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The Architecture of Counter-Terrorism Legislation in India and Indonesia: An Analysis of Issues and Challenges

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Abstract

Counter-terrorism law is a major challenge to any country since it incorporates a wide range of regulations of domestic law. Its multi-layered nature makes it imperative for academics to highlight comparative insights with a view to resolving the threat. The changes in the mode, tactics, and targets of terror attacks have evolved and become more complex; terrorist cell groups continue to grow, and the nature of terrorist networks across national borders ensures that terrorism cannot be tackled effectively by ordinary means. This paper employs comparative doctrinal research that aims to analyze and understand the similarities and differences between legal rules in India and Indonesia. This paper takes on the challenging endeavor of scrutinizing the counter-terrorism legislation of both countries. It delves into the obstacles confronted by both countries, offering systematically organized details on their current anti-terrorism legislations. The aim and objective of such discussion is to draw inspiration and perceptions from one another's jurisdiction to evolve a better law. The result of this study shows that, in India and Indonesia, the current counter-terrorism legislation heavily supports the authority of the State, often at the expense of civil liberties for citizens. It is essential to develop a holistic counter-terrorism framework that allows the State to effectively thwart terrorists and their activities, while simultaneously safeguarding the fundamental rights.

Keywords: Counter-terrorism; Legislation; India; Indonesia; Terrorism.

Introduction

India and Indonesia are the world's two largest eclectic democracies with more similarities than just their names. Both are two major countries in the Indo-Pacific region, the most dynamic regions in the world with various potentials.¹

¹ Mohit Anand, 'Trends in India-Indonesia Economic Relations' (*IPCS: Institute of Peace and Conflict Studies*, 2008) <<http://www.ipcs.org/focusthemsel.php?articleNo=2650>> accessed 22 October 2023.

Both nations draw their values of courage, strength, and honesty from a common heritage supplemented with stories from the two great epics of Ramayana and Mahabharata.² Colonization – by the British in India and the Dutch in Indonesia, led to a disconnect in their strong cultural ties. However, the ability of both nations to recalibrate diversity within a democratic political system has revived the shared heritage.

Despite having several potentials, both countries face major challenges within their democracies. Both have faced challenges and national security threats such as terrorism several times³ and both have enacted counter-terrorism legislation to tackle the heinous crime. The two countries also have initiated a number of bilateral cooperations in an effort to deal with the threat of terrorism.⁴ One example is the issue of terrorism and radicalism, which were the main points raised in the bilateral meeting of President Joko Widodo and Prime Minister Narendra Modi in New Delhi some time ago.⁵ One example in the context of cooperation between India and Indonesia in combating terrorism is that India is in a position to provide assistance to Indonesia in countering domestic threats from Islamic jihadists. The arrest by Pakistani authorities of a senior Indonesian member of Jemaah Islamiyah (Jemaat Islam), while training in Pakistan with the Kashmiri separatist group Laskar-e-Taiba (Tentara Murni), lead to a memorandum of understanding in July 2004 between Indonesia and India on combating international terrorism.⁶ The shared

² Pallavi Aiyar and Chin Hwee Tan, 'India and Indonesia: Twins Under the Skin' (*Milken Institute Review*, 2015) <<https://www.milkenreview.org/articles/india-and-indonesia-twins-under-the-skin>> accessed 8 September 2023.

³ Samti Wira Wibawati, Marina Ika Sari and Yuli Ari Sulistyani, 'The Dynamics Beyond Counter Terrorism Measures in the Indo-Pacific' (2019) 10 *Politika* <<https://jurnal.dpr.go.id/index.php/politica/article/view/1445/0>>.

⁴ David Brewster, 'The Relationship between India and Indonesia: An Evolving Security Partnership?' (2011) 51 *Asian Survey*. [221-244].

⁵ Riva Dessthanian Suatha, 'To Indonesia, Need India Strengthen Deradicalization Cooperation' (*CNN Indonesia*, 2018) <<https://www.cnnindonesia.com/internasional/20180104185942-106-266780/ke-indonesia-menlu-india-perkuat-kerja-sama-deradikalisasi>> accessed 21 October 2023.

⁶ Ministry of External Affairs, 'First Meeting of India-Indonesia Joint Working Group on Counter-Terrorism' (*Ministry of External Affairs Government of India*, 2005) <<https://www.mea.gov.in/press-releases.htm?dtl/5792/first>> accessed 20 October 2023.

interest in fighting Muslim extremist terrorism was underlined in July 2009 when the two countries filed a joint application at the ARF for more effective intelligence sharing in the two countries' regions.⁷ India and Indonesia stressed the importance of existing counter-terror mechanisms and strengthening intelligence cooperation systems amid increasing violence and the spread of radical ideologies.⁸

As a modern conception, a nation-state is expected to provide law, security, and welfare to its citizens.⁹ It is this security that is under threat today from terror attacks perpetrated by non-state actors that do not operate from any specified territory. It is becoming more and more difficult to tackle the peril that assails the very essence of a civilization. Both India and Indonesia have recently vowed to combat terrorism in their nations through cooperation between the two countries.¹⁰

Counter-terrorism law is a major challenge to any country since it incorporates a wide range of regulations of domestic law. Its multi-layered nature makes it imperative for academics to highlight comparative insights with a view to resolving the threat. This paper employs comparative doctrinal research that aims to analyze and understand the similarities and differences between legal rules in India and Indonesia. In so doing, it undertakes the onerous task of analyzing the counter-terrorism law of the two most important nations in the Indo-Pacific region, examining the challenges faced by both countries and providing structured information about the existing anti-terror legislations in India and Indonesia. The aim and objective of such discussion is to draw inspiration and perceptions from one another's jurisdiction to evolve a better law.

⁷ Vibhanshu Shekhar, 'India-Indonesia Relations' (*Institute of Peace and Conflict Studies*, 2004) <www.files.ethz.ch/isn/95449/PCPS-Special-Report-38.pdf> accessed 22 October 2023.

⁸ *ibid.*

⁹ Rana Dasgupta, 'The Demise of the Nation State' (*The Guardian*, 2018) <<https://www.theguardian.com/news/2018/apr/05/demise-of-the-nation-state-rana-dasgupta>> accessed 8 September 2023.

¹⁰ Shishir Gupta, 'India, Indonesia Hold Second Security Dialogue, Vow to Combat Terror' (*Hindustan Times*, 2022) <<https://www.hindustantimes.com/world-news/india-indonesia-hold-second-security-dialogue-vow-to-combat-terror-101647526214000.html>> accessed 15 September 2023.

