

Counter –Terrorism Law in India and the Ajmal Kasab Case – An Over view

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You cannot avoid war in life; you cannot avoid the fear of terrorism; you cannot avoid those things now; they are a part of everyday demeanor – John Mayor¹

A for AK47... B for bomb ...L for LeT ...S for Suicide bomber ... T for Terrorist ... can be easily comprehended by kinder garden children today. 'Terrorism has forced a new world, no nation is immune... networks of terrorism exist all over. Finances are raised globally, as are recruits. The very spread of technology that underpins the current surge of globalization and modernity has also empowered the terrorists with a new lethality'.² Today world order is most dangerously threatened by terrorist attacks.

An orgy of terror by 10 Pakistan trained terrorists left India invaded; innocent people were brutally killed, maimed and injured: 26-29 November 2008 will ever remain as black days in the history of this nation. Every attack is fresh in memory and fails to fade away. Right since its birth, India has been a victim of terrorist attacks. Undoubtedly, terrorism has undermined the United Nations principles of peace and security. UN has condemned terrorism and has adopted measures to prevent international terrorism. India as a renowned peace loving member is bound by such measures. Also, India has its Constitution and laws to combat the menace of terrorism.

1 www.brainyquote.com(11.11.13)

2 Defence Minister George Fernandes addressing the Shangri-la Dialogue in Singapore on June 1,2003(Indian Express , 7.6.2003 p7)

The purpose of this paper is to make an over view study of the Indian counter terrorism law and the recent judgments of the Indian Courts in Ajmal Kasab³ case.

Counter terrorism- our constitutional resolve

Terrorism is a bundle of crimes. There is no universally agreed definition of Terrorism⁴. The Prevention of Terrorism Act, 2000(UK) defined terrorism as the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear.⁵

UN declared that acts, methods and practices of terrorism in all its forms and manifestations are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of states and destabilizing legitimately constituted governments and called upon states to enhance cooperation in preventing and combating terrorism.⁶ Our Constitution proudly declares India as a sovereign, socialist, secular, democratic republic.⁷ India is wedded to welfarism, peace and development. Protection of human rights is an important object⁸. Terrorism devilishly laughs at all our cherished goals and threatens security

3 The lone terrorist who was captured alive and punished for the 26/11/2008 terrorist attacks in Mumbai

4 UN Office on Drugs and Crimes, www.unode.org. (2.11.13)

5 Section 20(1)

6 Preamble, UN General Assembly Resolution 60/288(2006)

7Preamble, Constitution of India.

8 Parts III and IV

and sovereignty of India. UN General Assembly Resolutions and Security Council Resolutions called upon the states to criminalize and prosecute acts of terrorism and disrupt and prevent the financing of terrorism. For this purpose wide ranging changes to the national legislation was urged upon.⁹ International, regional and sub regional responses to combat terrorism have resulted in nearly 20 conventions.¹⁰

India has not assigned 'Terrorism' as a specific subject while assigning the legislative powers to the union and states. Parliament's power was found to be flowing from the residuary power and the power to legislate in respect of defence of India¹¹. But today, the Union List entries on UNO and on implementing the international decisions are also noteworthy¹². Moreover, to give effect to international agreements, Parliament can ignore the distribution of subjects in the Constitution and legislate.¹³

Legislative efforts

9 (GA) 49/60 of 9 Dec 1994 : Declaration on Measures to eliminate International Terrorism, R 60/288 of Sept 2006: UN Global Counter Terrorism Strategy; SC 1373/2001, 1624 /2005, 1456/2003, 1540/2004,

10 International Conventions on nuclear terrorism, bombings, terrorist financing, air safety, maritime safety, plastic explosives and regional conventions of Organization of American of States, Council of Europe, SAARC, Arab countries etc.

11 Kartar Singh v State of Punjab, 1994 Cri L J 3139; PUCL v Union of India, AIR 2004 SC 456

12 Schedule VII, Constitution of India

13 Art 253

Terrorist and Disruptive Activities (Prevention) Act, 1985 was the first counter terrorism enactment in India. This was temporary for containing the upsurge of insurgency and disruptive activities in Punjab. TADA was further strengthened into TADA (Prevention) Act, 1987 and extended till 1995. But its misuse caused large scale human rights violations. Due to tremendous pressure from National Human Rights Commission, TADA was allowed to expire although the SC had upheld the constitutional validity of TADA. SC considered that the country was in the firm grip of spiraling terrorist violence and that the youths lured by the ideology of terrorism were committing serious crimes against humanity.¹⁴ Subsequently our country witnessed major terrorist acts particularly, hijacking of our aircraft to Kandahar (1999) and assault on the Parliament (2001). Law Commission strongly favored the passing of Prevention of Terrorism Bill.¹⁵

POTA was passed and its constitutional validity was upheld¹⁶. The new government promised to wipe out POTA and repealed it in 2004 only to reintroduce it in another form. Citing the UN Security Council Resolution¹⁷, the Unlawful Activities (Prevention) Act, 1967 (UAPA) was amended to fight terrorism. UAPA has been further amended in 2008 and 2012 to strengthen the measures to deal with terrorism in response to the UN Security Council Resolutions.¹⁸

14 Supra n 10 Kartar Singh at 3164

15 173rd Report on the POT Bill, 2000.

