Training Curriculum, UNODC.

⁸³ International Convention for the Suppression of the Financing of Terrorism (1999).

law”; and article 21 is “a catchall provision making it clear that the Convention does not affect the other rights, obligations and responsibilities of States.”⁸⁴

These efforts by the international community have emphasized on the importance of preservation and protection of fundamental freedoms and other human rights while dealing with terrorism and have had, if not binding, but a persuasive effect which has pushed these member states, including India and USA, to foster due importance and respect to such rights. However, the ICCPR does provide for some derogations in case of national emergencies to the extent required by the exigencies of the situation. Nevertheless, this derogation should only be temporary in nature and the provision shouldn't be interpreted as implying any right to engage in violation of human rights.⁸⁵

⁸⁴ Ibid 7 57, 58.

⁸⁵ International Covenant on Civil and Political Rights (1966) arts 4,5.

4.2 SPECIFIC HUMAN RIGHTS PROTECTION UNDER THE LEGAL SYSTEM OF INDIA AND THE USA VIS-À-VIS COUNTERTERRORISM

The spectrum of human rights concerns while countering terrorism is very broad, which makes an in-depth analysis of such concerns extremely difficult. However, emerging and prominent human rights violations due to counterterrorism regimes adopted by the states can be looked into. Thus, this section will deal with the specific human rights violations due to the counterterrorism regime and the obligations of states, in particular India and the USA, to protect and preserve such rights.

4.2.1 VIOLATION OF RIGHT TO LIFE

The right to life and personal liberty has been protected as a basic civil right or liberty by the constitutions of most of the states. Indian Constitution provides for this right under article 21 which says that “no person shall be deprived of his life or personal liberty except according to procedure established by law, nor shall any person be denied equality before the law or the equal protection of the laws within the territory of India.”⁸⁶

The bill of rights adopted by the USA also provides for this right under the fourteenth amendment right that stipulates that “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to

⁸⁶ The constitution of India (1950) art 21.

any person within its jurisdiction the equal protection of the laws.”⁸⁷ Thus, the two states are bound by a countervailing duty to protect the right to life and personal liberty.

It's a well-established fact that terrorism leads to the mass human rights violation. Besides the loss of life, forcing people to live in constant fear is also a violation of the right to life and liberty. However, as discussed in the previous chapters, states, in order to preserve national security, go too far and adopt a counterterrorism regime that in itself becomes a threat to the right to life. Provisions for targeted or deliberate killings imbibed in the legislative regime of many states, including India and the USA, as an alternative to detention and prosecution, in order to create deterrence among the members of terrorist organizations is one of the major challenges to the right to life and liberty.⁸⁸ In response to this it has been stated by the Human Rights Committee that “targeted killings should not be used as a deterrent or punishment and that the utmost consideration should be given to the principle of proportionality. State policies should be spelled out clearly in guidelines to military commanders and complaints about the disproportionate use of force should be investigated promptly by an independent body. Before any contemplation of resort to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted.”⁸⁹ Moreover, “the High Commissioner for Human Rights has emphasized the importance of ensuring that the entire law enforcement machinery, from police officers to prosecutors and officers operating detention and prison facilities, operates within the law. She has cautioned that, in the fight against terrorism, extreme vigilance

⁸⁷ Fourteenth amendment right, Bill of rights, USA (1868).

⁸⁸ Ibid 7 57, 58.

⁸⁹ Report of the Human Rights Committee (A/58/40, 2003) vol 1 para 85 (15).

should be applied by those in a position of authority against all forms of abuse of power, and that they should instil a culture of respect for the law above all by those entrusted with its application.”⁹⁰

Further, the states have even adopted ‘shoot to kill’ mechanisms even on the ground of suspicion upon which “the Special Rapporteur on extrajudicial, summary or arbitrary executions has reflected that ‘the rhetoric of shoot-to-kill and its equivalents poses a deep and enduring threat to human rights-based law enforcement approaches’. Much like invocations of ‘targeted killing,’ shoot-to-kill is used to imply a new approach and to suggest that it is futile to operate inside the law in the face of terrorism. However, human rights law already permits the use of lethal force when doing so is strictly necessary to save human life. The rhetoric of shoot-to-kill serves only to displace clear legal standards with a vaguely defined licence to kill, risking confusion among law enforcement officers, endangering innocent persons, and rationalizing mistakes, while avoiding the genuinely difficult challenges that are posed by the relevant threat. States that adopt shoot-to-kill policies for dealing with, for example, suicide bombers must develop legal frameworks to properly incorporate intelligence information and analysis into both the operational planning and post-incident accountability phases of State responsibility. They must further ensure that only such solid information, combined with the adoption of appropriate procedural safeguards, will lead to the use of lethal force.”⁹¹

⁹⁰ High Commissioner for Human Rights, Louise Arbour, ‘Keynote Address’ *A human rights framework for fighting terrorism* (Moscow State University/University of International Relations, 11 February 2005).

⁹¹ Report of the Special Rapporteur, Philip Alston, *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions: Extrajudicial, Summary or Arbitrary Executions* (E/CN.4/2006/53, 8 March 2006) session 62, Commission on Human Rights, ECOSOC para 45,51.

Since, the right to life is a non-derogable right under the international regime, as discussed in chapter 2, which can't be violated even in a situation of national emergency, the states are bound to protect and preserve the same.

4.2.2 VIOLATION OF RIGHT TO PROTECTION AGAINST TORTURE

Protection from torture, cruel and degrading treatment is regarded as a customary international law i.e. *jus cogens* or a peremptory norm by the international community from which no derogation or deviation is permitted.⁹² The Indian constitution, under article 21, provides for the right to life and liberty except according to the procedure established by law, thus providing protection from torture or any kind of assault and serving as deterrence against custodial violence.

Whereas the bill of rights adopted by the USA pins down under its eighth amendment that “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁹³ The USA, being one of the countries that ratified the convention against torture, is also bound by the same to protect the right to avail protection from torture. On the contrary, India though being a signatory to the convention hasn't ratified it yet.⁹⁴

⁹² International Covenant on Civil and Political Rights (1966) a 7, 4(2); European Convention on Human Rights (1998) arts 3, 15(2); American Convention on Human Rights (1978) arts 5, 27(2); African Charter on Human and Peoples' Rights (2004) art 5; and common article 3 of the four Geneva Conventions; *Prosecutor v. Furundžija* (IT-95-17/1, 1998) para 144.

⁹³ Eighth amendment right, Bill of rights, USA (1791).

⁹⁴ USA ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 21st October, 1994 while India became a signatory to the same on 14th October, 1997.

States, however, in order to fight terrorism have often resorted to torturous means to extract information from suspects of terrorist activities during their interrogation even when “the use of torture and other cruel, inhuman or degrading treatment to elicit information from terrorist suspects is absolutely prohibited, as is the use in legal proceedings of evidence obtained by torture, whether at home or abroad, and of ‘secret evidence’ put forward by prosecuting and other authorities in judicial proceedings, in violation of the principle of non-admissibility of evidence extracted by torture, contained inter alia in article 15 of the Convention against Torture.”⁹⁵ Further, the states are required to foster respect to the torture convention even when the suspects aren’t their nationals which can be inferred from the statements of various international actors or institutions. For example, the Human Rights Committee has said that “the rights enshrined in the International Covenant on Civil and Political Rights apply to all persons who may be within a State party’s territory and to all persons subject to its jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant, including the absolute prohibition of torture, to anyone within its power or effective control, even if not situated within its territory.” Similarly, the International Court of Justice is of the view that, “while the jurisdiction of States is primarily territorial, the rights enshrined in the Covenant extend to acts done by a State in the exercise of its jurisdiction outside its territory.”⁹⁶

Furthermore, the states have been evicting or deporting foreign nationals to their countries of origin or past residence as a measure against terrorism, especially after the

⁹⁵ Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (A/61/259) para 44-65.

⁹⁶ Ibid, para 111.

9/11 attack. These foreign nationals even include refugees or asylum seekers who had faced and fled persecution in their countries of residence of origin, and sending them back to places where they would be at risk of facing torture or ill-treatment would be a violation of the ‘principle of non-refoulement’ that has been laid down under article 33 of the 1951 convention relating to the status of refugees and under article 3 of the torture convention.⁹⁷

The international community has also showed its concern over extradition of accused under terrorist acts to states where they would face the risk of torturous or disproportionate treatment including undue imposition of death penalty, as can be seen from “article 7 of the International Covenant on Civil and Political Rights, which the Human Rights Committee, in its general comment N° 20 (1992), has interpreted to include an obligation on states not to expose individuals to ‘the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.’⁹⁸ and according to general comment N° 31, article 2 of the Covenant also entails an obligation on states ‘not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm... either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.’ It is well established in international law that the

⁹⁷ UN High Commissioner for Human Rights, *Promotion and Protection of Human Rights: Protection of Human Rights and Fundamental Freedoms while Countering Terrorism* (E/CN.4/2005/103, 7 February 2005) para 52.