Terrorism and Counter-Terrorism Legal Regime in India

The Threat of Terrorism

India currently faces the threat of terrorism from three quarters – Terrorism in Kashmir; Left Wing Extremism (LWE); and drugs and armed groups in the North-East.¹¹ The terrorist groups currently active in India include Lashkar-e-Tayyiba, Jaish-e-Mohammed, Hizbul Mujahideen, ISIS, al-Qa'ida, Jamaat-ul-Mujahideen, and Jamaat-ul-Mujahideen Bangladesh.¹²

Left Wing Terrorism - LWE or Naxalism (named after the district of its origin-Naxalbari) is a potent hazard to India's internal security. The aim of Naxalites is to overthrow the State by using violent means as they openly condemn democracy and elections. The stretch of territory in India affected by Naxalism is known as the 'Red Corridor'.¹³ The driving force of the Naxal ideology is violence by resorting to killings, kidnappings, intimidation, and extortion. Their ideology challenges the socioeconomic and political structures by instilling a fear psychosis through killing/kidnapping lower-level government officials, local police personnel, workers of mainstream political parties, and elected representatives of the Panchayati Raj Institutions.¹⁴

The CPI (Maoist) philosophy of armed insurgency to overthrow the government is unacceptable. The brunt of the spiraling violence in these parts of the country is being borne by the poor and marginalized sections like the tribals; between the years 2004 - 2022, 8,625 people have been killed by LWE in different parts of India.¹⁵

¹¹ South Asia Terrorism Portal, 'India: Assessment' (*Institute of Conflict Management*, 2022) <<https://www.satp.org/terrorism-assessment/india>> accessed 9 September 2023.

¹² Bureau of Counterterrorism, 'Country Reports on Terrorism 2021: India' (*U.S. Department of State*, 2021) <<https://www.state.gov/reports/country-reports-on-terrorism-2021/india/#:~:text=Overview%3A%20terrorism%20affected,Jamaat-ul-Mujahideen%20Bangladesh>> accessed 10 September 2023.

¹³ Red Corridor spreads from Bihar to Tamil Nadu involving 16 provinces of India and nearly 200 districts of these States. Worst affected States are: Andhra Pradesh, Bihar, Chhattisgarh, Jharkhand, Madhya Pradesh, Maharashtra, Odisha, Telangana, Uttar Pradesh, and West Bengal.

¹⁴ Lok Sabha Secretariat, 'Naxal Problem in India' No.07/RN/Ref/January/2017 Member's Reference Service' (*Lok Sabha Secretariat*, 2017).[1-3]. <https://loksabhadocs.nic.in/Refinput/New_Reference_Notes/English/Naxal_problems_in_India.pdf> accessed 9 September 2023.

¹⁵ Ministry of Home Affairs, 'Left Wing Extremism Division' (*Government of India*) <[https://www.mha.gov.in/en/divisionofmha/left-wing-extremism-division#:~:text=In a nutshell%2C the CPI,New Democratic Revolution' in India](https://www.mha.gov.in/en/divisionofmha/left-wing-extremism-division#:~:text=In%20a%20nutshell%20the%20CPI,%20New%20Democratic%20Revolution%20in%20India)> accessed 9 September 2023.

Terrorism in Kashmir - India's primary terrorist threat has been the jihadist challenge. Since the 1980s, militant groups in Kashmir, fueled by Pakistan's Inter-Services Intelligence (ISI), have waged a proxy war against the Indian security forces. Pakistan has continued to "finance, train, equip and support Kashmiri militants and actively abet their attempts at infiltration across the Line of Control (LoC)".¹⁶ The terrorist attacks perpetrated by ten Pakistani men from the terror group Lashkar-e-Tayyiba claimed 164 lives in Mumbai between November 26 and 29, 2008.¹⁷

Over a period, it has been noticed that Pakistan is unable to push terrorists across the LoC. Therefore, a new strategy has been adopted to recruit locals and provide rudimentary training to them to carry on the insurgency.¹⁸ Incidents of local militancy and stone-pelting were on the rise in Kashmir between 2014 and 2020.¹⁹ In February 2019, a convoy of the Indian paramilitary forces was attacked by the Pakistani Jaish-e-Mohammad in Kashmir which led to the death of 40 soldiers. In response, India carried out air strikes that targeted a training camp in Pakistan.²⁰

Despite the abrogation of Article 370 of the Indian Constitution in August 2019, terrorist activities continue in Kashmir in the form of targeted killings of police personnel, local councilors, and religious minorities.²¹ Jammu and Kashmir have completed four years as a Union Territory, but, without doubt, militancy remains a challenge to the security apparatus, although the situation

¹⁶ Gurmeet Kanwal, 'Proxy War in Kashmir: Jihad or State-Sponsored Terrorism?' (1999) XXIII Journal of Strategic Analysis <https://ciaotest.cc.columbia.edu/olj/sa/sa_99kag02.html#txt29>.

¹⁷ Josef Braml, 'Anti-Terrorism Laws and Powers: An Inventory of the G20 States 20 Years after 9/11' (*Friedrich-Ebert-Stiftung*).[16].<<https://library.fes.de/pdf-files/iez/18274.pdf>> accessed 10 September 2023.

¹⁸ Harinder Baweja, 'Kashmir's Disturbing New Reality' (*Hindustan Times*) <<https://www.hindustantimes.com/static/the-young-militants-of-kashmir/>> accessed 10 September 2023.

¹⁹ Insights IAS, 'Militancy in Jammu & Kashmir' (*Insightsias*) <<https://www.insightsonindia.com/security-issues/terrorism/militancy-in-jammu-and-kashmir/>> accessed 13 September 2023.

²⁰ Centre for Preventive Action, 'Conflict between India and Pakistan' (*Global Conflict Tracker*, 2023) <<https://www.cfr.org/global-conflict-tracker/conflict/conflict-between-india-and-pakistan>> accessed 12 September 2023.

²¹ Outlook Web Desk, 'The History of Kashmir Conflict and Its Various Phases' (*Outlook*, 2022)<<https://www.outlookindia.com/national/the-history-of-kashmir-conflict-news-189840>> accessed 10 September 2023.

has improved as the maneuvering space for terrorists has shrunk considerably.²²

North-East Insurgency – Since the 1950s, India’s Northeast has been marked by continuous “separatist insurgencies, mass agitations, ethnic riots and heavy-handed State response resulting in continuous bloodletting”.²³ In addition to the terrain, the slow socioeconomic development coupled with factors of ethnicity, language, tribal rivalry, illegal migration has resulted in large-scale insurgent violence directed against Indian security forces.²⁴ The insurgent groups regularly carry out violent and terror activities to intimidate the people, pressurizing the government to meet their demands. Consequently, the government has deployed its armed and para-military forces along with the State police for counter-insurgency operations.

These insurgent outfits maintain safe havens/camps in neighboring countries from where they procure arms; and train and engage with their members.²⁵ The conflict in the region ranges from insurgency with the objective of secession to autonomy; and from ethnic clashes to terrorism generated from the migrants coming in from the bordering countries.²⁶

Revival of Khalistan Terror - The terror campaign for Khalistan was successfully suppressed by the early 1990s. However, recently India is witnessing a revival of Khalistan-inspired terrorism encouraged by fundamentalists in Europe, North America, and Pakistan.²⁷ Pakistan’s ISI has intensified its activities in

²² Sameer Patil, ‘Counter-Terrorism Scenario in J&K’ (*Observer Research Foundation*, 2022) <<https://www.orfonline.org/research/counter-terrorism-scenario-in-jk/>> accessed 13 September 2023.

