REVIEW OF RESEARCH

HUMAN RIGHTS AND PHENOMENA OF TERRORISM: INDIAN LEGISLATIVE AND JUDICIAL RESPONSE

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ISSN: 2249-894X
IMPACT FACTOR : 5.7631(UIF)
UGC APPROVED JOURNAL NO. 48514
VOLUME - 8 | ISSUE - 8 | MAY - 2019

ABSTRACT:

In democratic society's fundamental human rights and freedom are put under the guarantee of law and therefore, their protection, preservation and promotion becomes obligation of those who are entrusted with the task of their protection i.e. legislative, executive and Judiciary. The protection and promotion of Human rights under the rule of law is essential in the prevention of terrorism. Here comes the role of law and courts responsibility. If human rights are violated, which adds to the need to strengthen action to combat violations of human rights. The lack or hope for justice provides breeding grounds for terrorism. Terrorism itself should also be understood as an assault on basic rights. Our constitution laid down clear limitation on state actions within the context of the fight against terrorism. To maintain this delicate balance by protecting core human rights is the responsibility of court. The present paper will discuss the relationship between prevailing terrorism in India and human rights. The paper will discuss the legislative and judicial regime against terrorism

KEYWORDS: *democratic society's , human rights and freedom.*

INTRODUCTION :

The Spirit or democracy cannot be established is the midst of terrorism. Justice will come when it is deserved or being and feeling strong. Terrorism and deception are weapons not for the strong but for the weak.

Mahatma Gandhi

The concept of human rights can be traced to the natural law philosopher, such as Locke and Rousseau. The natural law philosopher philosophized over such in hand human rights and sought to preserve these rights by propounding the theory of 'social contract'.

According to Locke, man is born "with a title to perfect freedom and uncontrolled enjoyment of all rights and privilege law of nature" and he has by nature a power' to preserve his property-that is his, liberty and estate against the injuries and attempts of other man[1].

Terrorism is a world-wide problem and India too is facing this menace. The reasons may be numerous but overpopulation problem and unemployment are main roots. The neighboring countries are playing a key role encouraging the terrorism. The victim of the terrorism may be the innocent persons including children and women or old. The method of practicing the terrorism is different from the ancient times due to the advanced technology. These crimes are of the serious nature, it sometime leads to destruction of society.

DEVELOPMENT OF ANTI-TERRORISM LAW IN INDIA

Keeping the view of heavy work load on the regular courts the terrorist and Disruptive Activities (Prevention) Act, 1985 (here in after referred as TADA Act) was enacted for the purpose of preventing the terrorist from committing terrorist acts, and disruptive activities by providing

special provisions.

The TADA Act 1985, was enacted initially for a period of two years. It was replaced with the terrorist and Disruptive Activities (Prevention) Act, 1987. Since, then it is receiving the extension after every and at present its life was extended up to may 1996. The TADA act is limited in it scope and effect. The act is an extreme measure which is to be adopted when all the other measures fail to tackle the situation under ordinary penal law. The TADA act contains special provision to fight be growing menace of terrorism in different parts of the country. Since the act is drastic measure, it should not ordinary be resorted to unless the government's law enforcing machinery fail[2]. Section 20; Sub-section (7),(8) and (9) of the TADA act lays down the provision for bail to an accused.[3] These provisions for bail are in addition to the provision provided under section 167, 436, 437, 438 and 439 of the Criminal Procedure Code.[4] Under the Indian Constitution right to life and personal liberty is a fundamental right. Article 21 of the constitution provides that life and liberty of the individual shall not be deprived by the state procedure established by law.[5] Article 14 of the constitution states that state shall not deny any person equality before law and the equal protection of law.

Section 20, (1) of the TADA provides that every offence punishable under this act shall be treated as cognizable offence. The cognizable offences are defined in section 2 (c) of criminal law Procedure Code.

In the case[6] it was observed that on the expiry of said period……the accused shall be released on bail if he is prepared to and does furnish bail….in this case[7] it was observed by P.N. Bhagwati J., that "*it would needed a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him, can the court ever compensate him for incarceration which is found to justified? Would it be just at all for court to tell a person?*"

In case[8] P.N. Bhagwati j., has expressed shock over the oriented approach of bail system as:-

"*Now, one reason why our legal system continuously denies justice to the poor by keeping them for long years in pretrial detention is our highly unsatisfactory bail system. It suffers from a poverty created approach which seems to precede an erroneous assumption the risk of monetary loss is the only deterrent against feeling from justice. It operated harshly against the poor and it is only the non-poor who able to take advantage of it by getting themselves released on bail. The poor find it difficult to furnish bail even by courts is unrealistically excessive that in a majority of the cases, the poor are unable to satisfy the police or magistrate about their solvency to stand as sureties*".