⁹⁸ *Soering v. United Kingdom* App no 14038/88 (ECHR, 7 July 1989).

prohibition of refoulement is absolute if there is a risk of torture or other cruel, inhuman or degrading treatment.”⁹⁹

4.2.3 VIOLATION OF THE RIGHT TO A FAIR TRIAL AND DUE PROCESS

The human rights protections in a criminal justice system require the presumption of innocence until established otherwise, the right to a trial by a fair and competent authority, the right to avail legal assistance, the right to have a conviction order or any other sentence reviewed by a higher authority which is fair, impartial and competent in that regard etc. The international framework includes specific provisions in that regard.¹⁰⁰ Commenting on the same, the Human Rights Committee has said that “the right to a fair trial and equality before the courts and tribunals is a key element of human rights protection and serves to safeguard the rule of law by procedural means. Article 14 of the Covenant aims at ensuring the proper administration of justice and to this end guarantees a series of specific rights, including that all persons should be equal before the courts and tribunals, and that in criminal or civil cases everyone has a right to a fair and public hearing by a competent, independent and impartial tribunal, that everyone charged with a criminal offence should have the right to be presumed innocent until proved guilty according to law, and that everyone convicted of a crime should have the right to have his or her conviction and sentence reviewed by a higher tribunal according to law.”¹⁰¹

⁹⁹ European Court of Human Rights, *Chahal v. United Kingdom* (no 22414/93, 15 November 1996); Louise Arbour, ‘In our name and on our behalf’, *International and Comparative Law Quarterly*, vol. 55 no 3 (July 2006) 511.

¹⁰⁰ ICCPR (1966) art 14.

¹⁰¹ General Comment no 32, Human Rights Committee (July 2007).

Further, the international community has also reflected on the concerns over special or military tribunals for the disposal of cases related to terrorism. It was yielded that “the use of military and special tribunals or courts to try terrorist suspects may also have a serious impact on due process rights, depending on the nature of the tribunal or court and any restrictions placed on a person facing charges before it.”¹⁰² In addition to this, special tribunals might lead to delayed disposal of matters since they are often few in number as compared to the persons accused, which is also an abrogation of the right to due process.

Both the Indian constitution and the bill of rights adopted by the USA protect this right to due process and fair trial, thus obligating the two states to foster respect to the same during combating terrorism.¹⁰³

4.2.4 VIOLATION OF RIGHT TO PRIVACY

Right to privacy has been recognized as a fundamental right within the scope of Article 21 or right to life and liberty, Article 14 or right to equality and equal protection of law and Article 19 or right to freedom¹⁰⁴. The Bill of Rights adopted by the USA in its “fourth Amendment protects the right of privacy against unreasonable searches and seizures by the government and in the fifth Amendment provides for the right against

¹⁰² African Commission on Human and Peoples’ Rights, *Media Rights Agenda v. Nigeria, communication* (no 224/98, 1998) para 59–62; Inter-American Court of Human Rights, *Castillo Petruzzi et al. v. Peru* (30 May 1999) para 128–131, 172.

¹⁰³ Constitution of India (1950) arts 21, 22; Bill of Rights, USA (1791) amendment right 5.6.

¹⁰⁴ *K.S. Puttaswamy and anr. v Union of India* (AIR 2017 SC 4161).

self-incrimination, which justifies the protection of private information.” Thus, a combined reading of the two amendment rights obligates the USA to preserve privacy rights. The right to privacy has also been recognized by the international community under Article 17 of the International Covenant on Civil and Political Rights (ICCPR). Article 17 of ICCPR “prohibits state parties from interfering with the privacy of those within their jurisdiction and requires them to protect those persons by law against arbitrary or unlawful interference with their privacy. Privacy includes information about an individual’s identity, as well as the private life of the person.”¹⁰⁵

Many states, in order to preserve their national security, have increased the level of security at places where the threat of terrorism is more such as in airports and this security even involves collection of biometrics, passport details, photographs etc. Thus, limiting the privacy of a person and raising questions as to how that data is to be protected. This right to privacy also gets compromised during mass surveillance or surveillance of individuals on mere grounds of suspicion by the competent authorities. Further, the absence of any law directing the method by which the surveillance is to be conducted, leads to the adoption of arbitrary measures by the administration.¹⁰⁶

¹⁰⁵ Human Rights Committee, views on communication, *Coeriel et al. v. the Netherlands* (453/1991) A/50/40 vol 2 annex 10 s D (31 October 1994).

¹⁰⁶ *Ibid* 7.

CHAPTER – 5

COUNTERTERRORISM REGIME IN INDIA AND THE USA: A COMPARATIVE STUDY

Both India and the USA are constitutional democracies that have adopted legal systems greatly influenced by the British common law system. India's constitution, having remarkable resemblance with that of the USA, imbibed constitutionally protected fundamental rights from the USA's constitution.¹⁰⁷ Therefore, India is very often considered to be the 'constitutional offspring' of the USA.¹⁰⁸ India has also incorporated the constitutional criminal procedure recognized by the bill of rights of the USA which includes "providing criminal defendants with safeguards prior to conviction for certain offences; guaranteeing defendants freedom from being charged for retroactive crimes, double jeopardy, and self-incrimination; providing defendants the right to know the grounds of their arrest, a right to legal counsel when detained, access to free legal counsel if deemed indigent, and the right to appear before a magistrate within twenty-four hours of arrest."¹⁰⁹

However, the drafters of the Indian constitution differed from that of the US constitution in two aspects i.e. they didn't provide for a specific clause for 'due process of law' unlike the bill of rights other than hinting towards the presence of an element

¹⁰⁷ Vijayashri Sripati, 'Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)' 14 Am. U. Int'l L. Rev (1998) 413, 422.

¹⁰⁸ Ibid.

¹⁰⁹ Manas Mohapatra, 'Learning Lessons from India: The Recent History of Antiterrorist Legislation on the Subcontinent', The Journal of Criminal Law and Criminology, vol 95 no 1 (2004) 315-344.

of due process by providing “no person shall be deprived of life or personal liberty except according to procedure established by law”¹¹⁰, and they made a provision allowing preventive detention.¹¹¹ The latter has led to contrasting anti-terror laws in India as against the USA. However, this difference doesn’t frustrate the utility of comparing the counterterrorism regimes of the two countries.

The USA strengthened its legislative regime against terrorism following the most dreadful terror attack on its soil. “In addition to the 3000 fatalities suffered in New York, Washington D.C., and Pennsylvania, the casualties reached a figure that exceeded the number of fatalities from any previous terrorist attack by a factor of ten”¹¹² and “the direct economic costs of the terrorist attacks of September 11th, 2001, was estimated to be over \$100 billion dollars.”¹¹³ Similarly, India enacted a new legislation following the 2001 attack on the Parliament when “halfway across the world from the mourning United States, a group of heavily armed militants attempted to storm India’s Parliament in New Delhi, triggering off a firefight in which five of the attackers and fourteen innocents were killed.”¹¹⁴ India’s legislation was further strengthened in the aftermath of 2008 Mumbai terror attacks “when armed terrorists attacked a dozen locations in Mumbai, including two luxury hotels, a hospital, the railway station, a restaurant, and a Jewish center; they killed as many as 159 people, both Indians and

¹¹⁰ The constitution of India (1950) art 21.

¹¹¹ The constitution of India (1950) art 22 (cl. 4-7).

¹¹² Paul R. Pillar, ‘Address at the College of William and Mary’, *Fighting International Terrorism: Beyond September 11* (28 November 2001) <http://www.cia.gov/nic/PDF_GIF_speeches/wmspeechNov01.pdf> accessed 23 June 2022.

¹¹³ Department of Defense, *Budget Priority for Fiscal Year 2004: Hearing Before the Committee on the Budget House of Representatives* (108th Congress 4 (2003)) (prepared statement for Paul Wolfowitz) <<http://www.house.gov/budget/hearings/wolfowitzstmt022703>> accessed 23 June 2022.

¹¹⁴ ‘India on High Alert After Attack on Parliament’, *Agence France Presse* (13 December 2001); ‘Six Gunmen Open Fire on Indian Parliament’, *Oakland Tribunal* (13 December 2001).

foreigners, and gravely wounded more than 200. The assault, known as 26/11, scarred the nation's psyche by exposing the country's vulnerability to terrorism."¹¹⁵

India, though being different from the USA in terms of population and socio-economic conditions, "the fact that the agents of many of the more recent acts of terrorism in India belong to the same group that has been named responsible for the September 11th attacks gives more credence to the notion that there may be some similarity between India's and USA's response to terrorism."¹¹⁶ Apart from international terrorism, both countries have a long and continual history of responses to internal or domestic terrorism, which also gives more credence to the utility of this comparison.

¹¹⁵ Rohit Deshpande and Anjali Raina, 'The Ordinary Heroes of the Taj', *Organizational Culture*, Harvard Business Review <<https://hbr.org/2011/12/the-ordinary-heroes-of-the-taj>> accessed 30 May 2022).

¹¹⁶ Ibid 85.

