

A CASE OF ‘HIRED GUNS’: QUESTIONS OF INNOCENT TERRORISM AND REACTIONS OF THE INSENSATE CRIMINAL JUSTICE SYSTEM

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The present paper questions the efficacy of sentencing in terrorism cases, arguing that usually such cases attract mechanical application of legislations, working in isolation to sociological and psychological issues involved therein and failing to distinguish the two classes of conspirator and inflictor involved in an act of terrorism. The paper argues that such mechanical application of anti-terror laws, indiscriminately to all the participants of a terror act, defeats the major aims of deterrence and reformation and thus, prevention, reduction and development of negotiation guidelines to tackle increasing cases of terrorism remain off the books; rather it perpetuates the crime by developing a feeling of vengeance in the similarly situated. The paper draws examples from the biggest terrorism cases in India and comments on the anti-terror legislations of India, US and UK. The paper focuses upon the sentencing trends in India and traces the mitigating factors available in terrorism cases here.

INTRODUCTION

Saad Gaya was a member of a terrorist group known as the ‘Toronto 18’, and participated in its activities. Eighteen at the time of the offence, he pleaded guilty of intending to cause an explosion, endangering life in association with a terrorist group. He accepted that he contributed to group’s activity, but he had no idea of the larger plot. His only task was to find a store for three tons of ammonium nitrate, which the group had procured. *Ahmad* played a leadership role in the same group; he set up the camp, recruited 13 young men to the group, and encouraged violent jihad.¹ The Canadian Trial Court took help of psychiatrists to assessing *Gaya*’s culpability. In the

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¹ *R v Gaya*, 2010 ONSC 434, 255 CCC (3d) 419 [*Gaya* (Trial)], 2010 ONCA 860, 266 CCC (3d) 428 [*Gaya* (Appeal)]

judgment, awarding a sentence of 12 years, with credits and parole eligibility, Durno J. emphasized that²;

.... [He was] *not the prime mover in the plot. He did not know all the details of the plan. He took detailed orders. He did not give them.... He did not know anything about bomb making.*³

A psychological analysis of his rehabilitative prospects, custody, and trial led the court to observe that *he has already been specifically deterred and is not a continuing danger to the public.*⁴ The judgment attempted to distinguish Ahmad's sentence from other members of 'Toronto 18', including *Saad*, noting that Ahmad was responsible for virtually ruining the lives of a number of other young men. However, the decision was over-turned by the Appellate Court which increased the sentence of *Saad Gaya* from 12 to 18 years suggesting that the Lower Court erred in considering the results of psychiatric examination of his behaviour as a mitigating factor. But, what would be the mitigating circumstances in terrorism cases remains a subjective debate, as left unanswered by the Appellate Court.

It is uncontroversial that sentence is an essential part of the *Criminal Justice System* which carries elaborate functions; foremost being deterrence and reform. Today the criminal justice system has moved away from the concept of law of vengeance. Even if one agrees that the punishment is to be proportionate to the seriousness of the crime committed, rationality and free will remain important factors in deciding the gravity of sentence. Offenders shall be punished only because they deserve it and for no other reason, argues *Just Deserts Theory*.⁵ But, affording a similar treatment to alike offences is often argued to perpetuate the crime by a-contextualizing the reasons and impacts thereof.⁶ It closes all the doors to evaluate the extent of rational will,

² *Id.*, ¶ 120

³ *Id.*, ¶ 120

⁴ *Id.*, ¶ 19

⁵ Barton, Alana. JUST DESERTS THEORY. Encyclopedia of Prisons & Correctional Facilities. Ed.. Thousand Oaks, CA: SAGE, 2004. 504-07. SAGE Reference Online. Web. 1 Aug. 2012., p. 3.