In the cognizable offences police officer can arrest a person without warrants. The police officer may try to link even non-cognizable offence with TADA act. Under section 164 of criminal law procedure code any metropolitan magistrate or judicial may record any confession or statement. But under section 20 (3) of TADA act power to record confession or statement is given to metropolitan magistrate, judicial magistrate, executive magistrate or special magistrate, when investigation cannot be completed within 24 hours, the officer in charge of police station or investigation officer not below the rank of sub inspector shall send to the nearest judicial magistrate a copy of the entry in the diary relating to the case along with the accused. Under TADA act the judicial magistrate includes the executive magistrate, special executive magistrate.

The bail application lies to the designated court under the TADA act from where it lies directly to the Supreme Court. But the High Court of the States has no jurisdiction to entertain the bail application relating to the terrorist and disruptive activities cases. Under the Criminal Procedure Code bail application from the lower court lies to the High Court and finally to the Supreme Court for bail. In the case[9] the Supreme Court observed that:-

"The enlightened bail project by the United States have shown that the presence of accused in large number of case has been possible even without monetary either being unable to obtain release, they have to remain in jail until such time as the court is able to take up their cases for trial.

The bail provision is restrictive in nature under TADA act then the Criminal Procedure Code. The bail is rich people oriented and does not take into considerable plight of the poor. The poor people further suffer when they have to approach Supreme Court against the order of designated court for the purpose of getting bail. More over the period of 180 days which shall be extended up to one year on the

application of the public prosecutor for granting bail to an accused is extra ordinary harassment to an innocent. It, is, therefore submitted that High Court of state may also be given jurisdiction to entertain the bail application of an accused.

In the case[10]the court felt that sadder with the manner in which the machinery of law moved .....what an affront to fundamental rights and human dignity, liberty and freedom of these persons were in chain for more than a year for no reason.

Hacker group called G-Force published the massages against India clamming Kashmir. They also had defaced and hacked several websites of Indian government, Companies and scientific organisation. The instances of hijacking of Indians Airlines flight to Kandhar in Afganistan in December 1999; December is one of such instances of cyber terrorism in India. Terrorist communicated and controlled whole operation through E-males but remained undetected. One Pakistani website called "Golabal.net.pk" was also hacked and defaced by Pakistani hackers e.g. G-Force Pakistani and hackers Ul-mos. They were generally known for anti-Indian hacking.

In the year 2001 after Pokharan II test western hackers attacked on Bhaba Atomic Research Center (BARC) to steel nuclear test DATA. They are to be treated as cyber terrorist. In November 2000 Pakistani hackers attacked American, Israel Public Affairs Committee (AIPAC) a pro Israeli Lobbing group in Washington, DC. Their websites were defaced with anti Israeli Commentary with theft of 3,600 E-mail addresses, 700 credit card numbers and publication of the same.

The Pakistani hackers group was founded by one Indian hacker known as Dr. Neruker whose actual name is Mr. Anand khare. He said that the aim of Pakistani hackers was to hack for injustice going around the Globe, specially with (sic) Muslim. In May 2001 Indian government and business sectors raised voice to act against anti Indian hacking specially Pakistani hackers. To achieve this goal government constituted a force of cyber security and enacted various laws and harasser penal provision to combat cyber terrorism.

Saniay Duttt v. State **(through C.B.I.),**[11] The expression possession though that of section 5 of Tada has been stared to mean a conscious possession introducing thereby involvement of a mental element i.e. conscious possession & not mere custody without awareness of nature of such possession and as regards unauthorized means and regards without any authority of law.

Devender Pal Singh v. State of N.C.T. of Delhi,[12] in a case where 9 people had died and several others injured on account of perpetrated acts the court said that such terrorist who has no respect for human life and people are killed due to their mindless killing. So any compassion to such person would frustrate the purpose of enactment of Tada and would amount to misplaced and unwarranted sympathy. Thus they should be given death sentence.

T.T. Anthony v. State of Kerala[13]This plenary power of police to investigate a cognizable offence is not unlimited. It is subject to certain limitations such as if no cognizable offence is disclosed & still more if no offence of any kind is disclosed the police would have no authority to undertake an investigation.