16 Supra n 10, PUCL

17 1373 of 28 Sept 2001

181373(2001), 1267(1999), 1333(2000), 1363(2001), 1390(2002), 1455(2003), 1526(2004), 1566(2004), 1617(2005),1735(2006) and 1822(2008)

UAPA geared to fight

In 2004, UAPA saw additions: Chapter IV – Punishment for Terrorist Activities; Chapter V- Forfeiture of Proceeds of Terrorism or any Property intended to be used for Terrorism¹⁹ and Chapter VI – Terrorist Organizations. Chapter IV offences-

S.15 Committing a terrorist act

S.17 Raising fund for terrorist act

S.18 Conspiring, attempting, advocating, abetting, advising, inciting or facilitating any preparation of a terrorist act

S. 18A Organizing terrorist camps

S. 18B Recruiting any person or persons for terrorist act

S. 19 Voluntarily harboring, concealing or attempts to harbor or conceal a terrorist

S.20 Being member of terrorist gang or organization

S. 21 Holding proceeds of terrorism

S. 22 Threatening witness

S. 23 deals with enhanced penalties. When certain offences under Explosives Act, Arms Act etc are committed with intent to benefit a terrorist, terrorist organization or terrorist gang the person will be awarded minimum five years imprisonment and upto a maximum of life. Even abetment, attempt to the above offences can invite a maximum of ten years imprisonment.

UAPA does not define terrorism but defines the terrorist act and requires ‘terrorism’ and ‘terrorist’ to be construed accordingly²⁰Under S. 15 (1) whoever does any act with intent to threaten or likely to threaten the unity, integrity, security, economic security or sovereignty of

19 Titled was reframed in 2012

20 Section 2(1)(k)

India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country by using bombs etc, causing death, destruction of property, disruption of essential services and supplies, damage to the monetary stability of the country, using criminal force, abduction, kidnapping, threatening, etc commits a terrorist act. 2012 amendment has inserted Second Schedule which lists the treaties. The offences under these treaties are also terrorist acts.²¹

Arming the Investigation and Prosecution

It is a gargantuan task for any government to combat terrorists. Terrorism has no face, no rules, no morality, no qualms. Ruthlessness and more ruthlessness are its driving force.²² Threat is unpredictable; brutal methods are employed; high conspiracy and secrecy is involved; weapons of unusual sophistication are used. There can be no iota of doubt that terrorist activities are no ordinary crimes. Terrorists have military strategy; they organize and act clandestinely. Legislation begins where evil begins²³. The instrument should suit the task. Entrusting drastic powers to the government to fight and flush terrorism seem to be the only answer. This conferment of powers is on TRUST and should be used fairly. Governments have been charged with excesses in countering terrorism. Rightly 'they are damned if they do, doomed if they don't'²⁴.

21 S.15(2). 9 treaties are listed.

22 Paras Diwan and Peeyushi Diwan, Human Rights and the Law, Deep and Deep Publication(1998) Preface(xiv-xv)

23 Kartar Singh at 3165

Chapter V ensures adequate powers to deal with the proceeds of terrorism. Proceeds of terrorism means all kinds of properties derived or obtained from committing terrorist act(s) and also the properties being used or intended to be used for a terrorist act. No person shall hold or be in possession of any proceeds of terrorism. Proceeds of terrorism held by a terrorist or other person is liable to be forfeited whether or not he is prosecuted or convicted under chapters IV or VI conviction.²⁵ The moveable and immoveable property in certain cases can be attached by the court; Cash can be seized pending decision of forfeiture. When a person is convicted for offences under chapter IV or VI in addition to punishments prescribed, the court may declare that any property of that person is forfeited to the government.²⁶ Confiscation can be ordered of all or any of the property of the accused whose trial cannot be concluded for death or absconding.

The First Schedule to UAPA lists the terrorist organizations. Organizations listed in the Schedule to the UN Prevention and Suppression of Terrorism (Implementation of Security Council Resolutions) Order, 2007 made under Section 2 of the United Nations (Security Council) Act, 1947 and amended from time to time are also deemed to be listed by entry 33 to first schedule. Central government has power to add to or remove from the list or amend the schedule; aggrieved persons can apply before the review committees. Chapter VI offences -

S.38 associating or professing to be associated with a terrorist organization with intention to further its activities

S.39 giving support (not necessarily by money) to a terrorist organization, arranging meetings or addressing a meeting for encouraging support

24 T N Shalla, Cries of Human Rights Violations and the Role of Human Rights Organisations, in S C Tiwari(Ed), Terrorism in India,