5.1 ANTI-TERROR REGIME IN INDIA

The legislative framework of India to counter terrorism finds its roots in the British preventive detention act of 1793.¹¹⁷ By way of this act, “the East India Company authorised the government to secure and detain in custody any person or persons suspected of carrying on[...] any illicit correspondence dangerous to the peace or safety of any of the British settlement or possession in India[...].”¹¹⁸ After India gained its independence, the framers of the constitution believed that this provision for preventive detention would safeguard the country from any communal riots or other social unrest; therefore, a provision in this regard was incorporated into the constitution.¹¹⁹ India also inherited various legislative and institutional frameworks from the British government that dealt with criminal law, procedure and policing. However, these frameworks were not designed to deal with heinous crimes of terror. Furthermore, following the footprints of the British government, India has periodically enacted, amended, repealed and re-enacted its anti-terror legislations.

In the Indian context, terrorism has been inspired by political, ideological, ethnic and religious considerations that tend to destroy the social construction. Thus, the terrorism found in India includes ethno-nationalist, cross border, narco, religious and left-wing. India has faced many acts of terrorism in the past including the 2008 Mumbai terror attacks, 2016 Uri Attack and 2017 Amarnath Yatra attack and such activities are

¹¹⁷ Vinay Lal, ‘Normalisation of Antiterrorist Legislation in Democracies: Comparative Notes on India, Northern Ireland, and Sri Lanka’, *Manas: History And Politics*, <http://www.sscnet.ucla.edu/southasia/History/Independent/anti_t> accessed 30 May 30 2022.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid* 85.

majorly centric in the North-eastern states, Jammu and Kashmir, and central India where Maoists remain active which is why one of the first legislations with respect to terrorism in India was the Armed Forces (Special Powers) Act of 1958.¹²⁰

5.1.1 ARMED FORCES (SPECIAL POWERS) ACT, 1958 (AFSPA)

The Parliament has enacted AFSPA to grant special powers to the armed forces in the northeastern states in areas that are declared as ‘disturbed areas’ in order to keep a check on the insurgency. These provisions were later extended to Jammu and Kashmir in 1990 by enacting the Armed Forces (Jammu and Kashmir) Special Powers Act. These special powers include the right to shoot or to kill, to raid houses, destroy any property that is likely to be used by insurgents, and to arrest without warrant, a person who has committed or even is about to commit a cognizable offence even on reasonable suspicion¹²¹. Further, despite the requirement of production of the accused before the magistrate within 24 hours, the act has allowed the armed force personnel to detain a suspect for days or even for months without producing them in front of the magistrate.¹²²

These provisions are draconian as incidents of grave breaches of human rights have been witnessed in such areas due to abuse of power by army officers and center and

¹²⁰ South Asia Human Rights Documentation Centre, ‘Armed Forces Special Powers Act: A Study in National Security Tyranny’ s 4 <http://www.hrdoc.net/sahrdc/resources/armed_forces.htm> accessed 28 May 2022.

¹²¹ Armed Forces (Special Powers) Act (1958) s 4.

¹²² Ibid 89.

state police personnel. Apart from excessive powers, AFSPA even provides such officers, immunity from prosecution¹²³. “Human rights organisations interpreted AFSPA as giving law enforcement and military a ‘license to extra judicially execute innocent and suspected persons under the disguise of maintaining law and order’ and despite the extraordinary power given to the armed forces and the police, AFSPA has ‘manifestly failed’ in solving the problems caused by the insurgency and has further isolated the residents of the troubled region from the central government. This pattern of increased legislation broadening police powers has continued to the present day, despite the lack of substantive evidence that the increase in power has led to a decrease in the targeted problem, be it insurgency or incidents of terrorism.”¹²⁴

5.1.2 UNLAWFUL ACTIVITIES PREVENTION ACT, 1967

Soon after the enforcement of the constitution of India, it underwent its first amendment in 1951. Following this amendment, the judiciary in order to uphold basic liberties and fundamental freedoms, passed various judgements stating that certain fundamental rights are quintessential to human existence including the right to life and thus, can't be abrogated by the state.¹²⁵ The parliament, in order to prevent any abuse of the fundamental rights guaranteed by the constitution, modified article 19(2) to include the term ‘reasonable’ before restrictions and ‘public order’ as an additional ground for abridging fundamental rights.¹²⁶ It was as a result of this amendment to the constitution

¹²³ Armed Forces (Special Powers) Act (1958) s 6.

¹²⁴ Ibid 89.

¹²⁵ *Kesavanada Bharti v. State of Kerela* (AIR 1973 SC 1461), *Minerva Mills Ltd. v. Union of India* (AIR 1980 SC 1789), *Waman Rao v. Union of India* (1981 2 SCR 1), *IR Coelho (dead) by Lrs v. State of Tamil Nadu* (AIR 2007 SC 861).

¹²⁶ The Constitutional (First Amendment) Act (1951).

that article 19 was steadily and gradually constricted which contributed to the enactment of the Unlawful Activities Prevention Act, 1967. The amendment to article 19 was brought due to the loss of the Indian army in the Sino-Indian war and the threat of secession of Tamil Nadu from India since DMK contested the election with secession being a part of its manifesto. The UAPA was primarily enacted to declare 'unlawful' the assemblies or associations that sought secession from India. Section 3 of the act made a provision in this regard that entrusted the central government with the power to enlist any association as unlawful and impose a ban on the same. The act provided for the declaration of associations as unlawful, adjudication by tribunals, penalties for members of associations etc.

5.1.3 TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT, 1987

TADA was the second major statute to curb terrorist practices and was originally adopted in 1985 in the backdrop of the Punjab insurgency to halt the Khalistani movement, which was to operate throughout India for two years. However, the Indian government extended the act in 1987 for a term of another six years, with strengthened provisions, looking at the havoc created due to terrorism. The act specifically dealt with terrorism and had more stringent provisions as compared to UAPA. The act sought to criminalise the act of terrorism and provided for penalties, including penalties for concealment or harbouring of a terrorist and abetting an act of terrorism. Since, during its initial operation for two years, the act didn't yield results that were expected by the

government, the powers given to the law enforcements were expanded in 1987 and the act was made even more stringent.

Subsequently, the constitutional validity of the act was challenged in *Kartar Singh v. State of Punjab*¹²⁷ on the ground that it violated article 246 and 7th schedule of the constitution since 'public order' is a state subject. The court, however upholding the constitutional validity of the act, held that terrorism would fall within the ambit of 'national defence', which is included within the legislative domain of the union.

The act was also challenged in the aforesaid case for being draconian in nature in terms of the high probability of its abuse by the authorities. It was contended in the Hon'ble Supreme Court of India that "*many of the stringent provisions of TADA were likely to be abused by the police. In particular, the provisions relating to the confession made to the police may lead to illegal extraction of confessions by the police; and the provision relating to the grant of bail were violative of human rights and the fundamental rights guaranteed by the Constitution of India.*"¹²⁸

Besides upholding the constitutional validity, the court took note of this fact and therefore made an effort to ensure that authorities do not abuse the provisions of the act by setting out certain guidelines with respect to confessions. It was held by Justice Pandian, "*in order to ensure a higher level of scrutiny and applicability of TADA Act, there must be a screening Committee or a Review Committee constituted by the Central*

¹²⁷ *Kartar Singh v. State of Punjab* (1994 SCC (3) 569).

¹²⁸ *Ibid.*

*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."*¹²⁹ Moreover, TADA defined abetment under section 2(1)(a)(ii) as "the passing on of any information likely to assist [. . .]terrorists" which was struck down by the supreme court in this judgment for being too broad to even criminalize associations with a terrorist without any criminal intent.

This was the first major step taken by the judiciary in order to safeguard fundamental rights and freedoms as against preserving national security concerning acts of terrorism. However, by the end of June 1994, around 76,000 people had been arrested under the act.¹³⁰ Out of these, only 35% of the matters went to trial and it was in 95% of the times that the accused was acquitted while less than 2% of the accused persons that went for trials were convicted.¹³¹ Subsequently, following controversies over the act, it was repealed and succeeded by the Prevention of Terrorist Activities Act, 2002.

¹²⁹ Ibid, para 265.

¹³⁰ Zaidi, S. Hussain, *Black Friday – The True Story of the Bombay Bomb Blasts* (Mumbai, 2002) Penguin Books (ISBN 978-0-14-302821-5).

¹³¹ Ibid.

Nevertheless, people booked under the act continued to languish in prisons even after the repeal of the act.

5.1.4 PREVENTION OF TERRORISM ACT, 2002

Seven years after repealing TADA for being ineffective and draconian, legislature came up with the Prevention of Terrorism Act, 2002 which was even more stringent.¹³² The act was passed in the backdrop of the 1999 hijack and the 2001 attack on the Parliament when the need for a stringent legislation to deal with terrorism was felt. However, the act received nationwide criticism, especially from human rights organizations, as they argued that the act violated the guarantees of fundamental rights imbibed in the constitution. On the other hand, the act was supported by a few for being effective in ensuring a speedy trial of the accused persons under the act.