²³ Subir Bhaumik, ‘Insurgencies in India’s Northeast: Conflict, Co-Option and Change’ (2007) 10.

²⁴ Government of India Ministry of Home Affairs, ‘Insurgency in North-East’ (*Ministry of Home Affairs, Government of India*) <https://www.mha.gov.in/sites/default/files/2022-08/NE_Insurgency_North_East_25022022%5B1%5D.PDF> accessed 13 September 2023.

²⁵ *ibid.*

²⁶ Archana Upadhyay, ‘Terrorism in the North-East: Linkages and Implications’ (2006) 41 *Economic & Political Weekly* <<https://www.epw.in/journal/2006/48/special-articles/terrorism-north-east.html>>.

²⁷ Tony Davis, ‘CT Overview: India’ (*Counter Terrorism Ethics*) <<https://counterterrorismethics.tudelft.nl/ct-overview-india/>> accessed 13 September 2023.

Punjab, resulting in an escalation of anti-national incidents.²⁸ The Indian National Investigation Agency (NIA) has been assigned cases pertaining to Khalistan terror.

Counter-Terror Legal Regime in India

Legislations pertaining to terrorism provide a set of regulations that intend to prevent and punish terrorist acts and other related activities. Every nation has its own set of laws that empower the enforcement and judicial authorities to investigate, prosecute, and punish groups, individuals or outfits involved in terrorist acts.²⁹ In India, specific anti-terror laws have been enacted to curb the menace of terrorism and its related activities. The Terrorist and Disruptive Activities Act (TADA) was enacted in 1985 and remained in force till 1995. Because of the attack on the Indian Parliament on December 13, 2001, the Prevention of Terrorism Act, 2002 (POTA) was enacted.³⁰ However, both TADA and POTA faced criticism for human rights abuses perpetrated through a broad definition of ‘terrorism’ that targeted political dissenters, provisions for prolonged pre-trial detention, and reversal of presumption of innocence.³¹ POTA was repealed in 2004.³²

The current anti-terror law in force in India is the Unlawful Activities Prevention Act, 1967 (UAPA). It was originally enacted in 1967 authorizing the government to designate organizations indulging in unlawful activities as ‘unlawful organizations’.³³ The law enabled the imposition of reasonable restrictions on the freedoms of speech and expression, assembly, and association

²⁸ South Asian Terrorism Portal, ‘India: Assessment- 2022’ (*Institute for Conflict Management*) <<https://www.satp.org/terrorism-assessment/india>> accessed 13 September 2023.

²⁹ Smriti Jha, ‘A Comparative Analysis of Terrorism Laws in Different Nations’ (*Legal Vidhiya*, 2023) <<https://legalvidhiya.com/a-comparative-analysis-of-terrorism-laws-in-different-nations/>> accessed 14 September 2023.

³⁰ Shruti Bedi, *Indian Counter Terrorism Law* (Lexis Nexis 2016).[87-88].

³¹ Srijoni Sen, Rukmini Das, Raadhika Gupta and Vrinda Bhandari ‘Anti-Terror Law in India: A Study of Judgments, 2001-2014’ (*Vidhi Centre for Legal Policy*, 2015) <https://vidhilegalpolicy.in/wp-content/uploads/2019/05/150531_VidhiTerrorismReport_Final.pdf> accessed 15 September 2023.[6-7].

³² ‘Prevention of Terrorism (Repeal) Act, 2004 (POTA Repeal Act)’.

³³ Law Wire Team, ‘An Analysis of Unlawful Activities Prevention (Amendment) Act, 2019 through the Prism of Constitutional Values’ (*Law Wire*, 2021) <<https://lawwire.in/an-analysis-of-unlawful-activities-prevention-amendment-act-2019-through-the-prism-of-constitutional-values/>>.

in the interest of the sovereignty and integrity of India.³⁴ Initially, the Act did not contain any reference to terrorism. It was through an amendment in 2004 that UAPA was converted to a counter-terror law that brought terrorist acts within its ambit. Subsequently, it was again amended in 2008 in response to the 26/11 Mumbai attacks. Along with the 2008 amendment, the National Investigation Agency Act, 2008 was enacted to set up the National Investigation Agency (NIA) at the national level to investigate and prosecute acts of terrorism. The UAPA has been further amended in 2012 and 2019 as well. The important provisions of the counter-terror regime in India are analyzed hereunder.

Definition of Terrorism

The definition of terrorism is the starting point of an anti-terror law and has always been a contentious issue. S. 15(1) UAPA defines a terrorist act as:

- (1) *Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security, economic security, or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country, -*
- (a) *by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause-*
 - (i) *death of, or injuries to, any person or persons; or*
 - (ii) *loss of, or damage to, or destruction of, property; or*
 - (iii) *disruption of any supplies or services essential to the life of the community in India or in any foreign country; or*
 - (iiia) *damage to, the monetary stability of India by way of production or smuggling or circulation of high quality counterfeit Indian paper currency, coin or of any other material; or*
 - (iv) *damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or*
 - (b) *overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death*

³⁴ 'Unlawful Activities (Prevention) Act, 1967 (UAPA), Statement of Objects and Reasons'.

of any public functionary; or
 (c) *detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or an international or inter-governmental organisation or any other person to do or abstain from doing any act; or commits a terrorist act.*

Intent to Strike Terror

The ingredient that is essential to constitute an act of terrorism is the intention to strike terror in the minds of the public. In the case of *Hitendra Vishnu Thakur v. State of Maharashtra*,³⁵ a case under TADA, the court stated that a shooting spree in itself would not amount to a terrorist act unless and until it was carried out with an intention to strike terror.³⁶

The significance of this is clearly established through the study of two cases under TADA. In the first case of *Niranjan Singh v. Jitendra Bhimraj*,³⁷ the accused persons formed an unlawful assembly and killed 'R' and 'K'. Based on the facts, the court came to the conclusion that the intention of the accused in carrying out the killings was to gain supremacy in the underworld and not to create terror in the minds of people. The court held that "the consequence of such violence is bound to cause panic and fear but the intention of committing the crime cannot be said to be to strike terror in the people or any section of the people".³⁸ Consequently, the offence of terrorism punishable u/s 3(1) TADA was not made out.³⁹

In the second case of *Girdhari Parmanand Vadhava v. State of Maharashtra*,⁴⁰ the intention to strike terror in the minds of people was made out as the accused declared his intention by indicating that 'V' should be killed in order to send the message to the people in the locality that if the demands of 'B' (accused) and his

³⁵ 'Hitendra Vishnu Thakur v. State of Maharashtra (1994) 4 SCC 602'.

³⁶ 'Unlawful Activities (Prevention) Act, 1967 (UAPA), Statement of Objects and Reasons' (n 34). para 11.

³⁷ 'Niranjan Singh v. Jitendra Bhimraj (1990) 4 SCC 767.'

³⁸ 'Unlawful Activities (Prevention) Act, 1967 (UAPA), Statement of Objects and Reasons' (n 34). para 10.

³⁹ *ibid.* para 10.