⁶ *Id.*

source of motivations, participatory levels and other relevant sociological and psychological issues engrossed in commission of an offense.⁷

The gravity of the sentence depends upon various surrounding circumstances, which (?) may be aggravating or mitigating in nature. However, in most terrorism cases, lack of sociological and psychological enquiries result into mechanical application of anti-terror legislations, compromising the ideas of deterrence, reformation and restrain. The Canadian Appellate Court in *R. vs. Gaya*⁸ made an observation (without seeking necessary expert consultation) that even if Gaya's remorse of Gaya were sincere and he tried to minimize his involvement in the terrorist activity, he remained a threat to the society. The Appellate Court also discarded the psychiatric findings in relation to his behaviour. The court awarded a longer sentence of 18 years on a note that it was necessary for the purposes of general deterrence, given the '*sad truth ... that young home-grown terrorists with no criminal antecedents have become a reality*'.⁹

It is a commonly accepted belief in many societies that terrorism is a response to injustice; these are people driven by desperate actions by intolerable conditions, like poverty, hopelessness, or oppression.¹⁰ The researcher opines that a mechanical legislation and its application are not helping in its reduction. The need is to tackle its sources, deal with the grievances and frustrations of people involved. Terrorism can't be suppressed by mere use of brute force.¹¹ Sentencing policies should be reflective of an understanding of the offence of terrorism; otherwise aims of deterrence, denunciation and reformation remain unserved.

⁷ *Id.*

⁸ *R v Gaya*, 2010 ONSC 434, 255 CCC (3d) 419 [*Gaya* (Trial)], 2010 ONCA 860, 266 CCC (3d) 428 [*Gaya* (Appeal)]

⁹ *R. v. Gaya*, 2010 ONCA 860, 266 CCC (3d) 428 [*Gaya* (Appeal)], ¶ 47.

¹⁰ Hamden, Raymond H., *Psychology of Terrorists: 4 types*, 2006, p. 11, [retrieved from [http://www.all about-psychology.com](http://www.all-about-psychology.com)] [hereinafter *Hamden*].

¹¹ *People's Union for Civil Liberties v. Union of India*, A.I.R. 2004 S.C. 456, 467.

It is desired that the culpability of offender be considered with a possibility of reformation, rehabilitation and remorse. During the course of this paper, the researcher aims to argue that in terrorism cases, these factors are often subordinated to emphasise upon the principles of general deterrence and protection of the community, leading to harsh sentences despite of presence of strong mitigating circumstances, which are applicable to all other ranges of offenses; mitigating factors are in abeyance, uncertain.

There are various perspectives through which terrorism may be examined. Some consider terrorism to be an occupational choice based on rationality; others treat it as a syndrome and some other as a tool to achieve political, religious or ideological goals. It becomes a duty of the court to balance all these perceptions and come up with a sentencing structure to address the hidden psychological and sociological issues involved therein, so as to allow reduction of terrorism and direct development of appropriate negotiation guidelines with terrorists to the executive, by drawing information from the live catches of terrorism. The paper analyses the question of why sentencing policies of a state need to be based on psychological investigation of terrorism. The paper discusses the anti-terror policy framework especially in India, to see if the sentencing structures and mitigating factors provided are effective enough to work towards deterrence of terrorism or perpetuates it through its insensitive dealings.

The paper is divided into four main parts. The first part introduces the issues involved in sentencing in terrorism cases, aims of the paper and research methodology employed. Secondly, the researcher examines terrorism from different perspectives of economics and psychology and answers the question why is it necessary to have an elaborate understanding of the offense. The third part talks about sentencing regime in terrorism cases, focussing on India. This part further examines the approaches taken by court in dealing with the biggest terror attack cases of the country. The last part concludes the paper.

2. UNDERSTANDING TERRORISM AND ITS PSYCHOLOGY

Generally, a *premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents*, is termed as 'terrorism'.¹² However, there is a lot of confusion regarding definition of terrorism; some consider it to be a purely political exercise for want of power, while others consider it to be driven by ideological differences.¹³ A common belief is that this use of violence is conscious.¹⁴ Psychologists usually see political or religious goals as an arena in which emotions originating elsewhere are stimulated and played out,¹⁵ because of excitement or arousal, once channelled into political violence.¹⁶ Then again, this *frustration-aggression hypothesis* has long been questioned-It is often argued that mere frustration does not mean that one becomes a terrorist.¹⁷ It is uncontested that in specific circumstances the psychological factors could be relevant to terrorism¹⁸. No proposition on possible contributors to terrorism can be disregarded in absence of any conclusive scientific study.

B. Motivations of Terrorism

i) The Rationality Argument

¹² U.S. Code Title 22, Ch.38, ¶. 2656f(d)

¹³ Kruglanski, Arie W. & Fishman, Shira, TERRORISM BETWEEN "SYNDROME" AND "TOOL", Current Directions in Psychological Science, Vol. 15, No. 1 (Feb., 2006), 45, [retrieved from <http://www.jstor.org/stable/20183071> on 25/04/2013 01:33] [hereinafter *Arie & Shira, Syndrome and Tool*].