POTA defined terrorist acts and provided for special powers to the investigating authorities and therefore served as a framework to strengthen administrative regime to suppress terrorism. The most striking feature of the act was that it provided for certain safeguards to ensure preservation and protection of human rights. These include requirement of sanction of the central government before taking cognizance of an offence by any court, investigation was permissible only by an officer of or above the rank of Deputy Superintendent of Police, admissibility of confessions made to the

¹³² Human Rights Watch, *In the Name of Counter-Terrorism: Human Rights Abuse Worldwide* (2003) 15, session 59, UN Commission on Human Rights <<https://www.hrw.org/legacy/un/chr59/counter-terrorism-bck.pdf>> accessed 24 June 2022.

police officer in the court only when the accused was presented before the magistrate within 48 hours with the confessional statement, provision for penalising officers acting maliciously etc. However, certain provisions of the act led to gross misuse of the act by the authorities. These provisions include a 180-day detention period without the necessity of filing of charges, treatment of confession made to a police officer as an admission of guilt which is contrary to the principles of criminal justice system in India, power of law enforcement agencies to withhold identities of witnesses etc. The act was challenged subsequently in *People's Union for Civil Liberties v Union of India* in 2004 for being in violation of the constitution with respect to legislative powers of the union. The court held that “the Parliament possesses power under Article 248 and entry 97 of list I of the Seventh Schedule of the Constitution of India to legislate the Act. Need for the Act is a matter of policy and the court cannot go into the same.”¹³³ The court nonetheless also held that “if human rights are violated in the process of combating terrorism, it will be self-defeating.”¹³⁴ This shows that the approach of judiciary has been pro human rights while dealing with terrorism.

Further, the court addressed specific issues in the act in subsequent challenges. In *Sri Indra Das v State of Assam*, the court “read down Section 10 of UAPA and Section 3(5) of TADA, both of which made mere membership of a banned organisation, criminal. The Court held that a literal interpretation of these provisions would make them violative of Articles 19 and 21 of the Constitution.”¹³⁵ This was a reiteration of the previous decision of the court in *Arup Bhuyan v State of Assam* wherein the court

¹³³ *People's Union for Civil Liberties v Union of India* (Writ Petition (civil) 389 of 2002).

¹³⁴ *Ibid.*

¹³⁵ *Sri Indra Das v State of Assam* (Criminal Appeal No. 1383 of 2007).

held that “mere membership of a banned organisation will not make a person a criminal unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence.”¹³⁶ The act was criticised by many human rights and civil liberty groups and was consequently repealed by the UPA government after coming to power in 2004 since it committed to repealing the act as a part of its campaigning process.

5.1.5 AMENDMENTS TO UNLAWFUL ACTIVITIES PREVENTION ACT, 1967 (2004, 2008 & 2019)

Presently, the primary act that deals with terrorist activities is the Unlawful Activities Prevention Act, 1967 (UAPA) which was amended in 2004 to include chapters dedicated to terrorist activities and subsequently amended in 2008 and 2019. There are certain provisions in the act that attribute draconian character to it and have attracted criticism from all across the country. The 2008 amendment to the act introduced section 43D which states that every offence covered by the act should be cognizable in nature¹³⁷ and that it authorises police custody of the accused for upto 30 days as opposed to 15 days as prescribed by section 167 of the Criminal Procedure Code, along with the extension of total detention period to 90 days under all circumstances, if the investigation isn't concluded within initial 30 days of police custody which is even extendable to 180 days, if the investigation isn't completed within 90 days provided the court is satisfied with the report submitted by the public prosecutor suggesting progress

¹³⁶ *Arup Bhuyan v State of Assam* (Criminal Appeal No(s). 889 of 2007).

¹³⁷ Unlawful Activities Prevention Act (1967) s 43D (1).

in the investigation¹³⁸. Moreover, the provision states that section 438 of CrPC, which talks about anticipatory bail, does not apply to the offences mentioned under the act¹³⁹ and that no person arrested for terrorist activities under the act can be released on bail or his own bond unless the public prosecutor has had an opportunity of being heard, on the application of such release.

However, such an accused would not be released on bail or on his bond if the police report submitted to the court suggests that sufficient reasonable grounds to believe that the accusations against the person so arrested are prima facie true are present¹⁴⁰. These provisions that extend the duration of police custody and leave little or no opportunity of being released on bail or bond are widely against the basic rules of our criminal justice system and afford opportunities for human rights violations of the persons being arrested by the administration. The criminal justice system of India makes ‘bail’ the rule and ‘jail’ the exception in order to prevent arbitrary deprivation of liberty until the guilt is established, which isn’t the case with this act that even makes a provision for absolute denial of bail or release if there is a prima facie case as per police report or diary.

Another unjust provision in the act is that which presumes the guilt of the accused and the burden to prove otherwise shifts on the accused when either the accused is in possession of arms that are similar to the ones used or when the fingerprints of the

¹³⁸ Unlawful Activities Prevention Act (1967) s 43D (2).

¹³⁹ Unlawful Activities Prevention Act (1967) s 43D (4).

¹⁴⁰ Unlawful Activities Prevention Act (1967) s 43D (5).

accused is found on objects associated with the crime¹⁴¹, which is again inconsistent with the adversarial criminal justice system of India. Subsequently, in 2019, the scope of the act was extended to include individuals along with organisations and gangs that can be labelled as terrorists¹⁴², which led to an upsurge in the number of detentions and as per the report of the National Crime Bureau, 1948 people were arrested in 2019¹⁴³ alone which saw a 37% upsurge from the previous year records. However, out of the total cases that were registered from 2015 to 2019, less than 2% of the people arrested ended in courtroom convictions. 11% of the cases were closed by the police due to lack of evidence and only in 22% of the total cases, the arrested persons were sent to trial. On the contrary, in the remaining cases, no charges have been framed against the accused persons.¹⁴⁴ Moreover, section 49 of the act provides for immunity to the centre and state government against any prosecution for the acts done in good faith.

Owing to the abovementioned facts, the UAPA Act, 1967 has come into serious scrutiny as various judges find the application of the terror laws arbitrary in nature. Madan B. Lokur, the former justice of the Supreme Court of India has stated that “A law to tackle terrorism is mandatory but its provisions are quite vague and can be used indiscriminately to crush dissent” and he further stated that “in fact, it has been misused and abused, look at the emotional, psychological impact on his family, him... his

¹⁴¹ Unlawful Activities Prevention Act (1967) s 43E.

¹⁴² Unlawful Activities Prevention Act (1967) s 35, 36.

¹⁴³ Ministry of Home Affairs, GOI, Annexure, Lok Sabha, Unstarred Question No. 2486 (9 March 2021) <<https://www.mha.gov.in/MHA1/Par2017/pdfs/par2021-pdfs/LS-09032021/2486.pdf>> accessed 24 June 2022.

¹⁴⁴ Rahul Tripathi, ‘Below 2% of those arrested under UAPA convicted in 2015-19: NCRB’, *Economic Times* <https://economictimes.indiatimes.com/news/politics-and-nation/below-2-of-those-arrested-under-uapa-convicted-in-2015-19-ncrb/articleshow/83624754.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 30 May 2022.

children... They will go to school where classmates will say your father is a ‘terrorist’ for something he has not done... We are not looking at the mental aspect,” Justice Lokur had stated in a virtual discussion on negative effects of UAPA¹⁴⁵. Justice Mr DY Chandrachud has also opined that “the courts must act as the first line of defence against the deprivation of liberty of citizens” and that “the criminal law, including anti-terror legislation, should not be misused for quelling dissent or harassment to citizens”, referring to his Arnab Goswami judgment¹⁴⁶. Thus, many justices have expressed that the terror laws should not exist in their current state.

This debate further strengthened with the death of Stan Swamy at the age of 84, the Jesuit priest and tribal rights activist, who was waiting in jail for his release for nine months and was booked under UAPA, 1967 over his alleged links with Maoists. Apart from this, many cases came under the glare of public that further intensified the growing concerns against the law. These cases include the arrest of Assamese peasant leader, Akhil Gogoi for allegedly supporting a terrorist. Carolyn Nash, the Asia advocacy director at Amnesty International has also suggested the link between human rights abuses and UAPA, 1967¹⁴⁷.

¹⁴⁵Legal Correspondent, ‘Former Supreme Court judges raise concerns over misuse of UAPA’, *The Hindu* <<https://www.thehindu.com/news/national/former-supreme-court-judges-raise-concerns-over-misuse-of-uapa/article35516005.ece>> accessed 30 May 2022.

¹⁴⁶IANS, ‘Anti-terror law shouldn’t be used to muzzle dissent: Justice DY Chandrachud’, *The News Minute* <<https://www.thenewsminute.com/article/anti-terror-law-shouldnt-be-used-muzzle-dissent-justice-dy-chandrachud-152274>> accessed 30 May 2022.

¹⁴⁷ Carolyn Nash, ‘Blinken Must Urge Modi to Repeal Repressive Laws’, *The Diplomat* <<https://thediplomat.com/2021/07/biden-must-urge-modi-to-repeal-repressive-laws/>> accessed 30 May 2022.

