

Terrorism and the Human Rights Paradigm: Navigating Security Imperatives and Civil Liberties in Global and Indian Contexts

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Abstract: Terrorism is not only a threat to national security but also a direct assault on the basic human rights that every individual is entitled to. Acts of terrorism violate the most fundamental rights, including the right to life, dignity, liberty, and safety. At the same time, the steps taken by governments to prevent and control terrorism often create new human rights concerns. This creates a difficult situation where States must protect their citizens from terror without compromising the very rights they are meant to uphold. At the global level, international human rights instruments such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) stress that even in times of crisis, counter-terrorism measures must respect human rights standards. However, across many countries, practices such as arbitrary detention, torture, mass surveillance, and discrimination have been reported in the name of security. These practices raise serious questions about the balance between security and freedom. In India, the impact of terrorism has shaped several stringent laws, including the Unlawful Activities (Prevention) Act (UAPA) and the Armed Forces (Special Powers) Act (AFSPA). While these laws aim to safeguard national integrity and public order, they have often been criticised for allowing prolonged detention, limited safeguards for the accused, and potential misuse of power. The Supreme Court of India has repeatedly attempted to strike a balance by protecting constitutional rights under Articles 14, 19, and 21 while acknowledging the State's duty to ensure security. This paper explores how the fight against terrorism intersects with human rights both globally and in India. It argues that effective counter-terrorism should not come at the cost of human dignity and democratic values, and that a human rights-based approach is essential for achieving lasting peace and justice.

Keywords: Counter terrorism; Human dignity; Civil liberties and Constitutional safeguards.

I. INTRODUCTION

Human Rights blossom in a peaceful atmosphere. The bonding between human rights and terrorism is a disturbed one. Human being has an inviolable right to go to hell in his own fashion sense but without injuring the person or property of another on the way directly.¹

¹Novel Morris and Gordon Hawkins, *The Honest Politician's Guide to Crime Control*, 1970 , Chicago University Press, at 2 , " Man has an inalienable right to go to hell in his own fashion , provided he does not directly injure the person or property of another on the way."

The protection of Human Rights Act, 1993, under Section 2(d) defines Human Rights as the rights connected to life, liberty, equality and dignity of any person guaranteed by the Constitution or incorporated in the International Covenants and enforceable by the courts in India.²

The issue of terrorism and human rights have been a sincere concern of the United Nation, but drew urgent attention post the attack of 11th September 2001 on U.S.A and the worldwide surge in the acts of terrorism thereafter. On 28th September, 2001 the Security Council took up Resolution 1373 under Chapter VII of the United Nation Charter, compelling the States to incorporate more efficient and efficacious counter-terrorism measures at the national level and to escalate international coordination in combating terrorism. The Resolution set up the Counter-Terrorism Committee (CTC) to surveillance action on these issues and takes up reports from the States on measures taken. Mr. Vieira de Mello, late High Commissioner while speaking to the Counter – Terrorism Committee in 2002, asserted the sole strategy to combat terrorism is to respect human rights by imparting social justice, enlightening democracy and upholding the primacy of rule of law.³

General Assembly Resolution 58/187(2003) and Security Council Resolution 2003/68 steer the action on the issue of human rights and terrorism of Office of the High Commissioner for the Human Rights –“ *Protection of human rights and fundamental freedoms while countering terrorism*”. These resolutions direct the High Commissioner’s office to:

- a) Analyse the question of protection of human Rights and fundamental freedoms as well while countering terrorism, considering all the authentic information from all the sources.
- b) Furnish general recommendations relating the obligation of the Nations to uphold and safeguard human rights and fundamental freedoms while combating terrorism.
- c) Furnish help and appropriate course of actions to States, upon their request on the safeguard of human rights and fundamental freedoms to the relevant United Nations bodies.

The office of the High Commissioner for Human Rights also incorporates the findings of the Secretary – General’s Policy Working Group on Terrorism, specifically its sub-group on human rights and terrorism, grounded on a Policy Working Group recommendation, the digest of jurisprudence, published in 2003 by the Office.

One of the Eminent Justices of Supreme Court and commentator, Justice Krishna Iyer, opposed POTA by warning that in the colour of anti-terrorism legislations, everything valuable in our constitutionally backed criminal jurisprudence could not be diluted. Arun Shourie questioned the applicability of Unlawful Activities Act, 1967 by stating that only those persons or organisations that target at rupturing the sovereignty and integrity

²S. 2(d) of Human Rights Act, 1993.

³ Mr. Viera de Mello stated “ *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.*”

of the nation can be tried but the terrorist don sitting at a specific corner of the world commanding over the film world is a threat or not to the sovereignty of the country⁴.

The Broadcast of the Digest of Jurisprudence of the United Nations and Regional Organisations on the Protection of Human Rights While Countering Terrorism , on 13th August, 2003 without voting⁵-

- Strongly excoriate all actions, measures and practices of terrorism as criminal and unjustifiable, wherever or by whosoever executed.
- Asks the Countries to take up all the measures taken up to scrap terrorism follow their obligations under international human rights enactments, international refugees law and international humanitarian law.
- Underscores that countries have the compulsion as per international law to safeguard all individuals within their jurisdictions against terrorist acts and to pursue and penalise their perpetrators, in compliance of standards set up by international human rights standards.
- Placing requests to the Governments, inter governmental organisations and national institutions for upholding human rights, experts and non-governmental organisations to furnish the co-ordinator and the sub- commission with all the relevant data in this regard.

Amnesty International:

There is an old adage goes like ‘if you have nothing to hide, you have nothing to fear’. The laxman rekha between the state and the rights of the individuals are being redrawn and Europe’s human rights framework which had been framed so carefully post second world war, is being very speedily stripped off. Several countries have made it very easier to implement and extend states of emergency, what should have been exceptional and quite temporary powers have increasingly become permanently incorporated in ordinary criminal law.⁶

Extremely broad definitions of terrorism are huge part of the problem. As there is non-existence of an world-wide accepted definition, States and international organisations have framed up their own. In this procedure, the scope of definition of terrorism has become extremely vague and has been implemented quite arbitrarily which eventually making the law-abiding citizens subject to several administrative orders and unwarranted surveillance which confine their freedom and right to life and personal liberty.⁷

The organisation’s secretary general, Irene Khan, had been critical of the government and states government had given up principles in the name of the ‘war on terror’ and turned a blind eye to massive human rights

⁴ Arun Shourie argued that “under the UAPA,1967, solely those individuals or organizations that aim at disrupting the sovereignty and integrity of the country can be proceeded against. The terrorist don sitting in Dubai exercising murderous control over the film world is not threatening the sovereignty of the country...?...can it be anyone’s case that while it is all right to require a person on whom some computer hard disk are found to prove his innocence , it is wrong and diabolic to require him to do so ...if RDX and AK-47 are found?”

⁵ www. Unodc.org.

⁶ Amnesty danger

⁷ Amnesty danger

violations and resultantly, the world is paying a heavy amount, in terms of destruction of fundamental principles and in the tremendous damage done to the lives and livelihoods of the ordinary people.⁸

2006 Amendments in Protection of Human Rights Act:

With the purpose of compliance with the international claim for the setting up of National Human Rights Commission in the National and State Human Rights Commission in the States at the State level and human rights Courts for better protection of human rights, the Act came into being on 28th September, 1993.