¹⁴ Id.

¹⁵ Hamden, supra note 10..

¹⁶ Hamden, supra note 10.

¹⁷ Arie & Shira, *Syndrome and Tool*, Supra note 18

¹⁸ Arie & Shira, *Syndrome and Tool*, Supra note 18

Economics of Terrorism assumes that every human is a rational being by nature.¹⁹ Hence, every choice he makes is based upon rationality. And every person makes rational decisions to the extent he expects them to maximize their profits or benefits and minimize costs and losses.²⁰ According to the hypothesis proposed by the *Rational Choice Theory*, if the expected benefits outweigh the expected cost of the crime, decision to commit the crime is made.²¹ But, *is it true that a terrorist sits and calculates the costs and benefits arising out of the crime, with full knowledge and free will?*²² Lack of information, moral values and other influences on criminal behaviour restrict rationality, but the theory argues that even in such case, limited rationality is involved.²³ This stand is supported by the idea that an individual's occupational choice depends upon assessment of his own intelligence, interests, abilities and aptitudes, as proposed by the *Occupational Choice Theory*.²⁴ Persons with inaccurate or limited self-knowledge make inadequate choices more frequently than persons with accurate self-knowledge.²⁵

ii) *Crime Causation Theories and Terrorism*

The basic premise of economics theories, i.e. there is an assessment of intelligence, abilities and aptitudes in taking a decision, is not a universal possibility according to the *Psychoanalytical Theory*. In cases of inaccurate self-knowledge, the choices made are not tempered with rationality, completely. *No person is born criminal*, as Emile Durkheim and Karl Marx

19 MARK LANIER & STUART HENRY, *ESSENTIAL CRIMINOLOGY* 145-146 (1998) [hereinafter LANIER & HENRY, *ESSENTIAL CRIMINOLOGY*].

20 Simpson, Sally S., *OF CRIME AND CRIMINALITY* 159 (2002).

21 *Id.*

22 *Id.*, at 161

23 *Id.*

24 Ginzberg, Eli, et.al. *OCCUPATIONAL CHOICE: AN APPROACH TO A GENERAL THEORY* 23 (1951).

25 *Id.*

contend.²⁶ Society places a very big role in developing delinquency. The capability to connect with and concern for other individuals lacks somewhere when we talk about the deprivations caused because a kind of emotional crisis which exists as a reason of disturbed family relations, emotional bonding, parental behaviour, relations between parents and relations between parent and children, lack of education etc²⁷.. The factors which are very important for any individual to be able to adapt to the social environment are missing in such cases, and such cases of mal-adaptation are commonly referred to as deviance.²⁸

As it is a commonly held view that the personality of a human is formed through socialization processes and is not biologically predetermined,²⁹ if the development is abnormal, psychological disturbances or personality disorders may become a part of an individual's personality. This development is greatly affected by the environmental influences.³⁰ However, factors like adequate education, occupational attainments, and loving relations with other adults act as a cushioning factor and protect an individual from deviating from societal mores.

These disturbances so caused by the unhealthy living environment reside in the mind of an individual and may be triggered into criminal behaviour by environmental factors like political scenario, economic depravity,

²⁶ Genders, Elaine & Morrison, Shona, *When Violence is a Norm, DANGEROUS PEOPLE* (Nigel Walker (Ed.)) 29 (1st Ed., 1996) [hereinafter Genders & Morrison, *When Violence is a Norm*].

²⁷ LANIER & HENRY, *ESSENTIAL CRIMINOLOGY*, SUPRA NOTE 24, AT 113-117.

²⁸ Glover, Edward, *TEAM RESEARCH ON DELINQUENCY: A PSYCHO-ANALYTICAL COMMENTARY*, *British Journal of Delinquency* 173 (1953-1954) [hereinafter Glover, *Team Research on Delinquency*] [

http://heinonline.org/HOL/Page?handle=hein.journals/brijode4&div=32&g_sent=1&collection=journals#] [Accessed on April 09, 2013].

²⁹ DAVID GADD & TONY JEFFERSON, *PSYCHOSOCIAL CRIMINOLOGY* 17 (1st Ed., 2007) [hereinafter GADD & JEFFERSON, *PSYCHOSOCIAL CRIMINOLOGY*].