The constitutional validity of the 2019 amendment to the act has been challenged in the supreme court in *Association for Protection of Civil Rights (APCR) vs Union of India*¹⁴⁸ and *Sajal Awasthi vs Union of India*¹⁴⁹ on the ground that sections 35 and 36 of the act violate articles 14, 19(1)(a) and 21 of the constitution. Both of these writ petitions are pending before the Supreme Court of India. However, unlike TADA and POTA, the constitutional validity of the act in its entirety hasn't been questioned in the court.

5.1.6 NATIONAL SECURITY ACT, 1980

The objective behind enactment of the National Security Act is to provide for preventive detention in certain cases related to the acts of terrorism or insurgency and other matters. The act empowers the central or the state government to make an order directing detention of a person to prevent them from acting in a manner that is prejudicial or detrimental to the defence or security of India, i.e. if they are a threat to national security¹⁵⁰. As per the provisions of the act, a person can be arrested and detained for upto 12 months without the formation of charge against him¹⁵¹. The person can appeal before a high court advisory board, but would not be allowed any legal assistance during the trial¹⁵². The government authority is protected from any prosecution or legal proceedings with respect to acts done under this act¹⁵³. The act

¹⁴⁸ *Association for Protection of Civil Rights (APCR) v Union of India* (Writ Petition (Civil) 1096/2019)

¹⁴⁹ *Sajal Awasthi v Union of India* (Writ Petition (Civil) 1076/2019).

¹⁵⁰ National Security Act (1980) s 3.

¹⁵¹ National Security Act (1980) s 13.

¹⁵² National Security Act (1980) s 11(4).

¹⁵³ National Security Act (1980) s 16.

thus, violates principles of a just criminal justice system and is capable of causing gross violation of human rights.

5.1.7 NATIONAL INVESTIGATION AGENCY ACT, 2008 AND ADMINISTRATIVE REGIME

The National Investigation Agency Act, 2008 came into force on 31st December, 2008 under the backdrop of 26/11 terror attacks. The Indian government, following the deadly 26/11 terror attacks, realised that the intelligence infrastructure of the country that deals with terrorism isn't effective and felt the need to establish a national body for prevention and suppression of terrorism. NIA Act was enacted with an intent to establish a national and central body, National Investigation Agency which is commonly referred to as counterterrorism task force, to investigate and prosecute grievous offences that tend to impact India's sovereignty, security, integrity, or relations with the members of the international community, i.e. the acts of terrorism. Another purpose of the act is to implement the international treaties, agreements and conventions with respect to the offences that fall within the scope of the act. These offences can be inferred from the schedule to the act, which enlists the enactments that deal with specific offences over which, the body established by the act has power. The act specifies that the agency alone will have the power to investigate and prosecute the offences under the acts that have been enlisted within the schedule to the act.¹⁵⁴ The 2019 amendment to the section further expanded its scope by making all the powers, duties, privileges and liabilities that are vested to the state police officers, available to

¹⁵⁴ National Investigation Agency Act (2008) s 3(1).

NIA¹⁵⁵, which requires no consent of the state governments. The act also provided for the power of central government to designate special courts for specific areas in order to try scheduled offences.¹⁵⁶

As per the NCRB report,¹⁵⁷ around 94.6% of the cases registered under the UAPA with NIA are pending trial and around 85% of such cases are pending investigation with less than 2.2% conviction rate¹⁵⁸. Further, as of 15th December, 2021; 49 special courts have been designated as stated by the Ministry of Home Affairs¹⁵⁹; however, the hearing rate of one matter is as low as one day per month, which frustrates the very purpose of the enactment¹⁶⁰.

In a case concerning investigation under NIA Act, the Hon'ble Supreme Court held that: *“looking to the voluminous record and number of the prosecution witnesses which are to be examined, it may take its own time to conclude and indeed the under trial prisoner cannot be detained for such a long period of incarceration. While deprivation of personal liberty for some period may not be avoidable, period of deprivation pending trial/appeal cannot be unduly long. At the same time, timely delivery of justice is part*

¹⁵⁵ National Investigation Agency Act (2008) s 3(2).

¹⁵⁶ National Investigation Agency Act (2008) s 11(1).

¹⁵⁷ NCRB, Crimes in India, 2020 vol 3 (13 September 2021).

¹⁵⁸ Sanchita Kadam, '95% Pendency of Trial of UAPA Cases, 85% Cases Pending Investigation: NCRB Report', *News Click* <<https://www.newsclick.in/Pendency-Trial-UAPA-Cases-Cases-Pending-Investigation-NCRB-Report>> accessed 5 June 2022.

¹⁵⁹PTI, '49 special courts designated for NIA cases trial: MHA' *The Times of India* <<https://timesofindia.indiatimes.com/india/49-special-courts-designated-for-nia-cases-trial-mha/articleshow/88302254.cms>> accessed 5 June 2022.

¹⁶⁰ Prachi Bhardwaj, 'UAPA| No day-to-day hearing, 298 prosecution witnesses yet to be examined? 74-year-old gets bail after 9.5 years', *SCC Online Blog* <<https://www.sconline.com/blog/post/2021/12/03/uapa-no-day-to-day-hearing-298-prosecution-witnesses-yet-to-be-examined-74-year-old-gets-bail-after-9-5-years/>> accessed 5 June 2022.

of human rights and denial of speedy justice is a threat to public confidence in the administration of justice."¹⁶¹

In another case concerning the same, the Madras High Court opined that: "*the very purpose of the NIA Act, 2008 is to expedite the trial of serious offences, enumerated in the schedule, which would be defeated if one court is jurisdictionally overloaded with several enactments conferring special jurisdiction. This is a practical issue which, if not addressed with reasonable dispatch, would defeat the very purpose of having special courts.*"¹⁶²

Thus, looking at the administrative regime for countering terrorism, leaving the intelligence forces, it can be concluded that the stagnancy in investigation and trials has resulted in gross violations of human rights of the accused persons booked under any of the acts mentioned in the schedule to the NIA act. Additionally, specific provisions in the legislative regime that are detrimental to fundamental freedoms must be done away with.

¹⁶¹ *Ashim v National Investigation Agency* (2021 SCC Online SC 1156).

¹⁶² *Jaffar Sathiq @ Babu v. the State* (CrI.M.P. No.13123 of 2020).

5.2 ANTI-TERROR REGIME IN THE USA

Generally, it is presumed that USA's counterterrorism policy began as a response to the attacks of 9/11. However, efforts to suppress and prevent terrorism have been made throughout the modern American history. The only difference between the counterterrorism regime pre and post 9/11 is with respect to who would be designated as a terrorist and the seriousness with which the threats of terrorism is taken, which has changed dramatically post 9/11. During cold war, the term 'terrorism' was associated with insurgents that were backed by the Soviet, civil rights leaders advocating equality by way of demonstrations or campaigns, or individuals with communist ideologies. Terrorism then was considered merely a tactical threat capable of causing little impact on the nation's security. The collapse of Soviet Union and 9/11 attacks dramatically changed America's outlook on terrorism. Thus, USA fundamentally restructured its counterterrorism regime post 9/11 catastrophe since terrorism is now considered as an existential threat as opposed to pre 9/11 when it was considered to be merely a criminal act.

5.2.1 PRE 9/11 REGIME

The institutional framework for counterterrorism in USA was established with the enactment of National Security Act of 1947 that established the National Security Council and the very first peace time intelligence agency or the Central Intelligence Agency. Further, the amendment to the act in 1949 under the presidency of Harry S. Truman created the Department of Defense, which is responsible for providing military

forces required to deter war and to preserve and protect national security. The growing Soviet influence in the twentieth century, which is known as the period of Red Scare; and increasing threats of communists, leftists and anarchists in America led to adoption of Counterintelligence Program (COINTELPRO) in order to disrupt communist societies or groups in United States. This program served as the precursor of modern surveillance tactics which have been incorporated in the PATRIOT Act post 9/11. Under the presidency of John F Kennedy, the cold war between superpowers intensified and the sole focus of counterterrorism regime was to obliterate Soviet influenced insurgents.

Under the presidency of Lyndon B. Johnson (1963-69), the civil rights movement intensified which resulted in a counterterrorism regime that now was directed at both Soviet influenced insurgents and leaders of civil rights movement, including Martin Luther King Jr. Further, prior to 1968, airplane hijacking was not considered as a terrorist threat, however more than 130 instances of airplane hijacking or 'skyjacking' took place between the period starting from 1968 to 1972. This further intensified the threat of terrorism. In 1974, counterterrorism mechanism faced a setback when CIA carried out an illegal surveillance or intelligence operation famously known as 'operation chaos' under the presidency of Richard Nixon that was in violation of the National Security Act of 1947. The operation led to a wide scale breach of privacy rights that resulted in profound distrust towards the government. A church committee was later formed to investigate into the abuses of CIA, FBI, NSA and other administrative agencies. The former revealed in its report, a far reaching politically motivated intelligence operations carried out by the latter in 1976.