After a joint reading of both Section 2(e) and Section 30 of this Act, it can be found out that for furthering speedy justice, the State Government with the concurrence of the Chief Justice of the High Court, by notification for each district, a Court of Session to be Human Rights Court to try the said offences. It is also provided that nothing in the sections shall be applicable, if-

- A court of Session is already designated as a special court.
- A special court is already established for such offences under any other legislations for the time being in force.⁹

As per Section 3(1) of the Protection of Human Rights Act, the Central Government is authorised to establish a body, called as National Human Rights Commission(NHRC).¹⁰ The National Human Rights Commission has been set up under Section 3(2) of PHRA and amended by the Protection of Human Rights (Amendment) Act, 2006. The reference which have been cited here are from the Protection of Human Rights Act, 1993, as amended.

As per Section 12 (a) of PHRA, the National Human Rights Commission is permitted to conduct inquiry, *suo moto* or on a petition to it by a victim or any individual on his or her behalf, into complaints of –a) breaching of Human rights or abetment to breach human rights; and ii) carelessness in the bar of such violence, by a public servant.¹¹ According to Article 36(2), the National Human Rights Commission is bar from accepting petitions after the expiration of one year from the date of the alleged breach of human rights.¹²

The NHRC assumes all the power of a civil court while inquiring into complaints, as per Section 13 of PHRA. Under Article 17(i) of PHRA the NHRC, can also direct the Central or State Government or other authority or any subordinate organisation to furnish information within a given time limit. And if the NHRC does not receive report within the stipulated time period, it can conduct inquiry on its own as per Article 17(i)(a).

Under Section 18, If the NHRC finds any breach of human rights or negligence in the safeguard of Human Rights, can put forward certain recommendations such as making any payment of damages to the complainant

⁸ amnesty

⁹ S, 2(e) and s. 30 phra

¹⁰ S. 3(1) phra

¹¹ S, 12 of phra

¹² S. 36(2) of phra

or victim or its family as it deems fit, proceedings for prosecution or other necessary action as it deems fit against the concerned individual or individuals, place an approach to the Apex Court or the High Court of the concerned state for orders, directions or writs as seems necessary to the court, granting of interim relief to the victim or victim's family members by the concerned authority or Government at any stage of the inquiry. The NHRC must broadcast its inquiry report, along with its recommendations and the Government replies.

In NHRC's Guidelines on encounter deaths (2003), the NHRC urged the following methods those are supposed to be followed by the State Governments in each cases of deaths in the course of police action:

- After obtaining the report of the deaths in an encounter between the Police party and others, the officer in charge must register the case at the first step.
- Conducting investigation by independent investigation agency.
- FIR of custodial death should be registered under relevant sections of IPC and the State Central Branch of Crime Investigation Department must conduct investigation of such cases.
- A Magisterial Inquiry should take place in all cases of custodial death, the next of the kin must be associated in the inquiry.
- Quick prosecution and disciplinary action must be started against all delinquent officers who are to be found guilty in the police investigation or magisterial inquiry.
- The facts and circumstances of each case will be the determining factor of the compensation to be made available to the dependants of the deceased.
- No out of turn promotion or instant or any valour rewards shall be rewarded on the concerned officer immediately after the happening.
- The Director General of Police shall send a six monthly statement of the death cases in police action in the State to the Commission, so as to reach its office by 15th January and July respectively.

The Commission after considering the opinions of the states and discussion with the experts in the concerned regime and ascertaining the U.N. Model Autopsy protocol partially has drafted a Model Autopsy form which is attached in the guidelines.

NHRC Guidelines on Arrest:

Huge number of complaints relating to Human Rights breach is in the regime of police powers, specifically regarding arrest and detention. It has therefore become quite required to curtailing the gap between law and practice, to furnish guidelines regarding arrest without much intervening into the power of the police.

Pre-Arrest:

- As per the observation made in *Joginder Kumar v. State of UP*,¹³ the authority to arrest without a warrant should be executed only after a reasonable investigation regarding the authenticity and good intention of a complaint and the complicity of the persons and requirement to effect an arrest.
- In cognizable cases, arrest may be regarded as a justified step in the following circumstances: a) if the case involves some heinous offence like rape, murder, dacoity etc. b) the accused or the suspect is prone to commit more violence, c) the suspect is prone to destroy the evidences or interfering the witnesses, d) the suspect is a habitual offender.
- The authority of arrest must be averted where the offences are bailable unless and until there is a solid apprehension for the accused absconding.
- Police officers who are executing an arrest or interrogation should always bear clear identification and name tags along with designations, the particulars of the police personnel making such arrest or interrogation must be recorded in a register which is kept at the police station.

Arrest:

- Use of force should be averted unless there is a need to overcome forcible resistance.
- The dignity of the person arrested must be upheld . public display or parading of the arrestee should be avoided in any circumstances.
- As mandated by the Supreme Court in *Prem Shanker Shukla v. Delhi Administration*¹⁴ and *Citizen for Democracy v. State of Assam*¹⁵, the use of handcuffs or leg chains should be averted and if quite necessary, it should be in compliance with the law repeatedly explained.
- As far as is possible women police officer should be associated where the individual or individuals being arrested are women. The arrest of women between 6PM to 6 AM should be averted unless extremely required.
- In cases where juveniles and children are supposed to be arrested, no force or beatings should be utilised at any cost. If required, the police officers may involve respectable citizens in this process so that the children or juvenile do not become a subject to terror.
- As per Section 50(1) of the Code of Criminal Procedure,1973, when the arrest is without a warrant, the individual arrested must be immediately intimated of the grounds of arrest in the language , which the concerned individuals understand. These grounds has to be already reduced to writing in police record. The arrestee should be shown the written reasons and also provided a copy on demand.¹⁶

¹³ *Joginder Kumar v. State of UP*, AIR 1994 SC 1349.

¹⁴ *Prem Shanker Shukla v. Delhi Administration*, AIR 1980 SC 1535.

¹⁵ *Citizen for Democracy v. State of Assam*, AIR 1996 SC 2193.

¹⁶ Section 50(1) CrPc.

- According to Section 50(1) the arrestee may palce a demand that a friend, relative or other individual acquainted to him be intimidated of the fact of his arrest and the place of detention. The police should record in a register the name of the person so intimidated.
- As per Section 50(2) of the CrPC, if an individual is arrested for a bailable offence, the police officer should make him acquainted with the fact of his or her entitlement to be released on bail so that the arrestee may arrange for sureties.
- The concerned police should intimidate the arrestee's right to consult and defended by a counsel of his choice. As mandated in *D.K. Basu v. State of west Bengal*¹⁷, the arrestee should also be made acquainted the he is entitled to free legal aid at the state expense.
- After bringing the arrestee in police station, if he requests for any medical assistance, it should be provided promptly. Where police personnel understands that the arrestee is in need of medical help, thought the arrestee himself is unable to place such demand, the police officer should for the same immediately. Any female arrestee demanding any medical help, should be examined of only by a female medical registered medical practitioner.
- Information relating to the arrest and the place of detention should be informed to the police Control Room and District/ State Headquarters. There has to be a monitoring system round the clock.
- Immediately after arrest, the police officer executing the arrest shall mention of the existence or non-existence of any injury on the arrestee in the registrar of arrest. If any injury is found on the arrestee, complete details as to the manner in which the injuries were received must be specified in the register and the entry must be signed both by the arrestee and the police officer. While releasing the arrestee, a certificate to the above effect under the signature of the police officer must be issued to the arrestee.
- In cases the arrestee is remanded to police custody under court order, the arrestee should undergo medical examination within forty-eight hours during his detention in custody by a doctor on the panel of approved medical practitioner appointed by director, Concerned State's or Union Territory's Health Services. During the release of the arrestee, the arrestee will be medically examined and a certificate shall be issued to him mentioning therein the factual condition of the existence or non-existence of any injuries on his body.