⁴⁰ 'Girdhari Parmanand Vadhava v. State of Maharashtra (1996) 11 SCC 179'.

associates were not met, the extreme consequence of the killing of an innocent person would be resorted to. Accordingly, ‘V’ was killed for giving effect to the intended threat to the people.⁴¹ The court concluded that such killing sent a shockwave and brought about terror in the minds of the people of the locality.⁴² “It is the impact of the crime and its fallout on the society and the potentiality of such crime in producing fear in the minds of the people or a section of the people which makes a crime, a terrorist activity under Section 3(1) of TADA”.⁴³

Membership of Terrorist/Unlawful Organizations

The UAPA u/ss. 10, 20, 38, and 39 holds individuals liable for membership-based offences and provides for punishment based on membership of unlawful associations and terrorist outfits. For the offence u/s 10, an individual must be a member of an association that has been notified as unlawful by the government; u/s 20, an individual should be a member of a terrorist organisation that has committed a terrorist act; u/ss. 38 and 39 an individual must be a member of terrorist organization coupled with the intention to further its activities. Such membership-based offences were also included u/s 3(5) TADA.⁴⁴ In 2011 in *Arup Bhuyan v. State of Assam*⁴⁵ the Supreme Court, while deciding a bail application under TADA that was filed by a person accused of being a member of ULFA (a banned unlawful association), had read down the membership provision stating that “mere membership of a banned organisation will not make a person a criminal unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence”.⁴⁶ Therefore, his conviction u/s 3(5) TADA was not sustainable. Similar

⁴¹ ‘Unlawful Activities (Prevention) Act, 1967 (UAPA), Statement of Objects and Reasons’ (n 34). para 39.

⁴² *ibid.*

⁴³ *ibid.*

⁴⁴ Kartik Kalra, ‘A Moral Case against Criminalisation of Mere Membership in UAPA [Part 1]’ (*The Proof of Guilt*, 24 December, 2022) <<https://theprooffofguilt.blogspot.com/2022/12/guest-post-moral-case-against.html>> accessed 16 September 2023.

⁴⁵ ‘*Arup Bhuyan v State of Assam* (2011) 3 SCC 377’.

⁴⁶ ‘Unlawful Activities (Prevention) Act, 1967 (UAPA), Statement of Objects and Reasons’ (n 34). para 12.

views were adopted by the court in *State of Kerala v. Raneef*⁴⁷ and *Indra Das v. State of Assam*,⁴⁸ cases under UAPA.⁴⁹

Recently, however, on 24th March, 2023, the Supreme Court overruled the three judgments in *Arup Bhuyan I*, *Raneef*, and *Indra Das* in the review of *Arup Bhuyan*.⁵⁰ The Supreme Court in *Arup Bhuyan II*⁵¹ stated that “once an association is declared unlawful of whom the concerned person was the member wishes to continue as a member despite the fact that he is well aware of the fact that such an association is declared unlawful and if he still wishes to continue being a part of such unlawful association it shows a conscious decision on his part and therefore liable to be penalized for such an act of continuation of his membership with such unlawful association”.⁵² The court held that “when an association is declared unlawful by notification issued under Section 3 which has become effective of sub-section 3 of that Section, a person who is and **continues** to be a member of such association is liable to be punished with imprisonment for a term which may extend to two years, and shall also be liable to fine under Section 10(a)(i) of the UAPA, 1967”. Resultantly, now there is no need to show that an accused was an ‘active’ member of an unlawful organisation for purposes of the offence.

Terrorism Financing

Financing terrorism is one of the biggest challenges facing the countries in the world today. Section 17 UAPA makes it an offence to raise funds, or provide funds, or collect funds from any source, knowing that such funds are to be used for

⁴⁷ ‘State of Kerala v. Raneef (2011) 1 SCC 784’.

⁴⁸ ‘Indra Das v. State of Assam (2011) 3 SCC 380’.

⁴⁹ LiveLaw News Network, ‘Mere Membership of Unlawful Organization Is UAPA Offence: Supreme Court Overrules 2011 Precedents’ (*Live Law*, 2023) <<https://www.livelaw.in/top-stories/supreme-court-passive-membership-banned-organisations-uapatada-arup-bhuyan-raneef-224628>> accessed 16 September 2023.

⁵⁰ LiveLaw News Network, ‘No Vagueness in UAPA Provision Criminalising Membership of Banned Organisation; No Chilling Effect: Supreme Court’ (*Live Law*, 2023) <<https://www.livelaw.in/top-stories/no-vagueness-in-uapa-provision-criminalising-membership-of-banned-organisation-no-chilling-effect-supreme-court-224692?infinite-scroll=1>> accessed 16 September 2023.

⁵¹ ‘Arup Bhuyan II 2023 SCC Online SC 338’.

⁵² ‘Unlawful Activities (Prevention) Act, 1967 (UAPA), Statement of Objects and Reasons’ (n 34). para 97.

the commission of a terrorist act. This is punishable with imprisonment from five years to life and a fine.

The 2012 amendment to UAPA introduced additional provisions penalizing financial activities related to terrorism. U/s 15, the concept of ‘offences threatening the economic security’ was introduced under the definition of a terrorist act that also included the smuggling of ‘high value’ counterfeit currency. In one of the first cases on this issue, in 2014, the National Investigation Agency through a special NIA court, sentenced six accused in a 2009 Fake Indian Currency Notes (FICN) case to life imprisonment.⁵³ This possession and circulation of FICN was categorized as an ‘act of terrorism’.

Designation of Terrorists and Terrorist Organizations

The 2019 amendment to UAPA introduced significant and controversial changes to the law. As opposed to the previous practice of only enabling the designation of organizations indulging in terrorist activity as terrorist organizations, the latest amendment now permits the designation of individuals as ‘terrorists’ u/ss. 35 & 36 of UAPA. This amendment has come under heavy criticism since it allows arbitrary powers at the disposal of the executive without any detailed grounds of the basis of designation of an individual as a terrorist.

Two petitions have been filed in the court, *Sajal Awasthi v. UOI*⁵⁴ and *Association for Protection of Civil Rights v. UOI*,⁵⁵ challenging the 2019 amendment as violative of right to equality, freedom of speech and right to life.⁵⁶ The allegation being that the amendment removes all chances of judicial scrutiny of the designation. An individual designated as a terrorist under the

⁵³ Mumbai, ‘NIA Court Gives Life Term to 6 Accused in Fake Currency Case’ (*Business Standard*, 2014) <https://www.business-standard.com/article/pti-stories/nia-court-gives-life-term-to-6-accused-in-fake-currency-case-114013000860_1.html> accessed 16 September 2023.

⁵⁴ ‘Sajal Awasthi v. UOI, WP (C) 1076/2019’.

⁵⁵ ‘Association for Protection of Civil Rights v. UOI, WP (C) No. of 2019’.

⁵⁶ Ishika Garg, ‘Explainer: Constitutional Challenges to UAPA’ (*Law and Other Things*, 2023) <<https://lawandotherthings.com/explainer-constitutional-challenges-to-uapa/>> accessed 16 September 2023.