In 1976 itself, the Attorney General Edward Levi created guidelines embracing rules that limited the power of FBI and other government agencies to carry out domestic political intelligence operations. “Subsequent attorney generals significantly weakened these guidelines to today’s standard; it is once again easier for the FBI to monitor and investigate American citizens even without clear proof of criminal activity.”¹⁶³ Terrorism further intensified during 1970s under the presidency of Jimmy Carter as a result of high profile attacks, especially the ones on Israeli athletes. Some of these attacks were state sponsored that forced USA to monitor countries that supported terrorism along with terrorists. In 1979, the congress passed the State Sponsors of Terrorism list that initially included Iraq, Libya, Syria, and South Yemen, which unified with the North in 1990. The list today includes Cuba, Iran, North Korea, and Syria. This list has served as an important instrument for foreign policy which is even used for monitoring sales of arms, imposing bans or sanctions etc.

During 1970s and 80s, hundreds of civilians were killed due to state sponsored terrorism. In 1983, suicide bombers from Hezbollah militant group executed the Beirut Barracks bombing killing around 300 civilians under the presidency of Ronald Regan, who promised to take measures to curb future attacks. However, conflict with the Soviet Union still overpowered the threat of terrorism. As cold war reached its end under the presidency of George H.W. Bush, new and developed tactics of terrorism emerged, which included the use of deadly chemical, nuclear and biological weapons. As a result, USA passed the Biological Weapons Anti-Terrorism Act in 1989. The act “extended

¹⁶³ Global era issues, World 101, ‘U.S. Counterterrorism Since 1945, Understand the evolution of U.S. counterterrorism policies that led to the war on terror’ <<https://world101.cfr.org/global-era-issues/terrorism/us-counterterrorism-1945>> accessed 30 June 2022.

the scope of bio-warfare materials regulation to include private individuals and non-state organizations. The act made it illegal to buy, sell or manufacture biological agents for use as a weapon.¹⁶⁴ To that end, the law implemented the 1975 ratification of the Biological Weapons Convention.¹⁶⁵ BWATA, which became known as Public Law 101-298 upon its passage and signing, provided criminal penalties for those who violated its provisions.¹⁶⁶ The act specifically exempted peaceful, often characterized as ‘defensive’, biological weapons research.¹⁶⁷” The decade after collapse of Soviet Union saw an upsurge in terrorist attacks against the US citizens under the presidency of Bill Clinton; for instances, “in 1993, Ramzi Yousef carried out the 1993 bombing of the World Trade Center in New York. Two years later, Timothy McVeigh bombed a federal building in Oklahoma City, killing at least 168 people in the then-deadliest domestic terrorist attack to date.”¹⁶⁸

The Clinton administration, in an attempt to create a powerful and unprecedented counterterrorism regime by initiating the enactment of the Omnibus Counterterrorism Act of 1995 that sought to give expanded powers of surveillance to the government, however the bill was widely opposed by the civil rights advocates and the act did not pass through the congress “on the grounds that it would violate fundamental civil liberties, including the right to confront one's accuser. Another source of opposition

¹⁶⁴ Scott Stern, ‘Biological Resource Centers: Knowledge Hubs for the Life Sciences’ (Brookings Institution Press, 2004, ISBN 0815781490) 31.

¹⁶⁵ Edward V. Linden, *Focus on Terrorism* (ISBN 1590332849, Nova Publishers, 2002) 109.

¹⁶⁶ Sharon Squassoni, *Proliferation Control Regimes: Background and Status* (ISBN 1590335597, Nova Publishers, 2002) 40.

¹⁶⁷ Zu Waldeck und Pymont, Wolrad Prinz et al (ed), *Patents and Technological Progress in a Globalized World: Liber Amicorum Joseph Straus* (ISBN 3540887423, MPI Studies on Intellectual Property, Competition and Tax Law, Springer, 2009) 215-216.

¹⁶⁸ Ibid 106 .

was the government's ability to use evidence from secret sources in deportation proceedings for suspected terrorists.”¹⁶⁹

The Clinton administration went ahead with another statute, Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). It contained a number of provisions to “*deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes*”¹⁷⁰ The act was challenged in the Supreme Court on the ground that it limited the ability of people to file writ petitions under Habeas Corpus and thus violated article 1 of the US constitution. The court upheld the statute by declaring that it didn’t unconstitutionally suspend writs under habeas corpus but merely imposed limitations.¹⁷¹ However in 2005, the federal court accepted to entertain pleas that challenged the constitutional validity of the act on grounds of separation of powers¹⁷², nevertheless, the court decided that the issue has already been settled by a precedent whereby the grant of habeas relief was revoked.¹⁷³ On 21st June, 2022, the Supreme Court asserted that the power to grant habeas corpus has been largely limited by the act.¹⁷⁴ However, the question of constitutional validity of the act hasn’t been disputed since *Felker v Turpin*.

¹⁶⁹ Neil A. Lewis, ‘Terror In Oklahoma: In Congress; Anti-Terrorism Bill: Blast Turns A Snail Into a ace Horse’, *New York Times* (21 April 1995) <<https://www.nytimes.com/1995/04/21/us/terror-oklahoma-congress-anti-terrorism-bill-blast-turns-snail-into-race-horse.html>> accessed 30 June 2022.

¹⁷⁰ Bill summary, Antiterrorism and Effective Death Penalty Act (1996).

¹⁷¹ *Felker v. Turpin* (518 U.S. 651).

¹⁷² *City of Boerne v. Flores* (521 U.S. 507 1997); *Marbury v. Madison*, (5 U.S. (1 Cranch 137) 1803).

¹⁷³ *Irons v. Carey* (05-15275), United States Ninth Circuit.

¹⁷⁴ *Shoop v. Twyford* (596 U.S. ____ (2022)).

5.2.1 POST 9/11 REGIME

Inception of the idea that considered terrorism as an existential threat was marked by the occurrence of one of the deadliest terrorist attacks ever recorded on 9th September 2001 famously known as the ‘9/11 attacks’ killing around 2,750 people¹⁷⁵. This led to a remarkable change in the counterterrorism strategy of United States. Following the attack, the congress allowed the president to carry out a military response operation against the perpetrators of the attack including the ones who had harboured the attackers.¹⁷⁶ This authorization served as the basis for war against terrorist groups such as Al-Qaeda and Taliban.

Further, ‘enhanced interrogation techniques’ or the famous ‘white house torture memos’ were adopted under the Bush administration that enabled CIA to detain individuals on the mere ground of suspicion and use tactics such as water boarding, exposure to extreme temperatures, sleep deprivation, confinement in small areas etc. to extract information during interrogation. A report submitted by Human Rights Watch concluded that, “since September 11, the United States has transferred about 650 men captured in connection with the Afghan war or who are suspected of links to al-Qaeda to the U.S. military base at Guantánamo Bay, Cuba. According to press reports, the detainees spend twenty-four hours a day in small single -person cells, except for two fifteen minute periods of solitary exercise a week, as well as interrogation sessions. The United States has refused to recognize the applicability of the Geneva Conventions to

¹⁷⁵ Peter L. Bergen, ‘September 11 attacks, 2001, United States’, *Britannica*, <<https://www.britannica.com/event/September-11-attacks>> accessed 30 June 2022

¹⁷⁶ Authorization for Use of Military Force (2002).

any of the Afghan war or al-Qaeda detainees held at Guantánamo or elsewhere, including captured members of the Taliban armed forces. It refused to permit competent tribunals to determine whether any of the detained combatants were entitled to prisoner of war status. It has also refused to abide by principles of international human rights law with regard to these detainees, asserting, in effect, that no legal regime applies to them and that in the war against terrorism, the United States may hold such combatants for as long as it chooses.”¹⁷⁷ These enhanced interrogation practices continued till 22nd January, 2009 when Barrack Obama, under his presidency, rescinded the aforementioned orders.¹⁷⁸ Even the senate’s report compiled in 2008 concluded that these enhanced interrogation practices weren’t an effective way of acquiring intelligence and practice of the same has damaged USA’s standing in the global community.¹⁷⁹

In the aftermath of 9/11 attacks, three major legislations were enacted, namely USA PATRIOT Act of 2001, Homeland Security Act of 2002 and The Border Protection, Anti-terrorism, and Illegal Immigration Control Act of 2005. The USA PATRIOT Act sought to tackle international terrorism by expanding surveillance power which even included listening to telephonic communications be it domestic or international, improved and effective interagency communications of the federal agencies and stringent penalties for crimes of terror, including provisions for indeterminate detention

¹⁷⁷ Ibid 94.

¹⁷⁸David Johnston and James Risen (June 27 2004) ‘The Reach Of War: The Interrogations; Aides Say Memo Backed Coercion Already In Use’, The New York Times <<https://www.nytimes.com/2004/06/27/world/reach-war-interrogations-aides-say-memo-backed-coercion-already-use.html>> accessed 25 June 2022.