Post Arrest:

- The arrestee has to be produced before the appropriate court within twenty-four hours of the arrest.
- While the interrogation procedure is being carried on, the arrestee must be allowed to meet his counsel at any time.

¹⁷*D.K. Basu v. State of west Bengal*, AIR 1997 SC 610.

- The interrogation must be carried on in a vividly identifiable place, as notified by the government for this specific purpose. The place must be accessible and the relatives or friend of the arrestee have to be intimidated about the place of conducting interrogation.
- The way of interrogation has to be in compliance with the recognised right against torture and degrading treatment which is an inseparable portion of right to life, liberty and dignity.

The NHRC will be able to act more efficiently if it takes up the methods as follows¹⁸:

- Each and every complaint have to be registered. In cases of non-registration, there must be some procedure in place and an analysis should also be undertaken to search the reason for not always registering the compliant.
- The NHRC has to set it up a compulsory mechanism for all the State that the response should be forwarded to the complainants and along with this, it is noteworthy that, the forwarding of response should take place automatically.
- If the NHRC should keep an eye on all its requests for information and if such information is not received within a prescribed time, the commission should direct the state authorities till they respond.
- The NHRC should enthusiastically boost the State Government to comply with its recommendations. It should also broadcast its recommendations along with the authority's action or inaction.

II.Obligations of States' under Human Rights Law:

Human rights law tries to set an equilibrium pint between legitimate security concerns and the safeguarding the fundamental freedoms. The balance is being sought to be struck through the International Covenant on Civil and Political Rights(ICCPR) and three regional human rights treaties European Convention for the Protection of Human Rights and Fundamental Freedoms(ECHR) and the African Charter of Human and Peoples' Rights and the American Convention on Human Rights (ACHR).¹⁹ On 11th July, 2002, the Committee of Ministers of the Council of Europe took up "Guidelines on Human Rights and the Fight against Terrorism".

Terrorism may under certain circumstances resultantly lead to a state of emergency. Laws on Human rights such as Article 4 of the ICCPR, Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 27 of the American Convention on Human Rights, asserts that few rights can be suspended during public emergency, whereas the African Charter does not incorporate such clauses. Deviation from certain rights is only allowed in extra ordinary circumstances mentioned in each of the three treaties. The measures adopted by the authorities has to be correct and minimalistic intrusive to attain their objective. The rule of non-discrimination must be always abided by.

¹⁸ Kavita singh at 214.

¹⁹ K singh at 218.

II.I. Right to Life:

The entitlement of not to be whimsically deprived of life is not at all derogable in both the international and regional regimes. This right is safeguarded by Article 6 of the Covenant and a non derogable entitlement specified in paragraph 2 of Article 4 ICCPR. It asserts that the in considering the specific circumstances in public emergency, the Human Rights Committee furnishes showed concern that Article 4 of the present Covenant, which determines the provisions which are not derogable during public emergency, has not been observed. It asserts that the present Article has applicability on the circumstance where the utilisation of weapons by combatants has resulted into the loss of life and loss of freedom of massive number of individuals, without having any regard as to the fact that an emergency has not been formally announced.²⁰

- **European Courts Of Human Rights:**

The pious duty of the State to furnish safeguard the right to life is the utmost significant in the convention system. Article 2 of European Court of Human Rights (ECHR) must be connoted as incorporating a mandate on the States to safeguard their population against terrorism.²¹ Paragraph 2 furnishes the circumstances where it is allowed to “use of force” which may lead to an unintended result , in the loss of life. The use of the term “absolute necessary” indicates that a way too strict and compelling test of requirement must be put in place from that normally applicable while finding out whether the State action is required in a democratic nation under Article 8 to Article 11 of the present Convention.²²

The European Human Rights Court asserts that under Article 2 the compulsion to safeguard the right to life and the State’s general duty under Article 1 to protect the rights and freedoms of everyone within its jurisdiction described in the convention needs an entailment that there must be some measures of effective official investigation when persons have been killed as a collateral effect of use of force by agents of the State.²³ In *McKerr v. the United Kingdom*²⁴ appropriate measure for ensuring the accountability of the State’s Agent are inseparable in upholding the public confidence and satisfying the legitimate issues that might take birth from the use of lethal force. Deficiency of such mechanism will only instigate sinister inspirations. Though he death penalty was allowed under Article 2, the Court asserts that and arbitrary privation of life pursuant to death penalty is forbidden. The need in Article 2 S1 that the punishment be furnished “provided by law” implies not only that there must be a basis for punishment in municipal law but the need of the calibre of the legislation be fully valued i.e., the basis of the legislation must be accessible and foreseeable.

²⁰ Art 4 Iccpr

²¹ Art 2 ECHR

²² Art 8-art 11 ECHR

²³ Art 1 and Art 2 of ECHR

²⁴ *McKerr v. the United Kingdom*, ECHR, 4 May,2001

- **Inter-American System:**

in those circumstances, where country's population is in peril as a result of violence, the State has the entitlement and compulsion to safeguard the population against such danger and for that purpose it is in justified position to utilise lethal force. In *Ocalan v. Turkey*²⁵, the Inter –American court has opined that in certain situation the country is entitled to use force even if it means privation people of their lives. There is ample amount of instances in history and philosophy as to the justification of death of persons in these situations germinates zero responsibility against the country or its officials.

In *Garza case* the Inter-American Court of Human rights viewed that the countries that still contain capital punishment has to implement most stringent command over watch of judicial guarantee in these issues as like if the due process of law along with all its guarantees must be honoured irrespective of the situations, then its follow up becomes more significant when the Apex entitlement that all human rights treaty and declaration mentions and protects is at stake: human life.²⁶

- **Indian Position:**

The notion of right to life and personal liberty as embedded under Article 21 of Indian Constitution, being a fundamental entitlement has a broad spectrum. The moredn jurisprudential aspect and revlutionalry decisions of Apex Court and several High Courts are pushing the limit broader. In *Maneka Gandhi v. Union of India* AIR 1978 SC 597²⁷, the Apex Court refuted its prior decisions and upheld that the measures laid down in Article 21 of Indian Constitution is a right which must be in compliance of just and fair procedure and not an arbitrary or oppressive procedure. In *Kartar Singh v. State of Punjab*,(1994) Cr.L.J.3139²⁸ the cogency of several provisions of TADA, 1985 came under the scanner of Article 21 . The Court asserted that Article 21 lays down basic human right to life and liberty. The State is forbidden from snatching away this entitlement except in compliance of the procedure established by law. It is rightly said by Krishna Iyer J., that a dynamic interpretation should be adduced to the right to life and liberty connotation and following the landmark decisions the Apex Court have scanned several dimensions of criminal justice and administration of prisons. Article 21 has rescued all individuals, whether an alleged offender or under trial prisoner, or a convicted offender.