25 S. 24,26

26 S.33

S.40 raising fund for a terrorist organization

Special Powers to arrest, search etc

To strengthen the investigation, adequate powers to arrest, search and have persons in custody have been added. Grant of bail has been made strict; anticipatory bails will not apply to accused under this Act. The court shall presume, unless the contrary is shown, the commission of terrorist act when by definitive evidence it is proved that the person possessed arms/explosives which were recovered from him, similar arms/explosives were used in the offence and that the person was found in the site of the offence. The investigation has power to seek any information from public authority and private agencies in their possession in relation to offences under this Act. Failure to furnish or deliberately furnishing false information are punishable.²⁷ The trial may be held in camera, or at place decided by the court and identity of witnesses may be withheld for protecting the witnesses.²⁸ Evidence through interception of communication is admissible as evidence; safeguards have been also ensured.²⁹ Impounding of passport and arms license of any charge sheeted person is deemed.³⁰

Central government has powers to freeze, seize or attach funds, assets etc, prevent transfer of funds and also prevent entry into or transit through India certain persons.³¹ Further, to prevent

27 Ss. 43A-43F

28 S. 44

29 S.46

30 S.51

31 S.51A

weapons of mass destruction to be delivered to non- state actors and terrorists India has enacted The Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005. Also for cooperation with neighboring nations, SAARC Convention (Suppression of Terrorism) Act, 1993 had been enacted. National Security Act, 1980 provides for preventively detaining persons on grounds of defense and security of India.

Kasab Case

Allah kasam, maf karna! are reported to be the last words of Ajmal Kasab³². Let god decide his stand. The world should answer- Was Kasab eligible for pardon? The attack on Mumbai was an attack on India-on every Indian³³

Ajmal Kasab and his comrades, entered India illegally, brought arms and ammunitions illegally, lobbed grenades, fired indiscriminately and killed brutally. Pakistan based terrorist organization – Laskhar-e-Toiba not only master minded the attack but also handled the terrorists- instructed, informed and guided them using voice over Internet Protocol. This was a conspiracy to wage war against Government of India to liberate Kashmir. 166 were killed and 238 injured. Loss to property was estimated to be over 150 crores of rupees.³⁴ Kasab was tried with 2 other accused persons and 9 dead accused and 35 wanted accused for various offences under the following legislations-

Indian Penal Code,1860
Arms Act, 1959
UAPA, 1967
Explosives Act, 1884
Explosive Substances Act, 1908
Passport (Entry Into India) Act,1920

32 www.ndtv.com (5/12/13)

33 Ratan Tata, Forward, 26/11 Mumbai Attacked, Ed Harinder Baweja, Roli Books (2009)

34 Mohd Ajmal Mohd Amir Kasab v State of Maharashtra, AIR 2012 SC 3565 at 3572

Prevention of Damage to Public Property Act, 1984
Railways Act, 1989
Customs Act, 1962
Foreigners Act, 1946

Kasab was awarded **five** death sentences, **five** sentences of life imprisonment and a total of (for various offences) **66 years and one month** of rigorous imprisonment! Total fine amount imposed was a meager **Rs.1,36,900/-** No separate sentences were imposed for conspiracy in respect of certain other minor offences and abetments as death had been awarded.³⁵ All the sentences were confirmed by the High Court and the Supreme Court. Kasab's petition for Presidential clemency was turned down and he was executed.

Kasab was given senior lawyers at state expense for the trial and appeals. Among other things, it was argued for him that the confession given to magistrate was not voluntary and that he was not afforded a lawyer during the pre-trial proceedings and therefore the trial was vitiated. Supreme Court laid down that it was the state's duty to provide lawyer even during pre trial proceedings. Kasab wanted a lawyer from Pakistan. He requested his government but did not get. Moreover there was no prejudice caused in this case because of overwhelming evidences and his further confession before the trial court. The SC rejected the plea.³⁶ The Court compared the safeguards in our law as to confession with American law and expressed satisfaction.³⁷

Close

India should have a dedicated legislation with extra integrated approach. Our firm determination to quell terrorism should be boldly exhibited. Preventing and punishing terrorist activities should be its object and it should include provision for aid to victims and public officers who are

35 State of Maharashtra v Mohd Ajmal Mohd Amir Kasab, MANU/MH/0169/2011 para6

36 Supra n 33 p3685

37 Id at p3677

involved in prevention, investigation etc of terrorism³⁸. Vigilance and surveillance should be strengthened; human rights should not be abdicated.³⁹ People should stand united and alert. Misuse of powers to combat terrorism should be controlled with an iron hand. Juvenile Justice Act, 2000 should deal with juveniles indulging in terrorism toughly; necessary amendments should be made. As a nation we need to decide and notify those offences which will merit no pardon. Mercy powers of the President and Governors should be regulated through law to eliminate delay; clemency should be hardheartedly denied for terrorist acts. SC has recently held that long delay in deciding the mercy petition as a ground for commuting the death sentence into life imprisonment cannot be invoked in cases where a person is convicted under TADA. The seriousness of the crimes involving gruesome killing and mass murder of innocent civilians should be gauged as standing altogether on a different footing.⁴⁰ Needless to say national security is our collective security and it is our fundamental duty to uphold and protect the sovereignty, unity and integrity of India.⁴¹

38 As in USAPATRIOT

39 UN Action plan (Sept2006)

40 Devendar Pal Singh v State of NCT of Delhi, AIR 2013 SC 1975 at 2009

41 Article 51A(c), Constitution of India.