Fourth Schedule of UAPA by the Central Government may file an appeal before the Central Government itself u/s 36(1). If the Central Government refuses to delist the individual as a terrorist from the Schedule, the only option that the individual has is to file a review petition before the Review Committee constituted by the Central Government.⁵⁷ Therefore there exists no scope of judicial review in such matters.

Detention and Bail

An individual arrested under UAPA can be detained for a period of 180 days (6 months) or longer without the filing of a charge sheet.⁵⁸ Further, a person arrested under this Act does not have a right to bail. The amendment to s. 43D (5), as a fallout of the Mumbai terror attacks, has made it extremely difficult for a person to be released on bail. S. 43D (5) UAPA requires a court to deny bail if there are reasonable grounds to believe that the case against the accused is *prima facie* true. The provision has made bail difficult to secure, since it requires the Court to assess guilt at the time of grant of bail only by looking at the charge sheet prepared by the NIA.⁵⁹

The Supreme Court interpreted s. 43D (5) in *NIA v. Zahoor Ahmad Shah Watali*⁶⁰ and reversed the order of the Delhi High Court that refused to grant bail to Watali who had been accused of funding/encouraging terrorist and secessionist acts through *hawala* channels. The Supreme Court interpreted the phrase ‘prima facie true’ u/s 43D (5) and clarified that “elaborate examination or dissection of the evidence is not required to be done at this stage. The Court is merely expected to record a finding on the basis of broad probabilities regarding the involvement of the

⁵⁷ ‘S. 36(4) UAPA’. Also see Amritanshu Pushkar, ‘Examining the Constitutional Validity of The Unlawful Activities (Prevention) Amendment Act, 2019’ (*SSRN*, 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3974648> accessed 16 September 2023.

⁵⁸ ‘S. 43D (2) UAPA’.

⁵⁹ EPW Engage, ‘Dissent in a Democracy: Political Imprisonment under the UAPA in India’ (*Economic & Political Weekly*, 2022) <<https://www.epw.in/engage/article/dissent-democracy-political-imprisonment-under>> accessed 16 September 2023.

⁶⁰ ‘NIA v. Zahoor Ahmad Shah Watali (2019) 5 SCC 1’.

accused in the commission of the stated offence or otherwise”.⁶¹

The stringent bail conditions under UAPA coupled with the general delays in the judicial system have led to long years of detention of the accused in custody pending trial. Consequently, the judgment in *UOI v. K.A. Najeeb*⁶² by the Supreme Court has come as a welcome relief. The court has held that s. 43D (5) of the UAPA cannot be the sole reason to deny bail when the accused has been denied a speedy trial.⁶³

Investigation of Terrorism Offences

The Parliament enacted the National Investigation Agency Act in 2008 to establish a special investigation agency at the national level to investigate and prosecute offences impacting the sovereignty, security, and integrity of India.⁶⁴ On receipt of an FIR (First Information report) of a Scheduled Offence,⁶⁵ the police officer-in-charge has to forward the report to the State Government⁶⁶ which in turn will forward it to the Central Government.⁶⁷ The Central Government shall, within 15 days, based on whether the offence is a Scheduled Offence, the gravity of the offence, and other relevant factors, determine whether it is a fit case to be investigated by the NIA⁶⁸ and shall forthwith direct the agency to investigate the case.⁶⁹

The Central Government u/s 6(5) also has the power to *suo moto* direct the NIA to investigate the offence where it believes that a Scheduled Offence has been committed. Clearly, the State Government is obligated to bring any terrorism-related

⁶¹ ‘Unlawful Activities (Prevention) Act, 1967 (UAPA), Statement of Objects and Reasons’ (n 34). para 24. Also see Abhinav Sekhri, ‘Bail in Terror Cases: Zahoor Watali, and the Fault Lines in the UAPA’ (*The Proof of Guilt*, 2019) <<https://theprooffofguilt.blogspot.com/2019/04/bail-in-terror-cases-zahoor-watali-and.html>> accessed 16 September 2023.

⁶² ‘UOI v. K.A. Najeeb (2021) 3 SCC 713’.

⁶³ ‘Unlawful Activities (Prevention) Act, 1967 (UAPA), Statement of Objects and Reasons’ (n 34). para 17.

⁶⁴ Sen (n 31).[11].

⁶⁵ FIR is a written document prepared by the police when they receive information about the commission of a cognizable offence. Scheduled Offences are the offences mentioned in the Schedule to the NIA Act. The NIA is empowered to investigate and prosecute only these offences.

⁶⁶ ‘S. 6(1) NIA Act’.

⁶⁷ ‘S. 6(2) NIA Act’.

⁶⁸ ‘S. 6(3) NIA Act’.

⁶⁹ ‘S. 6(4) NIA Act’.

act to the notice of the Central Government, which in turn decides whether it is a fit case to be investigated by the NIA. Once the NIA takes over the investigation, the State police shall forward all relevant records to the NIA.⁷⁰ The NIA ensures the in-depth and professional investigation of terrorism offences with modern and scientific tools of investigation. It has built a database of terrorism related information that it shares with the states in India and ensures a speedy and effective trial.⁷¹

The Indian counter-terrorism legal regime has been strengthened considerably after the lessons learned from past mistakes. However, the implementation of such laws, which are broadly worded, continues to allow for misuse by the authorities.

Terrorism and Counter-Terrorism Legal Regime in Indonesia

From the early days of the Unitary State of the Republic of Indonesia, various insurgent groups within the country have employed terrorist methods. Notably, the Darul Islam group and the Islamic State of Indonesia, under the leadership of Sekarmadji Maridjan Kartosuwirjo, utilized acts of terror in their struggles against the Central Government during the 1950s and 1960s.⁷² Meanwhile, in other regions like Aceh, the Darul Islam insurgency campaign continued under new leaders such as Daud Beureueh. This movement eventually transformed into The Free Aceh Movement (*Gerakan Aceh Merdeka*), which also employed terror methods in its actions. These actions included the murder of foreign citizens and public figures, the burning of homes belonging to migrant residents, and attacks on vital installations.⁷³

⁷⁰ 'S. 6(6) NIA Act'.

⁷¹ Clear IAS Team, 'National Investigation Agency (NIA)' (*Clear IAS*, 2022) <<https://www.clearias.com/national-investigation-agency/>> accessed 16 September 2023.

⁷² Francisco Galamas, 'Terrorism in Indonesia: An Overview' (*Research Paper 04, Instituto Español de Estudios Estratégico*, 2015).[2-3]. <https://www.ieee.es/Galerias/fichero/docs_investig/2015/DIEEEINV04-2015_Terrorismo_en_Indonesia_FcoGalamas_ENGLISH.pdf> accessed 1 October 2023.; also see Solahudin and Dave McRae, *The Roots of Terrorism in Indonesia: From Darul Islam to Jema'ah Islamiyah* (The Lowy Institute for International Policy 2013).[40-41].

⁷³ Kirsten E Schulze, *The Free Aceh Movement (GAM): Anatomy of a Separatist Organization* (East-West Center Washington 2004).[35-37]. also see Greg Fealy, 'Terrorism Today: Jemaah Islamiyah, Dulmatin and the Aceh Cell' (*East Asia Forum*, 2010) <<https://www.eastasiaforum.org/2010/06/23/terrorism-today-jemaah-islamiyah-dulmatin-and-the-aceh-cell/>> accessed 1 October 2023.