II.II. Prohibition of Torture or Cruel, Inhuman or Degrading Treatment:

- **United Nations:**

In United Nations Article 7 of the Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Human Rights Committee underscored the non-derogable nature of this Article. As per the

²⁵ *Ocalan v. Turkey*, ECHR, 12 March, 2003.

²⁶ K singh at 228

²⁷ *Maneka Gandhi v. Union of India* AIR 1978 SC 597

²⁸ *Kartar Singh v. State of Punjab*,(1994) Cr.L.J.3139

affirmation of the Committee that in public emergency circumstances as described in Article 4 of the Covenant, zero derogation is of Article 7 is permitted and it must be in force.²⁹ The Committee also expressed no circumventing situation or justification may be put forward to justify a breach of Article 7 for any reasons along with those executed according to an order from a public authority or superior officer.

The Human Rights Committee marks that the admission by the delegation of the state parties about the procedure for handcuffing, shaking, hooding and sleep deprivation have been utilised as techniques of interrogation which is also a breach of Article 7 of the Covenant and if any law is to be framed for authorizing interrogation technique, such a legislation should forbid all the treatments mentioned in Article 7. The Human Rights Committee remarked, in its General Comment No. 20, that long solitary confinement in itself a breach of right to freedom from torture and from cruel, inhuman or degrading treatment under Article 7.³⁰

- **European Courts of Human Rights:**

Article 3 of European Courts of Human Rights (ECHR) lays down one of the most significant and basic values of democratic nations. It says that no individual shall be a subject to torture or to any inhuman or degrading treatment or penalty. Article 3 is considered to be an absolute right which is obviously unqualified and cannot be put in balance against the entitlement and requirement of other people or greater public interest.³¹ Article 15(2) of ECHR lays down provisions for breach of Article 3, even during war or circumstance of public emergency endangering the life of people of a country.³²

In *Tomast v. France*,³³ it was observed that the need of the investigation and undeniable hardships embedded in the fight in countering terrorism , specifically regarding terrorism cannot lead to place boundary on the safeguard in respecting physical integrity of persons.

In *Dulus v. Turkey*, 30 January 2001³⁴ , it was upheld that devastation of residences and property executed while conducting anti terrorist operation in a cruel way and directing to a enduring of a significant intensity can be connoted as inhuman treatment and may involve State duty under Article 3. Though such devastation had been carried on to forbid terrorists from utilising those residences or to deterring others, ill treatment is unjustified.

- **Inter –American System:**

The inter-American Court has delivered that even in the vaccum of the physical injuries, psychological and moral undergoing along with psychic turmoil while question may constitute inhuman treatment. The deteriorating dimension is marked by the panic, fear and inferiority in bringing on for humiliating and demeaning the victim

²⁹ Art. 7 Con torture

³⁰ CCPR/C/79/Add93, para 20(1998).

³¹ Art. 3 ECHR

³² Art. 15 ECHR

³³ *Tomast v. France*, ECHR ,27 August 1992 (para 167)³³

³⁴ *Dulus v. Turkey*, 30 January 2001.

...that circumstance is worsened by the vulnerability of the detainee who has been detained unlawfully. Any infliction of force or coercion which is beyond the necessary limitation to guarantee the appropriate behaviour of the detainee results into an assault on the dignity of the individual and eventually results into breach of Article 5 of the American Convention.³⁵ In *Loayza Tomayo Case*,³⁶ it was observed that the exigencies of the investigation and the difficulties take place in the anti-terrorist struggle should not be permitted to confine the safeguard of an individual's right to physical integrity.

- **Indian Position:**

The Constitution of India does not contain any explicit provisions against cruel, torture or inhumane treatment and deteriorating sanction. In earlier decades the Hon'ble Courts of our country prioritised public order over individual's rights and refused to examine the quality of the procedure and whether it was in compliance with the principles of natural justice. But in *Maneka Gandhi v. Union of India*,³⁷ the Apex Court refuted its earlier view and upheld that the mechanism laid down in Article 21 of the Constitution is a right, just and fair procedures and not at all any arbitrary or suppressive mechanism. In *M.C Mehta v. Union of India*,³⁸ the court opined that right to life and personal liberty as well is the utmost valuable, inseparable, inviolable and fundamental amongst all the fundamental entitlement of citizens.

The Apex Court of the nation has come to safeguard human rights on several occasion. One of the landmark judgments in safeguarding the human rights of detainees or arrestees is *D.K. Basu v. State of West Bengal*³⁹. In this case the Apex Court opined that the latin maxim *salus populi est suprema lex* which means the safety of the people is the supreme law and *salus republicae est suprema lex* which implies safety of the State is the most important law is prevailing in co-existing situation and are not only significant but lie at the centre of the concept that welfare of the people must conform to welfare of the community. The steps taken by the State must be right, just and fair as well. Involving any sort of torture to extract any information would not be correct nor be fair and hence, not permissible, being contrary to Article 21 of Indian Constitution. The detainee or arrestee can not be made a subject to torture or third degree treatment or eliminated for the purpose of obtaining information, confession any other related facts. The arrestee's or detainee's constitutional entitlement cannot be breached except in the manner allowed by law, though the very type of things there would be qualitatively distinct in the process of interrogation of such process of interrogation as compared to an ordinary criminal law.

³⁵ Art. 5 of American Convention

³⁶ *Loayza Tomayo Case*, I/A Court of H.R., 17 September, 1997 (para 57).

³⁷ *Maneka Gandhi v. Union of India* AIR 1978 SC 597.

³⁸ *M.C Mehta v. Union of India*, AIR 1987 SC965.

³⁹ *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610.

II.III. Condition of Detention:

- **United Nation:**

Article 10 of the ICCPR lays down that all individuals in privation of their liberty shall be taken care of with humanity and respect as well for the inherent dignity of the human person. Except for special situation, an accused individual shall be kept separately from the convicted individuals and will obtain separate treatment right to their status as unconvicted individuals. An accused who is a juvenile person shall be kept separately from adults and brought quickly for the purpose of adjudication.⁴⁰

Though Article 10 of the ICCPR is not mentioned as non-derogable in Article 4 of the same treaty, the Human Rights Committee has held that view that the entitlement of individuals who are stripped of their liberty to be taken care of with humanity and with respect for the inherent gravitas of the human person is nevertheless not subject to derogation.⁴¹

- **European Court of Human Rights :**

As per Article 3 of European Court on Human Rights and Fundamental Freedoms, 1950 reasserts that the Country needs to ensure that an individual is kept in detention in those conditions which are simpatico with respect for dignity , the way of the execution do not make the arrestee or detainee undergo distress or difficulties beyond unavoidable level of plethora inherent in detention and that in the practical needs of imprisonment, the arrestee's well being along with medical assistance are properly protected.⁴²

In *Ocalen v. Turkey*⁴³, the European Courts of Human Rights held the opinion that the total sensory and social closing off may have a destructive impact on the personality and may resultantly constitute inhuman treatment, which cannot be made justified by the needs of security or other concerns.