¹⁷⁹ Ibid 106.

without trial, and search without warrant, knowledge or consent¹⁸⁰. It contained many clauses that made it time bound or “sunset provisions beginning December 31, 2005, approximately four years after its passage. Before the sunset date, an extension was passed for four years which kept most of the law intact. In May 2011, President Barack Obama signed the PATRIOT Sunset Extensions Act of 2011, which extended three provisions.¹⁸¹ These provisions were modified and extended until 2019 by the USA Freedom Act, passed in 2015.¹⁸² In 2020, efforts to extend the provisions were not passed by the House of Representatives, and as such, the law has expired.”¹⁸³ The act has been criticized by the advocates of civil rights on the grounds that it breaches privacy rights of individuals and the provisions that allow detention without trial or search without warrant are detrimental to right to life and basic liberties. Many claims that the act is unconstitutional.¹⁸⁴ In a controversy relating to the PATRIOT Act in 2012, the US Supreme Court held that “increased monitoring of suspects caused by such legislation like the Patriot Act violated the defendant's constitutional rights.”¹⁸⁵

A work on impacts of PATRIOT Act also suggested that "Indefinite detention upon secret evidence—which the USA PATRIOT Act allows—sounds more like Taliban justice than ours. Our claim that we are attempting to build an international

¹⁸⁰Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act (2001).

¹⁸¹Lisa Mascaro (27 May 2011), ‘Patriot Act provisions extended just in time’, *The Los Angeles Times* <<https://www.latimes.com/archives/la-xpm-2011-may-27-la-na-patriot-act-20110527-story.html>> accessed 30 June 2022.

¹⁸²Erin Kelly, ‘Senate approves USA Freedom Act’, *USA Today* <<https://www.usatoday.com/story/news/politics/2015/06/02/patriot-act-usa-freedom-act-senate-vote/28345747/>> accessed 30 June 2022.

¹⁸³Charlie Savage (27 March 2020), ‘House Departs Without Vote to Extend Expired F.B.I. Spy Tools’, *The New York Times* <<https://www.nytimes.com/2020/03/27/us/politics/house-fisa-bill.html>> accessed 30 June 2022.

¹⁸⁴David Cole, ‘The Patriot Act Violates Our Civil Liberties. Is the Patriot Act Unconstitutional?’, *Microsoft Encarta* (6 May 2006).

¹⁸⁵ *United States v. Jones* (565 U.S. 400 (2012)).

coalition against terrorism will be severely undermined if we pass legislation allowing even citizens of our allies to be incarcerated without basic U.S. guarantees of fairness and justice."¹⁸⁶ Wisconsin Republican Jim Sensenbrenner, released a statement after mass surveillance was carried out by NSA and PRISM program in 2013 stating that "While I believe the Patriot Act appropriately balanced national security concerns and civil rights, I have always worried about potential abuses. Seizing phone records of millions of innocent people is excessive and un-American."¹⁸⁷

The Homeland Security Act of 2002 sought to establish the US Department of Homeland Security and the office of Secretary of Homeland Security to exercise powers laid out in the PATRIOT Act. Further, The Border Protection, Anti-terrorism, and Illegal Immigration Control Act of 2005 sought to restructure US immigration laws in order to increase border security. The act allowed federal agencies to take custody of the detained illegal aliens¹⁸⁸ and provided for apprehension and deportation of illegal aliens along with penalties for fraudulent documentations. The bill more specifically focussed towards enlarging enforcements against human smugglers and provided for penalties against the ones that aided and abetted illegal immigrants. The bill however was only passed by congress and did not get approval by the Senate since it faced criticism and protests from millions of individuals who believed that the act would lead to mass deportation of illegal immigrants. The bill did not specify any particular group of aliens or what would amount to assisting an illegal immigrant which created a sense

¹⁸⁶Anita Ramasastry (5 October 2001), 'Indefinite detention based on suspicion: How The Patriot Act Will Disrupt Many Lawful Immigrants' Lives', *FindLaw* < <https://supreme.findlaw.com/legal-commentary/indefinite-detention-based-upon-suspicion.html> > accessed 30 June 2022.

¹⁸⁷ 'Author of Patriot Act: FBI's FISA Order is Abuse of Patriot Act' (6 June 2013) Archived from the original on 10 June 2013.

¹⁸⁸The Border Protection, Anti-terrorism, and Illegal Immigration Control Act (2005) s 607.

of fear amongst the Hispanics, who are the largest undocumented immigrant community in USA and the humanitarian workers, who have the sole object of providing relief to immigrants.¹⁸⁹

5.2.3 COURT STRIPPING

Lethal terrorist attacks in America have led to enactment of stringent legislative framework that has unjustly compromised civil liberties of individuals, especially of prisoners and immigrants. These civil liberties form a part of US Constitution that are appended in the form of Bill of Rights. Further, the US Constitution recognizes its supremacy¹⁹⁰ and judiciary has been entrusted with the power to protect its supremacy.¹⁹¹ Thus, review of legislations designed to suppress and prevent terrorism by the judiciary is of paramount importance in order to protect the civil liberties imbibed in the constitution from getting abrogated.

However, a report compiled by American Civil Liberties Union reveals that “the most basic civil liberty of all – the right to judicial review of executive authority – is uniquely vulnerable. Anti-terrorism laws passed by Congress in 1996 and again in 2001 reflect growing hostility to the role of judges in our constitutional system. Judicial review is a cornerstone of our system of government. But the unbearably tragic September 11 attacks, which toppled many cornerstones and caused others to tremble, have led to

¹⁸⁹ Zepeda-Millán, Chris, ‘Latino mass mobilization: immigration, racialization, and activism’, (ISBN 9781107076945, Cambridge, 28 September 2017).

¹⁹⁰ Constitution of United States (1789) art 6.

¹⁹¹ Constitution of United States (1789) art 3.

enactment of an anti-terrorism bill that undercuts the role of the judiciary in scrutinizing executive actions. Many provisions of the USA-PATRIOT Act limit judicial review of law enforcement activities altogether, or create the illusion of judicial review while transforming judges into mere rubber stamps.”¹⁹² These provisions include the expanded surveillance power and the power to detain a suspect who is a citizen for seven days without judicial review while a non-citizen for an indeterminate period.¹⁹³ The report further stated that the PATRIOT Act misunderstands the importance of judicial review and considers it as a threat or an inconvenient obstacle to executive actions.

Court-stripping through provisions of legislations is yet another measure that is detrimental to human rights protection and is a living proof of the fact that while dealing with terrorism, the state has gone too far in preserving the national security that it has neglected certain fundamental civil liberties that form the core of guarantee of rights under the Bill of Rights of the US Constitution.

¹⁹² Ronald Weich, Esq., *Upsetting Checks and Balances: Congressional Hostility Toward the Courts in Times of Crisis* (American Civil Liberties Union, October 2001).

¹⁹³ US PATRIOT Act (2001) s 203, 215, 216, 358, 412.

CHAPTER – 6

CONCLUSION

The statistical data presented by the Institute for Economics and Peace in its Global Terrorism Index report of 2022 reveals that terrorism has become a pressing global issue that needs to be addressed effectively. However, the global community has yet not settled on any definition of the term owing to its contested nature, an association of criminality with individuals or groups, and the fact that the forms and manifestations of terrorism are subject to change considering how the phenomena have evolved in the past 200 years.

In the absence of any globally accepted definition of terrorism, it can be concluded from a combined reading of proposals for definition made by various eminent scholars as discussed in Chapter -1, that terrorism is the use of certain violent tactics against civilians or non-combatants in order to intimidate a given population or instil fear amongst the masses, to fulfil certain political or ideological goals by forcing the government or any other institution to do or abstain from doing an act. Nonetheless, it is essential to recognize a globally accepted definition in order to weed out ambiguities and prevent both the state and individuals or groups identified as terrorists, from abusing the fact that there isn't any accepted definition of the phenomena. The concept of terrorism isn't new and its existence dates back to the mid-nineteenth century. Only the forms and manifestations of the phenomena have changed over the years. Many scholars such as David C Rapaport and Tom Parker in association with Nick Sitter,

have tried to trace the evolution of terrorism in the form of waves and strains respectively. Every subsequent wave or strain began with the change in ideological goals or tactics used by terrorist groups.

It is well settled that terrorist attacks lead to gross violation of human rights. Besides the loss of lives, it compels individuals to remain in a constant state of fear thereby depriving people of their right to life and liberty. Apart from individual human rights violations, terrorist attacks erode the capacity of a state to ensure public good, threaten democracy, and undermine civil society and therefore, an effort to defeat terrorism and terrorist groups or organizations is of paramount importance. However, just as terrorism violates guarantees of human rights, the counterterrorism regime adopted to defeat terrorism might itself violate human rights since human rights create no distinction between victims of a crime and suspects of a crime until the guilt is established. Harsh regime that provides for harsh interrogation techniques, arbitrary power to carry out surveillance or denial of trial with long periods of detention etc. proves to be counter effective as such measures may sow the seeds of future attacks. Thus, while enacting a sound and effective counterterrorism regime, the state ought to reach an equilibrium between national security and defeating terrorism by adopting frameworks that are neither draconian in character nor poorly implemented or ineffective.