In the 1970s, an effort was made to revitalize Darul Islam's campaign, labeled as the Jihad Command (Komando Jihad) by the government. This group organized various acts of terrorism in the name of jihad against the government, such as the bombing of Immanuel Hospital in Bukittinggi, the bombing of a Methodist church and Budi Murni College in Medan, and bombings and grenade launches at Nurul Iman Mosque in Padang, and a bomb explosion at Borobudur Temple.⁷⁴

Terrorism in Indonesia took on a new dimension in the late 1990s. This shift was marked by a change in the target of attacks, moving from symbols of the Indonesian government to a focus on jihad against the United States and its allies. Furthermore, bomb tactics and suicide bombings became more prevalent among terrorist groups during this period. The vulnerability occurs because of the region and its potential as a source of regional instability, underlined through the rise of Islamic extremist cells based in Indonesia after 9/11. In addition to the emergence of lone wolf terrorism in 2010-2018, there has been a change in targets.⁷⁵ This difference is seen from the targets of terrorism that occurred from 2010 to 2018 which were civil society and law enforcement officers, especially the police.⁷⁶ It is different from terrorism in 2000 to 2009 which directed acts of terror to objects that were symbols of the West. New networks affiliated with ISIS have also emerged, for example, JAD which has carried out a number of attacks, such as the suicide bombing in Surabaya in 2018.⁷⁷

⁷⁴ The Habibie Center, 'Counter-Terrorism Policy Brief Series The Role and Involvement of TNI in Countering Terrorism' (*The Habibie Center*, 2018).[7]. <<https://www.habibiecenter.or.id/img/publication/THC-Counter-Terrorism-Policy-Brief-Series-1.pdf>> accessed 1 October 2023.

⁷⁵ Stanislaus Riyanta, 'Shortcut to Terrorism: Self-Radicalization and Lone-Wolf Terror Acts: A Case Study of Indonesia' (2022) 4 *Journal of Terrorism Studies*. [1].

⁷⁶ Irsad Ade Irawan, 'Pergeseran Orientasi Terorisme Di Indonesia 2000-2018' (*Kumparan.com*, 2018) <<https://kumparan.com/erucakra-garuda-nusantara/pergeseran-orientasi-terorisme-di-indonesia-2000-2018/full>> accessed 1 October 2023.; also see United States Department of State Publication Bureau of Counterterrorism, 'Country Reports on Terrorism 2017' (*Washington DC*, 2018).[55-56]. <https://www.state.gov/wp-content/uploads/2019/04/crt_2017.pdf> accessed 1 October 2023.

⁷⁷ V Arianti, 'The IS Threat in Indonesia' (2019) 11 *Counter Terrorist Trends and Analyses*. [1-5].; 'IPAC The Surabaya Bombings and the Future of ISIS in Indonesia. Report No.51' (2018).; also see Kirsten E Schulze, *The Surabaya Bombings and The Evolution of The Jihadi Threat in Indonesia* (CTC Sentinel 2018).

Counter-Terrorism Legal Regime in Indonesia

Prior 2002, Indonesia did not have an Anti-Terrorism Law. The Indonesian government applied the Indonesian Criminal Code and the Anti-Subversive Law to fight acts that today would be characterized as “acts of terrorism”. Following the Bali Bombings in 2002, Indonesia has specific laws concerning terrorism, namely, PERPPU No. 1 of 2002 concerning the Eradication of Terrorism and PERPPU No. 2 of 2002 concerning the Implementation of Government Regulation in Lieu of Law of the Republic of Indonesia No. 1 of 2002 concerning the Eradication of Terrorism in the Bali Bombing Incident on October 12, 2002. One year later, PERPPU No. 1 of 2002 was adopted into Law No. 15 of 2003 (hereinafter 2003 Anti-Terrorism Law), and PERPPU No. 2 was adopted into Law No. 16 of 2003.⁷⁸ The 2003 Anti-Terrorism Law governed all aspects of terrorism, including general provisions, the scope of regulations, acts of terrorism, other criminal acts related to terrorism, the investigation process, prosecution and court proceedings, compensation, restitution, rehabilitation, and international cooperation related to counterterrorism efforts.

In 2013, the government enacted Law No. 9 of 2013 concerning the Prevention and Elimination of Terrorism Financing (hereinafter 2013 Anti-Terrorist Financing Law). In 2018, the 2003 Anti-Terrorism Law was amended into Law No.5 Year 2018 (hereinafter 2018 Anti-Terrorism Law). The amendment aimed to provide a stronger legal foundation for addressing the growing complexity of handling terrorist activities.

Scope of Terrorism

Article 6 of the 2018 Anti-Terrorism Law provides a generally-worded description of terrorism:

...every acts of every person who intentionally uses violence or threat of violence which creates an atmosphere of terror or fear against a wide spread

⁷⁸ On July 23, 2004, the Constitutional Court (MK) through Constitutional Court Decision Number 013/PUU-I/2003 annulled Perppu No. 2 of 2002 as enacted in Law No. 16 of 2003, declaring it non-binding and contrary to the 1945 Constitution of Indonesia by that MK decision. Law No. 16 of 2003 essentially retroactively enforced the law.

of people, causes mass victims by taking away other person's freedom or loss of life and possessions or cause damages or destructions to a strategic vital object, environment or public facility or international facility Criminal sanction for this act is increased to imprisonment time of five (5) years at minimum and twenty (20) years at maximum, prison punishment, or capital punishment.

The language in Article 7 closely resembles that in Article 6, with two key distinctions. Firstly, it pertains to an action aimed at inciting fear or widespread harm, even if it doesn't result in either of those outcomes. Secondly, Article 7 allows for a maximum punishment of life imprisonment. Articles 6 and 7 have a broad and inclusive language, encompassing a wide range of actions. Simon Butt in his paper has criticized the scope of these two articles.⁷⁹ He is particularly concerned about specific terms like 'the widespread atmosphere of terror or fear,' 'mass casualties,' and 'very high' which are left undefined, leading to subjective interpretations and raising several questions about their practical application, for instance:

1. Is it enough for terror or fear to affect most residents of a single village, or must it extend to a sub-district, province, or even the entire nation of Indonesia?
2. What level of economic, political, social, cultural, defense, and security significance is required for a place or structure to be classified as a 'vital object?'
3. How can the presence of fear or terror be substantiated? Should a survey be conducted, witnesses summoned, or would judges determine the occurrence of fear based on their own judgment?
4. Does the terror or fear induced need to be a 'reasonable' reaction to the threat or violence, or could it result from certain segments of the community overreacting to the violence or sensationalized media reporting?