- **Indian Position:**

The attributes of right to life is more than a bare animal existence. The scope of right to life and personal liberty enshrined in Article 21 of Constitution of India which is a fundamental right covers a quite broader spectrum. In *Sheela Barse v. State of Maharashtra*⁴⁴, 'life' as expressed in Article 21 of Indian Constitution has the broaden to the world and those citizens as well who are under detention in prison either as under trial or as convicted. Those individuals are also guaranteed to the advantage of Article 21 obviously subject to reasonable restrictions.

⁴⁰ Art 10 ICCPrR uchr website

⁴¹ Id.

⁴² Art. 3 of Europena Court of Human Rights and Fundamental Freedoms , 1950.

⁴³ *Ocalen v. Turkey*, ECHR , 42 ILM 257(2003).

⁴⁴ *Sheela Barse v. State of Maharashtra*, AIR 1983 SC 378.

It is rightly observed in Black's Law Dictionary that solitary confinement holds a dehumanising effect. In *Sunil Batra v. Delhi Administration*,⁴⁵ the Apex Court observed that in our Indian Constitutional arrangement it is self evident that the prison legislations do not override the fundamental rights of the arrestee ...courts are supposed to safeguard behind the bars, the policy of law is outside the limitation of purchasing by the authoritarians who are inputting dangerousness of inmates and peace inside the prison. It is very aptly said by Justice Krishna Iyer that in case solitary confinement is a insurrection against the human essence of the society, there should be no justification to allow the same punishment to be put into the prison arrangement by tagging it with different names. Law is a working mechanism of justice.

In *Prem Shankar Shukla v. Delhi Administration*⁴⁶ it is again very appropriately stated by Justice Krishna Iyer that handcuffing on the face of it is quite inhuman and thus unreasonable, extremely harsh and arbitrary as well. Vacuum of fair mechanism and object monitoring to impose irons seems to resort to zoological methods contradictory to Article 21.

II.IV Pre-trial and Administrative Detention:

A. Judicial Control and Bar of Arbitrary Detention:

- **United Nations:**

Pre-trial and administrative detention have been a worrisome concern regarding state activities in combating terrorism. In the General Comment No. 8 on Article 9 the Human Rights Committee discussed the issue of pre-trial and administrative detention. I observed that though Article 9 of ICCPR which also includes judicial control is not described as non-derogable in emergency situation under Article 4, paragraph 2, the committee has remarked that there is no excuse or scope for derailment from this guarantee while emergency situation is prevailing. The presumption of an accused to be innocent should be respected.⁴⁷

- **European Court of Human Rights:**

In *Ocalan v. Turkey*⁴⁸, the ECHR has already marked that on several occasions with the investigation of the offences related with terrorism undoubtedly place forward an extraordinary circumstances in front of the authority. But that does not imply that the authorities engaged in investigation have authority under Article 5 to arrest suspected individuals for the purpose the questioning, independent of effective control by the municipal courts and lastly, the Convention supervisory authorities engage whenever they chose to counter terrorism.

⁴⁵ *Sunil Batra v. Delhi Administration*, AIR1978 SC 1675.

⁴⁶ *Prem Shankar Shukla v. Delhi Administration*, AIR1980 SC 1535.

⁴⁷ Art 9 iccpr.

⁴⁸ *Ocalan v. Turkey*, 42 ILM 257 (2003) at 278.

- **Inter-American System:**

Article 7 of American Convention of Human Rights, 1969 comprises guarantees against arbitrary or illegal detention or arrests, as mentioned in Clause 2 and clause 3, respectively. As per the former provision, no individual can be at a loss of his or her freedom apart for reasons or circumstances explicitly described by material law and must be a subject to strict follow up to the mechanisms framed in that law. The later provision raises the concerns that no individual should be subjected to arrest or detention which seems to be legal but in actuality exists in non-compatibility with fundamental right.⁴⁹ The convention under Article 27(2) explicitly includes judicial guarantees required for the safeguard of non-derogable entitlements in its list of non-derogable rights.⁵⁰

- **Indian Position:**

the Preventive Detention Act, 1950 was at the first instance imposed for one year but was elongated periodically upto 1969. Thereafter, requirement was felt to set up another Preventive Detention legislation to safeguard internal security and thus, the infamous Maintenance of Internal Security Act, 1971 came into being. This piece of legislation had been hugely misused by the government to shut all the opposition political parties up during the period of 1965-1967. In *Bankhat Lal v. State of Rajasthan*,⁵¹ the Apex Court opined that the Maintenance of Internal Security Act, 1950 had come up as an engine to oppress, which is a danger to the democratic way of life.

In the process of completion one of the promises, the Janta Party struck down the Maintenance of Internal Security Act, 1971, though the COFEPOSA Act, 1971 and Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980 remained effective. After that the National Security Act, 1980 had been effective with the aim to cope up with administrative activities, industrialist disturbances and escalating mindset of several parts of several interested parties to germinate agitations on different regards. The next was Terrorist and Disruptive Activities Act which was a draconian piece of legislation. Though this was repealed later on but some of its draconian provisions had been incorporated in the UAPA.

II.V. Charge And Right To Be Informed on The Grounds of Arrest:

- **United Nations:**

The number and periods of detention without letting the arrestee know the charge under the category of offences against the State act have been escalated and this poses as a serious concern for the committee. The implication of this legislations marks the problem of compatibility with Article 9 and Article 14, paragraph 3(g) of the

⁴⁹ Arti7 AHCR

⁵⁰ Art. 27(2) AHCR

⁵¹ *Bankhat Lal v. State of Rajasthan*, AIR 1975 SC 522

ICCPR.⁵² The committee while considering the State party's reservation to Article 9 of the ICCPR, the Committee takes up that this reservation does not push away the obligation on the State party to follow up with the need to intimidate the concerned individual of the grounds for his or her arrest.⁵³

- **Indian Position:**

the Apex Court has asserted certain entitlements, which are very fundamental to arrestee which heads towards the conclusion that the authority to arrest an individual alleged of a cognizable offence is not unrestricted and registration of a cognizable offence by itself does not require arrest on each occasion. Despite all these protective measures reiterated time and again by the Apex Court and several High Courts uncountable instances of torture inflicted on the arrestee by the police personnel are still there. Police personnel uses these tortuous technique to extract information and confession. In a landmark case namely *D.K. Basu v. State of West Bengal*⁵⁴, the Apex Court laid down certain guidelines regarding the process of arrest which are as follows:

- Intimidate the arrestee or detainee the grounds of arrest instantly at the time of his or her arrest so that he can take up a reasonable defence regarding the same. The arresting authority should remain duty-bound to do the same.
- The arrestee has to be brought before the Magistrate within twenty-four hours. If the arrestee has not been brought within twenty-four hours then the arrest will be considered as an illegal arrest.
- After the arrest, the police will notify the legal aid cell of the concerned district regarding the arrest.
- Whenever the session judge gets to know about any illegal detention from any person, the concerned session judge will make a surprise visit of the police lock-up to test whether the detention has been made in contravention of the procedures laid down in Section 57 of Cr.P.C and Section 55 of the Cr.P.C.
- Regarding the identification, there are certain things those should be followed up such as- i) while making the arrest of an individual, his identification marks should be noted and photos should be taken and made of records; b) while filing charge sheet such photographs must be attached; iii) similar procedures has to be complied with during the filing of the appeals; iv) concerned arresting officer who made the arrest should authenticate the photographs taken; v) in all sessions case when warrant of arrest is issued the photographs and marks to be cross checked.