³⁰ LANIER & HENRY, *ESSENTIAL CRIMINOLOGY*, SUPRA NOTE 27, at 113-115.

peer pressure etc.³¹ This argument is strengthened by *Psychoanalytical Theory*. The theory argues that crime is a result of buried conflicts in the mind caused due to traumas and deprivations during childhood.³² Even the upcoming laws identify that the childhood maltreatment can make a person insane or mentally unfit to perform regular tasks.³³ The theory of '*Intergenerational transmission of violence*'³⁴ also supports the argument to its crux. The victimized individuals attempt to re-create the parental or conjugal roles they have seen and experienced. A person who has been a victim of childhood trauma, not necessarily always become a violent or murderous offender. But, studies on psychological research say that he does suffer from Post Traumatic Mental Disorder, which may be enhanced by various environmental influences to grow into a body of crime.³⁵

This view is further maintained by the '*Model of Overwhelming Pressure*', when it says that internal or external pressure might intrude upon an actor's freedom of choice that the act committed by him no longer deems to

³¹ *Id.*

³² *Id.*

³³ [Section 20: Cruelty to a child: Prevention of Offences against Child Bill, 2009: Whoever, having the actual charge of or control over a child, assaults, abandons, exposes or wilfully neglects the child or causes or procures the child to be assaulted, abandoned, exposed or neglected in a manner likely to cause such child physical or mental suffering shall be punishable with imprisonment of either description for a term with rigorous and non-rigorous which may extend to three year or fine upto Rupees Ten thousand only or both. Provided that, if that as a result of the aforesaid mentioned cruelty, the child:

(1) is physically incapacitated;

(2) becomes insane or mentally unfit to perform regular tasks;

(3) has risk to life or limb;]

³⁴ Elaine Genders & Shona Morrison, When Violence is a Norm, DANGEROUS PEOPLE (Nigel Walker (Ed.)) 29 (1st Ed., 1996) [hereinafter Genders & Morrison, When Violence is a Norm]. at 502.

³⁵ Paul Cavadino, A Case for Change, CHILDREN WHO KILL (Paul Cavadino (Ed.)) 12 (1996) [hereinafter Cavdino, A Case for Change].

his doing.³⁶ The act becomes an unavoidable act, if psychological position of the actor is considered. The psychological position of victims of unpleasant experiences suggests that they tend to manipulate the circumstances to convince themselves that the people whom they are killing have hurt them and they deserve to suffer for it.³⁷ These people can be very easily used as agents to carry out crimes for others, as people who have suffered the events of victimization tend to change their perspectives regarding self, group, community or others.³⁸

Note- Use transitional phrases or connectors to form a flow in your arguments, or even from one part of the essay/sentence to another. Each sentence should flow naturally from the previous one. The same is true for a paragraph also. Try to make the point in a particular sentence/paragraph relevant to the next one.

iii) Balancing the Arguments: Psychology vs. Economics

In common consensus, terrorists are often used as means to an ideological, religious or political end.³⁹ Terrorism may be employed by State or non-state actors or lone perpetrators.⁴⁰ The idea that terrorism is a tool to achieve religious, ideological or political aims has vital implications for understanding psychology which makes terrorism more or less likely. The *Theory of Motivation-Action Interface* suggests that terrorism is used as a means till the time its expected utility is higher than that of other means to achieve desired goals.⁴¹ The available mental resources i.e. how much effort and energy one is able and is willing to invest, is determined by the ready

36 J. MITCHELL MILLER (ED.), ENCYCLOPEDIA OF CRIMINOLOGY 1546 (2005) [hereinafter MILLER (ED.), ENCYCLOPEDIA OF CRIMINOLOGY], at 639.

37 <http://www.guidetopsychology.com/terrorism.htm> [Accessed on April 10, 2013].

38 *Hamden*, Supra note 10.

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40 Supra note 12, P. 46

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access to the means.⁴² It is a rational choice to maximize the utility derived by the perpetrators of violence. To execute terrorism as a means, human resources are used as tools, to achieve the desired results. Hence, bringing the psychological criminology and economics together, it is suggested that rationality can only be attributed to the perpetrator of violence, none else.