In order to maintain this equilibrium, the states need to decide a threshold for the degree of harshness of counterterrorism framework and for this purpose, they need to determine the success rate of terrorism worldwide along with the possibility of defeating terrorism. To determine the former, various scholars did their research on the

success rate of terrorism and have yielded that, while terrorist groups succeed in their intermediary goals such as creating a situation of alarm or gathering attention from media and civilians, they are seldom successful in their primary goals which include political and ideological demands. Further, to address the latter, the scholars have suggested that defeating terrorism includes defeating both, terrorism as a phenomenon and individual terrorist groups. The research presented by these scholars, especially by Seth Jones and Martin Libicki from RAND corporation, reveals that terrorism came to an end due to actions of police and military groups, which led to prevention and suppression of both terrorism and individual groups; success of terrorist groups and inclusion of the groups in political processes, which only led to defeat of terrorism as a phenomenon. Thus, it has been concluded that terrorism is rarely successful and it is possible to defeat the same.

Now that it has been settled that countering terrorism is a possibility, the next step in determining the threshold is respecting fundamental or core human rights while adopting a framework. This becomes pertinent because human rights are guaranteed to everyone by virtue of them being humans and the state has a responsibility to protect the rights of both victims and suspects of terrorist acts. This means that the state can't selectively perform its obligations. Furthermore, human rights are regarded as customary international law and no derogation is allowed from such laws. Additionally, the international community has yielded that terrorism thrives in environments where human rights aren't respected since probability of groups adopting radical approaches to respond to curtailment of civil liberties increases in such environments. Further, reflecting upon the intention of founding fathers of human rights, the international community concluded that human rights aren't a luxury but necessity and weren't

adopted just keeping peace in mind. Thus, even during the time of unrest, human rights ought to be respected and should not be considered as obstacles for counterterrorism measures. The global community has provided for counterterrorism framework by way of treaties, conventions and institutional arrangements in order to help member states adopt effective counterterrorism regimes without abrogating basic or core civil liberties. Despite vociferous suggestions by international organizations and research scholars, to accommodate human rights protection while adopting counterterrorism regime, member states continue with their practices of criminal profiling, torturous interrogative techniques, decapitation, shoot to kill etc. that barely render desired results. Member states, including India and USA, have repeatedly violated fundamental human rights such as right to life and liberty, right to freedom from torture, right to fair trial, right to privacy etc., in an attempt to not go soft on the issue of terrorism, which however has proved to be counter effective.

An analysis of the legislative regimes of India and USA also reveals that human rights get compromised while dealing with terrorism. The regimes of both the countries provide for longer periods of detention without trial, arrest on the ground of suspicion, harsh interrogation techniques, expanded surveillance powers to authorities, disproportionate use of force etc. Court stripping in USA is another challenge for protection and preservation of fundamental rights and freedoms.

6.1 FINDINGS

- The Global Terrorism Index 2022, which reveals a 1.2% decline in the casualties than the previous year, also reveals there has been a 17% rise in the terrorist attacks worldwide. This means that the number of casualties has increased with decreased impact per attack. However, it wouldn't be wise to turn a blind eye to human rights violations caused due to such attacks.
- The phenomenon of terrorism leads to gross violation of human rights. However, counterterrorism measures or regimes adopted by the states to defeat terrorism also result in human rights violations.
- Terrorism thrives in environments where human rights aren't respected since individuals may adopt radical means to respond to curtailment of civil liberties thereby sowing the seeds for future attacks. therefore, the states need to balance protecting national security with preserving respect for human rights.
- International organizations and academic scholars, after analysing the counterterrorism regimes of various countries and their effectiveness, have yielded that it is possible to defeat terrorism without infringing upon human rights.
- Terrorism and terrorist organizations though being successful in their intermediary goals of creating fear amongst the masses and gathering attention of media, important personalities and civilians barely succeed in their primary goals which are either political or ideological goals.

- Defeating terrorism means defeating both, terrorism as a phenomenon and individual terrorists or terrorist groups. Researchers suggest that police and military operations, inclusion of such groups or individuals in political processes and success of terrorist groups result in defeat of terrorism. While the former leads to defeat of both terrorism as a phenomenon and individual terrorists and groups, the latter two only lead to the defeat of terrorism as a phenomenon.
- International framework for counterterrorism provides for a wide range of international instruments including conventions and resolutions, effective institutional infrastructure and judicial body in order to assist member states in their struggle against terrorism. The international community has also made an active effort to ensure that human rights are respected while countering terrorism. Various conventions and treaties have been signed by the member states and resolutions have been passed by security council and general assembly in this regard.
- Criminal profiling, as a state practice to obliterate terrorism, is not effective. This involves determination of a certain set of behavioural or physical traits to identify terrorists. The measure is ineffective as terrorists often tend to conceal their behavioural or physical traits in order to not draw any attention. Additionally, the measure often discriminates against a particular community, in particular a religious or racial community.

- De-radicalisation, as a measure to prevent terrorism, has proved to be somewhat effective. It involves counselling of members of terrorist groups in order to disengage them from terrorist practices. Whereas decapitation or arrest and/or killing of the leaders of terrorist groups was found to be ineffective in short run but somewhat effective in long run. Success of decapitation depends on the context i.e. it works in one case and proves to be counterproductive in the other and that there isn't any single solution that fits all. Thus, the success is determined by the kind of organisation that is attacked and its modus operandi.
- India and USA face similar threats of terrorism, are constitutional democracies influenced by British common law, and foster respect to human rights by recognizing them in their legal systems which is why comparing the counterterrorism regime of the two countries would be of great utility in determining the degree of harshness of the said regime.
- Legislative and administrative framework of both the regimes i.e. counterterrorism regime of India and USA violate civil liberties on some level in an attempt to preserve national security. These liberties include right to life and liberty, fair trial, right to freedom from torture, right to privacy etc. Court stripping is one of the major obstacles that prevents protection of civil liberties in USA since the role of judiciary in safeguarding human rights have been significant.

6.2 SUGGESTIONS

- Counterterrorism measures are adopted to protect national security; however, it has been seen that terrorism thrives in environments wherein human rights aren't respected as curtailment of human rights results in radical responses against the state, thereby sowing the seeds for terrorist attacks. Therefore, the states need to ensure that their counterterrorism regime is neither too soft or poorly implemented nor draconian in nature in order to obtain effective results.
- Criminal profiling, which leads to racial and religious discrimination ought to be discouraged since it does not even render effective results. Instead, resources should be allocated for de-radicalisation programs, which have shown effective results.
- While performing decapitation operations, the states should ensure that the collateral damage doesn't outweigh the result of such an operation. Since there isn't any fixed rule as to when decapitation technique would work, the states need to be very cautious while deciding on execution of the operation.
- Any provision that allows the authorities to shoot to kill even on the grounds of suspicion is blatantly against the doctrine of proportionality and should not be practiced in any state.
- In order to ensure that measures used for interrogation aren't torturous, the states should either create a provision for judicial supervision or should require the police or other forces involved in the interrogation process to wear body-worn cameras. However, the latter would incur heavy costs and lack of required

resources would be an obstacle in its implementation. This practice is prevalent to an extent in USA.

- In order to ensure that the suspects aren't detained arbitrarily for a long period of time before going to trial, requisite number of special courts to try the offences of terrorism should be designated.
- If investigation is carried out by a single federal agency or body, then the states should ensure that such an institutional infrastructure is not leading to any unreasonable delay. Preferably, the federal or central institutions of India and USA should have a supervisory role and the local units should also be entrusted with the power to investigate, in conformity with the principle of federalism which is accepted by both the countries, despite the fact that the matter concerns national security and is of national importance. However, considering the intention of the founding fathers of the Indian constitution, India gained its independence as a quasi-federal state and hence, the federal agency can even be entrusted with regulatory role. Nevertheless, forces of local units should be empowered to investigate in order to speed up the process of justice.
- Arbitrary surveillance powers, including the power to tap telephones, should not be provided to the authorities responsible for gathering intelligence on a mere ground of suspicion or during mass surveillance. Any like measure can be taken when there is a reasonable ground or a reason to believe that a suspect is a terrorist.

- While deporting illegal aliens or immigrants that fall short of documents, utmost respect should be given to the principle of non-refoulement and individuals should not be forced to return to the territory they faced persecution in so as to secure the border.
- Court stripping or limiting the power of the court to review legislations that deal with terrorism by way of the very same or any other legislation ought not be practiced. The practice of court stripping jeopardizes independence of judiciary, which is the core principle of separation of powers imbibed in the legal systems of both India and USA. Power of judicial review in democratic countries is a means to achieve the end of safeguarding fundamental rights and core civil liberties and curtailment of this power would be a threat to preservation of such rights and liberties.
- This independence of judiciary should be realized by adopting a mixed appointment model, securing the term of the judges, their salaries and other benefits so that the judges aren't subjected to any external and undue influence. Moreover, this independence of judiciary should be balanced by legally ascertained judicial accountability so as to prevent any ludicrous decisions by the courts.

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