II.VI Prolonged Pre trial and Administrative detention:

- **United Nations:**

Regarding the extraordinary laws on armed groups, the Human Rights Committee marks the concern that the time period of pre-trial detention can be carried on for numerous years and the highest time limit of such detention

⁵² Art. 9 and Art. 14 ICCPR

⁵³ CCPR/C/79/ Add.81, para. 24(1997).

⁵⁴ *D.K. Basu v. State of West Bengal*⁵⁴, AIR 1997 SC 610

can be as per the applicable penalty. The Committee asks for the State Party to decrease the time limit of pre-trial detention and to halt utilising the time period of the applicable punishment as a standard for fixing the highest time limit of pre-trial detention.⁵⁵

- **Inter-American System:**

The concept of rule of law that forms the requirement for the purpose of criminal prosecution of all the offences by the State, cannot provide a reasonable excuse for furnishing an unlimited time frame to provide a solution to the criminal matter. By the international conventions and standards, an individual alleged of an offence must be taken up as innocent until proven guilty. The entitlement to defend is also safeguarded by the American Convention under Article 8(2) is endangered by the long captivity without conviction case, in few cases, it escalates the defendant's hardships to prepare a valid defense.⁵⁶

- **Indian Position:**

If an individual is stripped of his liberty under a process which cannot be considered as "reasonable, fair or just" such privation would result into the breach of Article 21. In *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC1360⁵⁷, J Bhagwati viewed that a process which keeps several people behind bars without trial for long duration, cannot probably be considered as "reasonable, just and fair" so as to be in compliance with the need of Article 21. It is required that the legislature make legislations which is administered by court should drastically transform its approach to pre-trial arrestees or detainees and assure "reasonable, just and fair" process.

II.VII Incommunicado Detention:

- **United Nations:**

The Human Rights Committee has raised concern over the danger inherent in the praxis of the incommunicado pre-trial detention which also encompasses the probability of infliction of torture or ill treatment. The committee articulated concern that the up-keeping on a persistent way of extraordinary legislations under which individuals suspected of being a part of armed groups, may be detained incommunicado for up-to five days and underscores that those provisions are contradictory with Articles 9 and Article 14 of the ICCPR. It requests the State Party to discard the utilisation of incommunicado detention.⁵⁸

- **Inter – American System:**

It has been persistently asserted by the Inter-American Commission and Court have persistently asserted that any privation of freedom must be strictly in compliance with the procedure established by law. The failure to

⁵⁵ CCPR/C/79/Add.61, paras. 12,18(1996).

⁵⁶ K Singh at 252

⁵⁷ *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC1360

⁵⁸ CCPR/ C/79/Add. 61, paras.12,18(1996).

adhere to such mechanism germinates probability of abuse of the guaranteed entitlement of the detainee. In those cases where the detention is not ordered, or appropriately supervised by a competent judicial authority, where the detainee may not completely get the reason for the detention or can get an access to a lawyer or where the family of the arrestee or detainee is incapable to know the location of the detainee or arrestee quickly, there is a vivid danger not just to the legal entitlement of the detainee but also to his or her personal injury.⁵⁹

- **Indian Position:**

The criminalisation of ‘abetting’ a terrorist, which had been repealed by the Apex Court in TADA again found out a place in the Prevention of Terrorism Act. Section 20 of POTA⁶⁰ assumes that a person labelled with being a part of a terrorist organisation is a terrorist until that individual can prove that he or she has not taken part in activities related to terrorism and that organisation was not labelled as illegal by the country at the time when that individual joined.

Under Section 49(2) of Prevention of Terrorism Act the police may place a suspected individual in jail for maximum ninety days without initiating any court proceeding. This period may be elongated for another three months if the prosecution place forward a report to the Court describing the State’s requirement for additional time.⁶¹ When a person is labelled under the Prevention of Terrorism Act, Section 49(7) allows the refusal of bail to the accused for one year , till the defence satisfies the court for granting the same.⁶² Section 57 of the same Act provides governmental authority freedom from prosecution under the same Act as long as the action was taken up to counter terrorism and executed in good faith.⁶³

Section 52(4) furnishes that the accused is not does not have any right to have a legal counsel present throughout the duration of the police interrogation.⁶⁴ Section 14 provides that any person including the defense lawyer is mandated to furnish information to the State of any person who is in breach of Prevention of Terrorism Act.⁶⁵ These provisions breach the very basis of United Nations Basic Principles on the Role of Lawyers in two significant ways. Firstly, Article 1 of BPRL provides that the clients should have access to their legal counsel while the police interrogation is taking place. Secondly, Article 22 of BPRL underscores that the confidentiality of the conversation between the lawyers and their clients must be respected by the State and any endeavour to disrespect it is contradictory to the international norms on the entitlement of the detainee.⁶⁶

⁵⁹ IACHR

⁶⁰ S. 20 pota

⁶¹ S. 49(2) pota

⁶² S. 49(7) pota

⁶³ S. 57 opota.

⁶⁴ S. 52(4) pota

⁶⁵ S. 14 pota

⁶⁶ K singh at 257.

II.VIII Right to Fair Trial:

The right to fair trial is expressly described as a human rights in terms of Article 14 of the International Covenant on Civil and Political Rights (ICCPR) which has been ratified by our country and which is now incorporated in the statutory legal regime expressly acknowledged under Section 2(1)(d) of the Protection of Human Rights Act, 1993⁶⁷. Breach of a right to fair trial is not only breach of the fundamental rights as enshrined in our constitution. Apart from fundamental rights it is a breach of the internationally acknowledged human rights as expressed in ICCPR to which India is a party.

The notion of fair trial is a constitutional imperative and is expressly recognised in particular provisions of the Constitution which includes Articles 14, 19, 21, 22 and 39 A of the Indian Constitution and several provisions of CR.P.C,1973. If a criminal goes unpunished, it is against the interest of large public interest. It is therefore necessary for the Apex Court in the exercise of its authority under Article 142 of the Constitution to prescribe guidelines and directions regarding the protection of witnesses and victims of crime in criminal trials which can be followed up the prosecuting, law enforcement agencies and subordinate judiciary. This is an essential step to escalate the efficiency of the criminal justice delivery system⁶⁸.

The Apex Court in *People's Union for Civil Liberties v. Union of India*⁶⁹, viewed that the safeguarding and promotion of human rights under the aegis of rule of law is necessary to counter terrorism. In case human rights are breached in the mechanism in countering terrorism it itself will be self defeating ...the deficiency of hope for justice furnishes fertile grounds for terrorism. Terrorism itself should be perceived as a breach of human rights...Indian Constitution prescribes vivid limitations on State's action within the context of combating terrorism. Striking a balance by safeguarding the basic human rights is the duty of a court in these cases.