The broad wording used in Articles 6 and 7 has drawn scrutiny due to its potential for application in contexts unrelated to terrorism. Certain legal experts have expressed apprehension that the Anti-Terrorism Law's various interpretations could render it susceptible to being used as a means of political repression. There are concerns that it may be used as was the now-repealed Anti-Subversion Law, which was extensively employed by the Soeharto regime to stifle dissent, especially against critics.⁸⁰

⁷⁹ Simon Butt, *Anti-Terrorism Law and Criminal Process in Indonesia* (The Backgr, University of Melbourne 2008).[5-7].; also see Abdul Wahid [*et.al.*], *Kejahatan Terorisme: Perspektif Agama, HAM Dan Hukum* (Refika Aditama 2004).[77].

⁸⁰ Yuzuru Shimada, 'Authoritarianism and Constitutional Politics in Post Authoritarian Indonesian Society: Reemergence or Legacy' (2022) 9 *Brawijaya Law Journal*. [1].

Definition: Intent/Motive of Terrorism

Terrorism has been defined in the 2018 Anti-Terrorism Law, following the absence of terrorism's definition in previous laws. According to Article 1, point 2 of the 2018 Anti-Terrorism Law, terrorism is "*Acts that use violence or threats of violence that create a widespread atmosphere of terror or fear, which can result in mass casualties, and/or cause damage or destruction to vital strategic objects, the environment, public facilities, or international facilities, with motives related to ideology, politics, or security disruption.*" This definition of terrorism places more focus on the impact or consequences of terrorism and includes the condition of "motives related to ideology, politics, or security disruption." Without this specificity, acts of terrorism would be indistinguishable from ordinary crimes such as murder, assault, property damage, and arson. The motive is a key criminal element reflected in the 2018 Anti-Terrorism Law.

Several criminal offenses related to terrorism are also governed under the Indonesian Criminal Code (KUHP) and other statutes, such as property destruction, group violence, possession of weapons and explosives, and unlawful acts against the safety of civil aviation. However, it is the motives and targets that distinguish 'terrorist activities' from ordinary criminal acts. The motive for terrorism involves deliberate murder and harm to civilians with the intent of intimidating the population or compelling the government to act. As such, provisions in ordinary criminal law and the KUHP cannot simply be applied to what is now referred to and categorized as 'terrorist activities' or 'terrorist acts.'

Article 5 of the 2018 Anti-Terrorism Law includes an exception stating that acts of terrorism that are stipulated under this Law do not qualify as 'political crimes.' This is done for the sake of efficiency and effectiveness in extradition agreements and reciprocal legal assistance in criminal matters between the Indonesian government and foreign governments. Article 5 further explains that this provision is intended to prevent acts of terrorism from hiding behind political motivations, backgrounds, and goals to evade legal procedures, including investigation, prosecution, court hearings, and imposition of criminal sanctions.

Article 5 also aims to ensure that individuals or groups engaged in political movements or demonstrations to exercise their political, social, and economic rights can do so without fear of being accused of committing terrorism. However, some potential issues that may arise in practice are how to limit these rules from encroaching on political activities and the civil and political rights of the people. If law enforcement expands the scope of the terrorism definition to the extent that it infringes on the civil and political rights of the public, it would not be in line with the rule of law, which is intended to protect the population from the arbitrary actions of authorities. [Top of Form](#)

Membership of Terrorist/Unlawful Organizations

Article 12A of the 2018 Anti-Terrorism Law deals with the participation of an individual in an organization engaged in the commission of terrorist-related acts. In the first paragraph of Article 12A, a criminal penalty is imposed on anyone who plans, instigates, or coordinates a terrorism-related criminal act with others, either within the country or abroad. Meanwhile, in the second paragraph, any person who knowingly joins or recruits others to join an organization that has been legally determined and/or designated as a terrorist organization by the court is subject to a criminal penalty. In addition to addressing individuals intentionally joining or recruiting for such organizations, paragraph (3) also establishes criminal penalties for the founder, leader, management, or those who exercise control over the organization.

Terrorism Financing

Based on Article 4 of the 2013 Anti-Terrorist Financing Law, the act of financing terrorism prescribes a maximum punishment of 15 years imprisonment and a maximum fine of Rp 1 billion. Article 5 covers attempts, conspiracies, or assistance related to terrorism financing, and it carries the same penalties as stated in Article 4. Article 6, on the other hand, addresses individuals who intentionally plan, organize, or incite others to commit the offense described in Article 4.

The penalty for this action is either a life sentence or a maximum of 20 years in prison. This particular article is noteworthy for a couple of reasons. Firstly, it presents two apparently conflicting penalties, namely life imprisonment or a maximum of 20 years. Secondly, it introduces a more severe penalty for planning, organizing, or inciting compared to Article 4, and this is broader in scope. It is conceivable that this section could be applied to impassioned speeches by Islamist clerics (*taklim*) that include a call for donations to jihadist groups.⁸¹ Clearly, if the group is listed, this would constitute a crime. Additionally, if it is known, or should be known, that the funds will be used for a terrorist act, this would also be considered a crime under Article 6, exposing the speaker to a maximum penalty of life imprisonment. The severity of this penalty presumably reflects the seriousness of the offense, especially when individuals in positions of authority, like clerics or teachers, abuse their influence by encouraging others to support terrorism.⁸²

Designation of Terrorists and Terrorist Organizations

The legal mechanism for the designation of terrorist and terrorist organization is stipulated under the 2013 Anti-Terrorism Financing Law. Based on this Law, it is as follows: The Head of the Indonesian National Police must submit a request to the Central Jakarta District Court to include the identification of individuals or corporations in the list of suspected terrorists and terrorist organizations; recommendations from the ministry responsible for foreign affairs in cases where documents originate from foreign countries, international organizations, and/or other international legal entities; the Central Jakarta District Court shall examine and decide on the request within a maximum period of 30 days.

The legal procedures related to DTTOT (Designation of Terrorist and Terrorist Organizations List) still have flaws. Even though it involves judicial institutions, the existence of a judicial process that allows suspects or alleged terrorists to defend

⁸¹ Adam Fenton and David Price, 'Forbidden Funds: Indonesia's New Legislation for Countering the Financing of Terrorism' (2014) 15 Australian Journal of Asian Law.[115-116].

⁸² *ibid.*

themselves is optional. The lack of a guarantee for the right of suspected terrorists to defend themselves in front of a court before the designation is made potentially violates human rights. Potential violations also exist due to the high subjectivity of the Indonesian National Police in proposing DTTOT designations, and the absence of further regulations regarding the contents of documents that must be submitted by the Police as requirements for DTTOT designation to the Central Jakarta District Court. On the other hand, the National Counterterrorism Agency (BNPT), which is authorized by the law to coordinate counterterrorism efforts, only has a limited role in proposing DTTOT designations.⁸³

Detention

According to the 2018 Anti-Terrorism Law, the detention of a suspect or defendant involved in a terrorism-related criminal activity is allowed during the investigation, prosecution, and court examination phases. Article 25, paragraph 2, specifies that the initial detention of a suspect for investigative purposes cannot exceed 120 days. The investigator may, however, request a 60-day extension from the public prosecutor.

Furthermore, paragraph 4 clarifies that the total duration of detention mentioned in paragraphs 2 and 3 can be extended for an additional 20 days by submitting a request to the chief of the court. In the prosecution phase, as per Article 25, paragraph 5, the public prosecutor can detain a defendant for a maximum of 60 days. If more time is required, the public prosecutor can request a 30-day extension from the Chief of the District Court.