State (N.C.T. of Delhi) v. Navjot Sandhu @ Afzal Guru[14]this was an appeal against convictions in view of attacks made on parliament. The matter was relating to admissibility and evidentiary value of evidence that retracted confessions cannot be acted upon by Court unless it is voluntary and can be corroborated by other evidence. Confession of accused can be used against co-accused only if there is sufficient evidence pointing to his guilt confession made under POTA cannot be used against co-accused as POTA operates independently of Indian Evidence Act and Indian Penal Code. Section 10 of Evidence Act has no applicability as confessionary statement has not been relied on for rendering conviction.

Admissibility of intercepted phone calls, intercepted phone calls are admissible piece of evidence under ordinary laws even though provisions of POTA cannot be invoked as it presupposes investigation to be set in motion on date of its interception. Impact of procedural safeguards have under POTA on confession made involuntary is inadmissible evidence. If procedural safeguards have not been complied it will affect admissibility and evidentiary value of evidence being proved all charges beyond reasonable doubt convictions were upheld.

Acts of terrorism have been held to come under the ambit of offence of waging war or attempting wage war or abetting waging of war under Section 121 IPC. This was held by the Delhi High Court in the case State (NCT) of *Delhi v. Mohd. Afzal* and Ors[15].This judgment of the Delhi High Court was confirmed by the Supreme Court on appeal. Mohd.Afzal also known as Afzal Guru was convicted by the Supreme Court under section. He was one of the conspirators of the terrorist attack on the Indian Parliament in December 2001.

There has been some confusion however whether the word "whoever" in this section includes foreign nationals. In Mohd. Afzal's case[16] it was held that Section 121 IPC applies to foreign nationals as well. The position of the Delhi High Court in this regard was reaffirmed by the Supreme Court when it held that- "We find no good reason why the foreign nationals stealthily entering into the Indian territory with a view to subverting the functioning of the Government destabilizing the society should not be held guilty of waging war within the meaning of Section 121. The section on its plain terms need not be confined only to those who owe allegiance to the established Government."

CURRENT ANTI-TERRORISM LEGISLATION IN INDIA:-

However the Indian Penal Code suffers from certain inherent drawbacks when it comes to the provisions regarding terrorist acts and offences related to acts of terror. The very first being that nowhere in the Indian Penal Code is the word **"terrorism"** defined. There is a need to incorporate permanent special provisions to deal with terrorism in all three of our major acts dealing with crimes i.e. the Indian Penal Code 1860, Criminal Procedure Code, 1973 and the Evidence Act, 1872. All three of these acts were drafted and enacted before terrorism became rampant and therefore these legislations unless amended are not well equipped to deal with acts of terrorism.

The special provisions should preferably be in a separate chapter in the Indian Penal Code and should clearly define terrorism and terrorist; and prescribe stringent and deterrent punishments, including prescribed minima for incarceration. The new provisions in the Criminal Procedure Code should provide for speedy trials denial of bail after the charge is framed by the court, restrict the number of appeals to one and that too only on substantive points of law etc. Time limits could also be prescribed for filing charge sheets, trial procedure and appeals. Special provisions in the Evidence Act should try to liberalise the rules of evidence (loading it in favour of the citizens instead of the terrorists). Along with the introduction of special legal provisions to tackle terrorism, safeguard against misuse or abuse of the provisions can also be enacted.

It is unfortunate that criminals, particularly those involved in terrorist attacks, are able to use the existing safeguards in our laws to delay or evade punishment, thus reducing the deterrent effect of suitable punishment for brutal acts of terrorism. The trial of those accused I the serial blasts of 1993 in Mumbai dragged on for 13 years, and it has to be kept in mind that the appeals process is yet to materialize. Ajmal Kasab, the lone attacker captured after the 26/11 has been making a complete mockery of the Indian Judicial system. Amendments to the Indian Penal Code, 1860 and the Criminal Procedure Code, 1973 should lead to quicker and clearly deterrent punishments and may hopefully help in preventing terrorism from assuming more virulent proportions.

The Unlawful Activities (Prevention) Amendment Act, 2008:-

The Unlawful Activities (Prevention) Act, 1967 was conceived to put reasonable restrictions, on the freedom of speech expression, the right to assemble peacefully or unions for the interests of the India's sovereignty and integrity. The Indian Parliament amended the Act in 2004 following the repeal of Prevention to Terrorism Act, 2002 (POTA). This changed the entire character of the Act and made it more of anti-terrorism legislation. The Unlawful Activities (Prevention) Amendment Act, 2008 made a number of procedural and substantive changes to empower the NIA, Act effectively and decisively on terrorism.