II.IX Military and other Special Courts:

- **United Nations:**

The human Rights committee has reckoned in several cases, the nature of tribunals and its competency to try crimes which are connected to terrorism and security of states. Regarding the same, the committee expressed its concern and asserted that the military and members of security and other forces carry on to exercise powers over civilians which also includes judicial authorities, provided to them by the formation of Special Public Order Zones by decrees which are not enforceable any longer.⁷⁰

The committee marked that the State party has not furnished data on the scope of definition of "exceptional situations and is tensed that these military courts or tribunals exercise jurisdiction to address civil and criminal

⁶⁷ S. 2(1)(d) Human Rights Act, 1993.

⁶⁸ ART. 142 Indian Constitution

⁶⁹ *People's Union for Civil Liberties v. Union of India*, (2004) 9 SCC580.

⁷⁰ CCPR/C/79/Add.76, para. 19 (1997).

cases indulging non-military personnel in breach of Article 14 and Article 26 of ICCPR. The State party must take up the required legislative measures to confine the jurisdiction to the military courts to conduct trial of military members who are alleged of military offences. The committee is also concerned regarding the measures adopted by military courts and deficiency of supervision of the military courts process and judgments by the ordinary courts.⁷¹

- **European Courts of Human Rights:**

In *Ocalan v. Turkey*,⁷² the Court marks that in several previous decisions few aspects of the military judges sitting in the State security courts which have convicted the applicants endanger the confidence which the courts are supposed to uphold in a democratic society and in the criminal justice system as well. In determining that whether there is a valid ground for fearing that a specific court lacks independence and impartiality, the viewpoint of the alleged individual is significant without being decisive.

- **Inter –American System:**

Reassigning the cases from civil courts to military courts and thus permitting military courts to adjudicate the alleged individuals of treason implies that the independent, competent and impartial tribunal prior formed by law is excluded from adjudicating the case. But when a military courts adjudicates over a matter which was supposed to be adjudicated by civil courts the accused's entitlement of hearing by an independent, competent and impartial tribunal formed by the law of the land is results in violation of the accused's right to due process. It has been opined by the Court that states are not there to set up tribunals that do not put into use the established processes of legal procedure...to dismantle the jurisdiction which belongs to the ordinary courts or judicial tribunals.

- **Indian Position:**

Terrorist and Disruptive Activities Act, 1985 and terrorist and Disruptive Activities Act, 1987 also introduced the practice of setting up of a system of Designated Courts and positioned limitations on granting of bail until the court recorded the being of reasonable grounds for trusting that the alleged individual was not guilty. These Acts provided the investigating police officer ample power in cases of seizure of properties regarding which there was reason to belief to have been deduced as an outcome of terrorist acts, apart from provisions for attaching and forfeiting of such property. These Acts escalated the probability of elongating the period of detention of a suspect in police custody pending investigation.

⁷¹ CCPR/CO/71?UZB,para. 15 (2001).

⁷² *Ocalan v. Turkey*, ECHR , 12 March 2003 (para. 114) .

Thereafter, Prevention of Terrorism Act, 2002 was another step by the State to take up two –legged schemes, one addressing the terrorism as an offence, and the other for measures those could be tagged as preventive in nature. This Act incorporated the revised form of definition of the offence of ‘terrorist act’ which requires at the very first element , the ‘intent to endanger the unity, integrity, security or sovereignty of the Country or to inflict terror in public. This piece of legislation would also allow confession given before the police officer rather than a judicial authority.

The constitutionality of the Prevention of terrorism Act, 2002 was challenged before the Apex court. Though the court maintained the constitutional validity of this Act in the case of *People’s Union for Civil Liberties v. Union of India*⁷³ .

II.X Right to Appeal:

- **United Nations:**

The Human Rights Committee has expressed concern regarding the right to appeal of the convicted individual under Article 14, paragraph 5 of ICCPR. They were concerned regarding the fact that there is provision for appeal against the judgement of the special courts. The Committee further went to recommend that the state party must assure that all individuals convicted by the judgment of the special courts in cases related to terrorism should have the entitlement to the review of the judgement given by the Higher tribunal according to the provisions of law.⁷⁴

- **Inter-American System:**

The recognised right to appeal the decision of lower tribunals is not quenched just because there is a higher tribunal or court than the one that adjudicated the alleged offender. For a genuine review of the decision as contemplated in the Convention , the higher court should have the jurisdictional authority to adjudicate the specific issue in question. It is noteworthy that from the first to last stages, a criminal proceeding is a single process comprising of various stages. So, the notion of a tribunal antecedently set up by law and the concept of due process apply through out all the stages and should be followed up throughout the several procedural instances. If the higher court does not quench the needs that a court must satisfy to be a fair, independent and impartial tribunal antecedent set up , then the stage of the adjudication conducted by that tribunal or court cannot be considered to wither lawful or valid.⁷⁵

⁷³ *People’s Union for Civil Liberties v. Union of India*, AIR 2004 SC 456.

⁷⁴ CAT/C/XXIX/Misc.4, para.6 (2002).

⁷⁵ *Castillo Petruzzi et al. Case, I/A Court H.R., judgement of May 30, 1999 (para. 161).*

- **Indian System:**

the Apex Court has three kinds of jurisdiction-Original, appellate and advisory. Its elusive jurisdiction widens to any problem between Government of Indian and one or more states or between Government of India and any State or States on one hand and one or more than one states on the other hand, if and to that extent the dispute comprises of any question i.e., whether of law or fact on which the beingness or the extent of legal right reckoned. Apart from that, Article 32 of Indian Constitution provided an broaden original jurisdiction to Apex Court with respect to implementing fundamental rights. It is authorised to issue directions, orders or writs to implement fundamental rights. The Apex Court is empowered to direct shift any civil or criminal case from one state High Court to another state High Court or from subordinate court to different state's high court. As per the Arbitration and Conciliation Act, 1996, International Commercial Arbitration can also be brought in the Apex Court.

The appellate jurisdiction of the Apex Court can be implemented by a certificate granted by the concerned High Court under Article 132 (1) , 133(1) or 134 of Indian Constitution regarding any judgment, decree or final order of a High Court in civil as well as criminal cases which must involve substantial question of law as in the need of interpretation of the Constitution. Apart from these two Jurisdiction the Apex Court has a very broad appellate jurisdictions. Over each and every courts and tribunals of India in as much a it may grant special leave to appeal under Article 136 of Indian Constitution.

The Apex Court also authorised to exercise its advisory jurisdiction which may particularly be referred to it by the President of India under Article 143 of Indian Constitution. as per Article 129 and Article 142 the Apex Court is empowered to place sanction for the contempt of court including the authority to punish for contempt of itself.

The High Courts stand as the head of a state' s judicial administration. Each high court is empowered to issue any person within its jurisdiction directions, orders or writs for the proper enforcement and protection of fundamental rights or for other purposes. Each High Court is empowered to superintendent over all the subordinate courts within its jurisdiction. It is empowered to ask for return from such courts, frame and issue general rules and suggest forms to modulate their proceedings and practice and fix up the manner and form in which book entries and accounts shall be maintained.