A. Defining Terrorism: Struggles of the Legislators and the Judiciary

Paul Wilkinson gives five characteristics of terrorism⁴³; *it has to be premeditated and aimed at creating a climate of extreme fear or terror, directed at a wider audience; inherently involving attacks on random and symbolic targets, including civilians and is seen as extra-normal breaching the social norms.*

In India, no concrete definition of terrorism ha been provided by any legislation. Section 3 of *Prevention of Terrorism Act, 2002* talks about punishment for terrorist acts, however in the definition clause, ‘*terrorist*’ or ‘*terrorism*’ has not been defined specifically. The Section punishes any person who intends to threaten the unity, integrity, security or sovereignty of India, or strike terror in the people and does any act or thing by lethal arms or other substances⁴⁴ to cause, or likely to cause, death of, or injuries to any person or persons or loss of property etc.⁴⁵ These activities also include detention of any person and threatening to kill or injure such person to compel

42 Abdollahi, abdohussian, COUNTERING TERRORISM: PSYCHOSOCIAL STRATEGIES, Terrorism: Psychological Issues, (Updesh Kumar & Manas K Mandal Ed.) 34-35 (2012).

43 *People’s Union for Civil Liberties v. Union of India*, A.I.R. 2004 S.C. 456, ¶ 5.

44 [Substance include bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means].

45 [Also includes disruption of any supplies or services essential to the life of the community or causes damage or destruction of any property or equipment used].

the Government to do or abstain from doing any act.⁴⁶ Membership of unlawful associations or funding such associations is also considered as terrorist activity, within the purview of the Act.⁴⁷ *Unlawful Activities Prevention Act, 1967* does not define 'terrorism', but 'Unlawful Activity' under Section 2(f) of the Act.

Even the judiciary has failed considerably in concretising the term 'terrorism'. The Supreme Court of India in *People's Union for Civil Liberties and anr vs. Union of India*,⁴⁸ noted that terrorism is aimed at influencing political behaviour.⁴⁹ The reason for such could be anything; to get demands of perpetrators fulfilled, publicise a political cause or advocate a religious or ideological perspective.⁵⁰ However, here the court noted that it is only the psychological factor which distinguishes terrorism from other offenses.⁵¹ But, the meaning of terrorism was restricted only to a political offense, by the court. In *Mhd. Iqbal M. Shaikh vs. State of Maharashtra*⁵², the court noted that terrorism cannot be defined precisely, but in terms of effects, it results into physical and mental damage of the victim and also prolonged psychological effect, creating a sense of trauma and terror.⁵³ Courts in various cases have

46 See Section 3(a), POTA.

47 [(b) is or continues to be a member of an association declared unlawful under the Unlawful Activities (Prevention) Act, 1967 (37 of 1967), or voluntarily does an act aiding or promoting in any manner the objects of such association and in either case is in possession of any unlicensed firearms, ammunition, explosive or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of human life or grievous injury to any person or causes significant damage to any property, commits a terrorist act.

Explanation.—For the purposes of this sub-section, "a terrorist act" shall include the act of raising funds intended for the purpose of terrorism].

48 AIR 2004 SC 456

49 *People's Union for Civil Liberties v. Union of India*, A.I.R. 2004 S.C. 456, ¶ 5.

50 *People's Union for Civil Liberties v. Union of India*, A.I.R. 2004 S.C. 456, ¶ 5.

51 *People's Union for Civil Liberties v. Union of India*, A.I.R. 2004 S.C. 456, ¶ 6.

52 1998 CriLJ 2537.

53 *Mhd. Iqbal M. Shaikh vs. State of Maharashtra*, 1998 CriLJ 2537, ¶ 7.

noted that fight against terrorism is not a usual criminal justice endeavour.⁵⁴ The court felt that there is need to devise new approaches, techniques, weapons, expertise and new laws, to fight terrorism.⁵⁵ An ideal Anti-terror law should dissuade individuals or groups from resorting to terrorism, and deny the opportunities indulge into terrorism. Such a law should also focus on *pre-emptive rather than defensive State action*.⁵⁶

3. PERCEPTIONS ON SENTENCING IN TERRORISM CASES

As already discussed, Economics of Terrorism argues that since terrorism is based on rationality and is a means to achieve desired goals, to discourage it, there is a strong need to convince the perpetrator that there exists a legitimate alternative means to the desired end and that the terrorism is ineffectual.⁵⁷ The argument however, holds good only for he organisational or lone perpetrators of terror, not for the inflictors, as suggested by the *Theory of Motive-Action Interface*. Also, this reasoning seems to be flawed in cases where the fight is ideological or religious in nature or just to terrorise states.⁵⁸ The major focus here is on the inflictors of the terror, and not the perpetrators, which is beyond the scope of this study.