These are some of the important changes that have been brought about is in the amendment act. Section 17 was replaced by a provision which makes such persons punishable who collects or provides funds or attempts to do the same and has knowledge that such funds are likely to be used for terrorist

activities. Two additional provisions have been inserted after section 18 of the Unlawful Activities Prevention Act, 1967. Section 18A deals with the offence of organizing or causing the organization of any camp for imparting training in terrorism and section 18B deals with the offence of recruiting or causing the recruitment of any person for the purpose of committing a terrorist act. A new Section 43D has been incorporated in the Amendment Act, which has increased the maximum period of custodial interrogation (remand) to 180 days, an increase of over the 90 days allowed under Section 167 of the Code of Criminal Procedure of 1973. Section 43E introduces the principles of presumption of guilt, which was also present in POTA. According to the section arms, explosive or other substances specified in Section 15 of the Act, if recovered from the possession of the accused and if there is reason to believe that substances of similar nature will be used in the commission of the offence, the court shall resume that accused has committed such offence. Critics have countered this section 43E stating that our criminal justice system is based on the presumption of innocence until proved guilty. The onus of proving the guilt of the accused is invariably and always on the prosecution whereas as per Section 43E if a person is found with the weapon the onus would be upon him to prove that the is not guilty.

The legislation again meets the objectives of speedy and efficient investigation, fair and speedy trial, and deterrent punishment. However similar to the NIA act, it comes into play only after the terrorist act has been committed. However deterrent our laws are, it is not going to affect the spirit of a *Jehadi* on a suicide mission.

ROLE OF JUDICIARY IN PROTECTION OF HUMAN RIGHT

The right to speedy trial is one of the basic objectives of the administration of justice. The right to speedy trial flows from Article 21 of the Indian Constitution which is available to accused at all stages of trial, namely investigation, inquiring, trial, appeal, revision and retrial. The Code of Criminal Procedure and Police Act put emphasis for expeditious disposal of matters. Though, a number of Commissions and Committee have been constituted to suggest measure to implement this constitutional provision but it remains a "mirage" in our system of governance. There are reasons for delay-

(1) Numerous litigations
(2) Absence of witnesses
(3) Absence of Counsel
(4) No system for day to day hearing
(5) Failure to testify witnesses however present
(6) Delay in the delivery of judgment

Right to speed trial is the basic feature of a judicial system. It is desirable because delay may defeat justice, thus the ultimate object of criminals justice delivery system would be defeated. There is a proverb-*justice delayed is justice denied*. Therefore, speed trial is the most important essence of an organized society. However, to deliver speedy justice the procedural norms cannot be ignored as the proverb says that "justice hurried is justice buried". There should be balance between the speed and justice.

According to the Supreme Court of India-speedy trial is the essence of criminal justice. In U.S.A. speedy trial is the Constitutional right guaranteed under the 6thAmendment. However, in Indian Constitution the right to speedy trial is snot specifically enumerated as a fundamental rights but it is implicit in the broad view and content of Article 21 of the Constitution as it is interpreted in *Maneka Gandhi`s* case by the Supreme Court. In *Hussainara Khatoon v. Home Secy., State of Bihar,*[17] the Supreme Court has life and personal liberty enshrined in Article 21 of the Indian Constitution. Although in another case *A.R.Antuly v. R.S. Nayak,*[18] the Supreme Court ruled that neither it is desirable nor advisable to fix any time limit for trial of offences. It is the burden on prosecution to explain and justify the delay in trial. The right to speedily trial is available to the accused at all stages of trial. The object and content

of Article 21 supports the above concept. The right to speedy trial cannot be denied to the accused merely on the ground that he had failed to demand a speedy trial.

The Supreme Court is of the view that the right of a speedy trial is one of the dimensions of the fundamental right to life and liberty guaranteed by Article 21 of the Constitution. But, the question whether the right to speedy trial was violated depends upon various relevant factors. Thus, to determine the speed or delay would depend upon the nature of the case and the general situation prevailing in the Country. No time limit can be fixed because it may not be in the interest of justice. According to Cock-"prolonged detention without trial will be contrary to law and delay in trial itself is an improper denial of justice."