II.XI Freedom of Thought , Conscience and Belief:

- **United Nations:**

The Human Rights Committee expressed its concern regarding the recent terrorist attacks on the bedrock of religious beliefs and using religion as an instrument to incite their religious the execution of criminal acts. The committee is also concerned regarding the fact that occurrence of violence and intimidation based on religious beliefs persist to take place. It has been suggested by the Committee that the states must widen its criminal

legislation to include offences instigated by religious hatred and should adopt other measures to assure that every individuals are safeguarded from different treatments based on their religious beliefs.⁷⁶

- **Indian Position:**

Article 21 of Indian Constitution prescribes it very vividly that life or personal liberty can only be stripped off as per those processes which are set up by those procedures which are set up by law. The Constituent Assembly conceived that this piece of provision adopted from Article 31 of Japanese Constitution was more particular and would assist in avoiding the reputation of the heinous history of American due process of law. In the case namely *A.K. Gopalan v. State of Madras*⁷⁷, the court interpreted Article 21 extremely literally and expressed that the phrase procedure established by law only entailed any process which has been prescribed in the Act by the competent legislature to strip off an individual of his life or personal liberty, and it was not allowed to incorporate in the Article any such notion tagged as natural justice or reasonableness or due process of law. Furthermore, the Court opined that every fundamental right was free from each other and Article 19 should not be applied while interpreting Article 21. Thus, according to this judgment the procedure could not be challenged even it lack reasonableness or inconsistent with the notion of natural justice.

But in *Maneka Gandhi v. Union of India*⁷⁸, the Apex Court widened the scope of both the phrases-personal liberty and procedure established by law. The Apex Court interpreted that the judiciary sets up the scope and limitations of the basic entitlements and freedoms and other branches of State are constitutionally mandated not to overlap on the entitlements that provide constitutional safeguards.

II.XII Treatment of Non-National including asylum, expulsion and non-refoulement:

The Universal Declaration of Human Rights under Article 14 furnishes that every individual is entitled to seek and enjoy in other nations asylum from prosecution.⁷⁹ This may not be evoked in case of prosecution authentically emanating from non-political offences or from acts, as in the cases of terrorist acts, which stand in contradiction of the purpose and notions of United Nations.

- **United Nations:**

The Human Rights Committee regarded the connection between removal, refoulement or expulsion or torture, in its General Comment No. 20 on Article 7 of the Covenant thus, states should not reveal individual to the peril of torture or cruel, insensate or degrading treatment or sanction upon return to another nation by following their measures of extradition, expulsion or refoulement.

⁷⁶ CCPR/CO/73/UK, para 14 (2001).

⁷⁷ *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27.

⁷⁸ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

⁷⁹ Art. 14 of UDHR.

- **European Courts of Human Rights:**

The inhibition as furnished by Article 3 against ill treatment is absolute in same manner in expulsion cases. Thus, in those cases where substantial grounds have been proved for imposing the belief that a person would face a danger of being subjected to treatment which is contradictory to Article 3 if expelled to another nation, the duty of the contracting nation to protect him or her against such handling is involved in expulsion procedure. In these situations the actions of the concerned person, howsoever endangering or undesirable cannot become a primary consideration. The safeguards thus furnished in Article 3 ...is thus broader than that furnished by Article 32 and Article 33 of the United Nation, 1951 Convention on the Status of Refugees.⁸⁰

- **Inter-American System:**

The Commission takes up that considering the fundamental right of the person to find asylum for prosecution and to be heard in framing the presentation through an efficient mechanism entitlement acknowledged in the American Declaration and legitimate right and duty of the state to preserve citizen's protection and public order, issues of eligibility to step into the determination mechanism should be ordered within the competence of the Convention Refugee Determination Division. The status of refugee is one which deduces from the situation of an individual, it is acknowledged by the State rather than bestowed by it. The object of applicable efficient mechanism is to assure that it is acknowledged in each and every case where it is justified.

- **African Commission on Human and Peoples' Rights :**

The African Government has reckoned o the 'draw-back' clause of Article 12(2) which prescribes that the entitlement may only be subject to prohibitions furnished by the law for safeguarding the national security, law or order, public health or morality.⁸¹

- **Indian Position:**

The Constitution of India on human Rights and Fundamental liberty adduce highly significance to the safeguard of life and personal liberty of a person and underscore on the respect for human dignity. In the case of *Khatri (II) v. State of Bihar*⁸², AIR 1981 SC 1068 (Bhagalpur Binding Case), it was upheld by the Hon'ble Court that when a court tries a writ petition proceeds to find out into the breach of violation of any right to life or personal freedom, while the person is languishing in police custody the court does so to find out whether any violation of fundamental right under Article 21 has been breached or not and whether the state should be held responsible to pay compensation to the victim or not. The court made it very clear that the nature and object of the inquiry

⁸⁰ Chahal v. the United Kngdom, ECHR, 15, November 1996 (para.80).

⁸¹ Art. 12 (2) of ACHPR.

⁸² *Khatri (II) v. State of Bihar*, AIR 1981 SC 1068 .

is quite dissimilar from that in criminal case and any conclusion arrived at in the writ petition in this regard cannot bear any substantial relevance or any binding impact, in criminal proceedings which can be taken against a specific police officer.

In *Nilabati Behra v. State of Orissa*,⁸³ the deceased had been arrested by the police and kept in jail custody. The very next day, the deceased's dead body was recovered on a railway track. The court awarded compensation to the deceased's mother. The court opined that granting compensation in a proceeding initiated under Article 32 by the hon'ble court or under Article 226 of Indian Constitution is a way out available in public law, grounded on strict liability for breaching of fundamental entitlements to which the notion of sovereign immunity is not applicable, though it may be pleaded in defence in private law in a tort based action.

In one of the landmark cases namely *D.K. Basu v. State of West Bengal*⁸⁴, the Court expressed that custodial violence which also includes torture and death in the lock ups inflicts a severe blow at the notion of rule of law, which requires that the power at the hand of the executive must not only be deduced from legal principles but the same should be confined by law. Custodial violence is indeed a matter of worry. Further it is more worrisome by the fact that it is being committed by those persons who are responsible for the protection of the citizens. It is executed under the guise of uniform and within four walls of a police station, the victim being completely helpless... any sort of torture or cruel or insensate treatment would ultimately violate the spirit of Article 21 of Indian Constitution, irrespective of whether it takes place during interrogation, investigation or otherwise.

III. CONCLUSION.

The main aim of an effective counter-terrorism endeavour is to protect human rights, fortifying democracy and maintain rule of law. The reaction to terrorism can neither be selective nor lead to inflicting a series of uncontrolled repression, which would ultimately result into the breach of the entitlements of the citizens. Thus, it is extremely significant to strike an equilibrium point between assuring security and integrity of the nation and protecting the human rights of the people.

REFERENCES

[1] Arun Shourie argued that "under the UAPA, 1967, solely those individuals or organizations that aim at disrupting the sovereignty and integrity of the country can be proceeded against. The terrorist don sitting in Dubai exercising murderous control over the film world is not threatening the sovereignty of the country...?...can it be anyone's case that while it is all right to require a person on whom some computer hard disk are found to prove his innocence, it is wrong and diabolic to require him to do so ...if RDX and AK-47 are found?"

⁸³ *Nilabati Behra v. State of Orissa*,⁸³ AIR 1993 SC 1960.

⁸⁴ *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610.