A significant addition to the detention rules is the requirement for investigators to arrest suspects of terrorism while upholding fundamental human rights principles, as stipulated in Article 25, paragraph 7. This includes treating the suspect with humanity, prohibiting torture or cruel treatment, and ensuring that the suspect's dignity as a human being is not compromised. Violation of this provision

⁸³ Marfuatul Latifah, 'Pelindungan HAM Dalam Prosedur Penentuan Daftar Terduga Teroris Dan Organisasi Teroris Di Indonesia' (2018) 9 Negara Hukum.[1].

by investigators may lead to criminal penalties in accordance with relevant laws and regulations.

Investigation of Terrorism Offences

Indonesia has a special anti-terrorism police force known as Densus 88, a special counter-terrorism unit under the Indonesian National Police (Polri) responsible for combating terrorism and extremism in the country.⁸⁴ The unit was established in the early 2000s in response to the growing threat of terrorism in Indonesia.⁸⁵ Densus 88 conducts operations to prevent and respond to terrorist threats, including arresting and neutralizing individuals involved in terrorist activities. Densus 88 also has the role of conducting intelligence gathering. It collects and analyzes intelligence related to terrorist organizations, their activities, and potential threats. Densus 88 also plays a role in investigating terrorist incidents, collecting evidence, and building cases against individuals and groups involved in terrorism. Lastly, Densus 88 provides security and protection for key locations, individuals, and events vulnerable to terrorist attacks.⁸⁶

A Comparative Perspective on Counter-Terrorism Legal Regimes between India and Indonesia

India and Indonesia, both being countries with diverse populations and complex security challenges, have implemented anti-terrorism laws to address the threat of terrorism. India currently uses the anti-terrorism laws, Unlawful Activities (Prevention) Act, 1967 (UAPA) and the National Investigation Agency Act, 2008 (NIAA). The latest amendment to UAPA in 2019 provides for the designation of individuals as terrorists in addition to banning of terrorist and unlawful organizations.

⁸⁴ Alif Satria and Cameron Sumpter, 'Recognizing Trade-Offs in Indonesian Counterterrorism Strategy' (2022) 16 *Perspective on Terrorism*. Ed Davies (ed) and Olivia Rondonuwu, 'U.S. Funded Detachment 88, Elite of Indonesia Security' (*Reuters*, 2010).

⁸⁵ Muradi, 'The 88th Densus AT: The Role and the Problem of Coordination on Counter-Terrorism in Indonesia' (2009) 2 *Journal of Politics and Law*. [85].

⁸⁶ *ibid.* [87-88].

Indonesia primarily relies on its 2003 Anti-Terrorism Law, which has undergone amendments. In 2018, Indonesia passed a new anti-terrorism law, which expands the authorities' powers to combat terrorism. The laws in both countries make it a criminal offense to engage in terrorist activities, such as planning, organizing, or participating in terrorist acts. They also cover the provision of material support to terrorist organizations. While there are similarities in their approaches, there are also significant differences in their anti-terrorism laws.

Definition of Terrorism - Both India and Indonesia have definitions of terrorism in their laws, which broadly encompass acts of violence intended to create fear, disrupt public order, or harm the security and sovereignty of the State. As observed in both legislations, the wide and vague wording of what constitutes terrorism is the issue at hand. This allows authorities to arrest people who may not be involved in terrorist activity. Since these are harsher laws, any misuse creates an atmosphere of fear among the people. The maximum punishment for the crime of terrorism provided in India and Indonesia is life imprisonment or the death penalty.

Counter-Terrorism Agencies - Both countries have specialized counterterrorism agencies responsible for handling and investigating terrorism-related cases. In India, this agency is the National Investigation Agency (NIA), while in Indonesia, it is the Special Detachment 88 (Densus 88). The counter-terrorism justice system has considerably improved in India after NIA was set up with the quality of investigation having improved primarily on account of the focused and dedicated work of the NIA. The NIA is responsible for the investigation and prosecution of terrorist offences only; it does not specifically work at the prevention of terrorism unlike Densus 88 in Indonesia.

Designation of Terrorists and Terrorist Organizations - The laws in both countries empower the government to designate individuals and organizations involved in terrorist activity as terrorists or terrorist organizations. Interestingly, in both countries, there is an absence of judicial scrutiny of such procedure, which becomes a ground for violation of human rights. Simply taking a unilateral decision to categorize individuals as terrorists has far-reaching consequences due to the

denial of the opportunity to hear from them.

Membership of Terrorist Organizations - Being a member of a terror organization is a punishable offence both in India and Indonesia. However, in India the recent judicial interpretation states that mere membership of an organization when one is aware that such organization is unlawful, is an offence. Whereas in Indonesia, the membership offence is attracted only when the individual 'knowingly' joins such an organization. The difference in the wording signifies that there exists more clarity in the Indonesian provision. India needs to bring lucidity to the membership provisions under UAPA.

Financing Terrorism - The financing or terrorism by generating funds that are used for terrorism threatens the economic security of any country. Indonesia has a separate enactment called the Anti-Terrorist Financing Law which makes it a punishable offence; whereas the offence is punishable in India under the regular counter-terrorism law UAPA itself. The punishment for generating funds for terrorism in any manner whatsoever in India is five years to life imprisonment, while in Indonesia it ranges from three to 15 years imprisonment.

Legal Procedures/Detention - Both countries have provisions for the detention and prosecution of individuals suspected of terrorism under specific legal procedures, often allowing for preventive detention/detention. It is a fact that investigation of terrorist offences requires time since it is usually inter-connected with other offences, and spread over different territories. In India, pre-trial detention under the UAPA can be extended up to 180 days, whereas in Indonesia the maximum detention period has been increased to 290 days (\pm 10 months) in certain circumstances. Both legislations suffer from the controversial provisions of long detention periods. Also, in both India and Indonesia, prosecution and defense witnesses need to be provided with complete protection for ensuring the success of a fair trial and the criminal justice system.

Conclusion

It is generally seen that, when governments of nations are faced with issues of terrorism, they tend to adopt laws and policies that give them wide powers. These

are in the form of vague provisions that do not comply with the settled norms of criminal jurisprudence and, hence, are violative of human rights. These counter-terrorism legislations are misused by authorities to target dissent and curb legitimate protests. Both India and Indonesia have a strong counter-terrorism architecture that provides the groundwork for tackling the threat. However, whether they are effective in countering terrorism and targeting those individuals and groups that are involved in terrorist activity remains to be seen.

As far as India and Indonesia are concerned, the counter-terrorism law favors the State. This leads to the denial of civil liberties to its citizens. Such repudiation is justified by stating that to tackle a heinous crime like terrorism, special laws that are stringent are required. However, these laws can damage the social and democratic fabric of a nation. We need comprehensive counter-terrorism legislation which enables the State to deny complete operating space to terrorists and terrorist activity, but at the same time ensures the basic rights of the people of the country. For that, political consensus and strong responsible leadership are required that enact an effective and permanent counterterrorism law, with safeguards against its abuse.

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