In our country the fundamental right to speedy trial is a result of judicial activism expressed in respect of Article 21 of the Constitution. In present time the right to speedy trial has become an internationally recognized human right. The right to speedy trial has secured a place in category of fundamental rights because of the liberal judicial interpretation. P.N. Bhagwati j., in *Hussainara case* had said that "*though the right to speed trial was not specifically guaranteed by the founding fathers of the Constitution, it was implicit in the broad and content of Article 21. It means speedy trial means reasonable, quick trial, it does not mean that delayed trial is always an unfair trial*".

The Supreme Court of India in *Champa Lal v. State of Maharastra,*[19] has ruled that though a fair trial implied speedy trial, a delayed trial was not necessarily an unfair trial. According to justice O. Chinnappa Reddy-There is distinction between the two-(i) Where the delay is caused by the accused himself and (ii) the delay is caused by the prosecution agencies. He said, delay by the accused did not prejudice him. Hence, the quashing of conviction on the ground of delay would depend upon the facts nature and circumstances of the case.

In India, the right to speedy trial has secured the status of the fundamental right due to liberal judicial interpretation of article 21 of the Constitution. This right is available to the accused person at all of trial – (i) investigation, (ii) inquiry, (iii) Trial, (iv) Appeal, (v) Revision and (vi) retrial.

In *Kharak Singh v. State of U.P*[20].the held that the expression "life" under Article 21 of the Constitution is not confined to bodily restraint to prisoners only. the Apex Court further held that the domiciliary visits of the policeman were an invasion into petitioners' personal liberty. An unauthorized interference or intrusion into a person`s home and the disturbance caused to him is the violation of the personal liberty of an individual which has been guaranteed by the Constitution.

The expression: life" as used in Article 21, is meant something more than mere animal existence. In another case *Manaka Gandhi v. Union of India,* [21]the Apex Court has widened the scope of the expression "personal liberty" and observed –"The expression personal liberty in Article 21 is of the widest amplitude and it a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of fundamental rights and given additional protection under Article 19."

In *Govind v. State of Madhya Prades*[25] the Apex Court observed that "the right to personal liberty, the right to move freely and the freedom of speech create an independent right of privacy as an emanation from them which can be characterized as a fundamental right. The "right to privacy" would necessarily have to go through a process case by case development.

In *State of Maharastra v. Madhuker Narain Mardikar.*[22] The Supreme Court has held that "Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as when he likes. In the view of Apex Court`s judgment no person is authorised to violate or to make intrusion into her privacy as and when he wishes. In the above case, the Court said that a women of easy virtue is also entitled to protect her person if there is an attempt to violate it against her wish, she is equally entitled to the protection of laws. This landmark judgment of the Apex Court has widened the scope of the "right to privacy" which included that the right to privacy is one of the fundamental rights under the Indian Constitution. This judgment deserves to the hailed as the judicial excellence. Right to privacy again cropped up before the Apex Court in *Raja Gopal v. State of T.N.* [23]in connection with the publication autobiography of condemned prisoner which contained *inter alia* the materials as to show close nexus

between the prisoner and several I.A.S., I.P.S. and other officers, some of whom were his partners in several crimes. The Apex Court in that case has laid down the following principles.

The right to privacy is Implicit to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of this own, his family, marriage, procreation, motherhood, child bearing and education among other matters. No one can publish anything concerning the above matters without his consent-whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in action for damages. Position may, however, be different if a person voluntarily thrust himself into controversy or voluntarily invites or raises a controversy.

CONCLUSION:-

Indian has been the victim of insurgencies and terrorism of various hues since it became independent in 1946. Over the years the magnitude of attacks and the impact caused has only increased. Under the circumstances there is an urgent need to include certain provisions to deal effectively and strongly with this menace in the Indian Penal Code, 1860 and the other major legislation namely the code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872. Incorporation of a separate chapter in the Indian Penal Code which defined terrorism and offer related offences can be a great step forward. It should also prescribe stringent and deterrent punishments for such offences.

In this regard the National Investigative Agency (NIA) Act, 2008 and the Prevention of Unlawful Activities (Prevention) Amendment Act, 2008 are two effective legislations. However it is very doubtful to what extend it will lead to prevention of terrorist acts. One way of achieving this can be by reorganising the entire Indian intelligence set up along the lines that the United States has does in the wake of the September 11 terror attacks.

The Government on its part should ensure the effective implementation of our terror legislation. Indian politicians should refrain indulging in vote bank politics for the purpose of protecting their vested interests and personal political careers. Mere slogans and promises alone would not suffice; appropriate action is required to be taken.

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