A. ‘Character’, ‘Choice’ and ‘Capacity’ of Sentencing

State of criminal law continues to be - as it should be - a decisive reflection of social consciousness of society. ⁵⁹

As the criminal law aims to achieve security of people and property, its tools must be moulded in a manner to meet the upcoming challenges. These aims could only be achieved by imposing appropriate sentence.⁶⁰ Sentencing

⁵⁴ *People’s Union for Civil Liberties v. Union of India*, A.I.R. 2004 S.C. 456, ¶ 9

⁵⁵ *People’s Union for Civil Liberties v. Union of India*, A.I.R. 2004 S.C. 456, ¶ 9

⁵⁶ *People’s Union for Civil Liberties v. Union of India*, A.I.R. 2004 S.C. 456, ¶ 12

⁵⁷ *Arie & Shira, Syndrome and Tool*, Supra note 12, at 46.

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⁵⁹ *Sevaka Perumal etc. v. State of Tamil Nadu*, 1991 (3) SCC 471, ¶ 7.

⁶⁰ *Sevaka Perumal etc. v. State of Tamil Nadu*, 1991 (3) SCC 471, ¶ 7.

should be structured in a manner to include the elements of both corrective machinery and deterrence.⁶¹ The structure should be stern but modulated with mercy.⁶² Various factors including peculiar factual matrix of the crime, nature of offense, manner of planning and executing, motive, social and educational background of offender are to be considered when deciding on sentencing.⁶³

Usually culpability is decided basing on principle of proportionality, altered by judge's discretion to allow due consideration to peculiar facts and circumstances of each case.⁶⁴ Apart from aggravating and mitigating circumstances, many a times, sentence is driven by extraneous factors like correctional needs of the perpetrator or tragic results of the crime, and seems to contribute to apparent justice.⁶⁵ There is no straight jacket formula to decide just and appropriate sentence, hence allowing judges to exercise discretion in relation to germane facts of each case is the only option left to the system.⁶⁶

In 1987, the Kerala High Court in *Raman & anr vs. Francis & ors*⁶⁷ noted that *criminal law has a social purpose to achieve and, it is in the realms of corrective jurisprudence*.⁶⁸ The court noted that sentencing is the only instrument in the hands of criminal justice system to modulate the

⁶¹ *Sevaka Perumal etc. v. State of Tamil Nadu*, 1991 (3) SCC 471, ¶ 7.

⁶² *Sevaka Perumal etc. v. State of Tamil Nadu*, 1991 (3) SCC 471, ¶ 7.

⁶³ *Sevaka Perumal etc. v. State of Tamil Nadu*, 1991 (3) SCC 471, ¶ 7.

⁶⁴ *Sevaka Perumal etc. v. State of Tamil Nadu*, 1991 (3) SCC 471, ¶ 8.

⁶⁵ *Sevaka Perumal etc. v. State of Tamil Nadu*, 1991 (3) SCC 471, ¶ 9.

⁶⁶ *Dennis Councle MCG Dauth v. State of Callifornia* (402 US 183: 28 L.D. 711 [In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished].

⁶⁷ 1988 CriLJ 1359.

⁶⁸ *Raman & anr vs. Francis & ors*, 1988 CriLJ 1359, ¶ 3.

corrective machinery.⁶⁹ It should be stern when required and tampered with mercy if warranted.⁷⁰ There is no straight jacket formula to decide standards of sentencing.⁷¹

As per the Classical School of Criminology, based on hedonistic psychology, *a man governs his behaviour by considerations of pleasure and pain.*⁷² Sum of such pain and pleasure has to be balanced. Sentencing is a method of doing so. Chinnapa J. in *Bishnu Deo Shaw vs. State of West Bengal*⁷³ noted that it is the duty of a judge to balance the personality of an offender and the surrounding circumstance and reactions thereof, to decide an appropriate sentence to be imposed.⁷⁴ There are many aspects which a judge has to consider and questions which he has to answer, before deciding upon the gravity of sentence;

..... [W]as the offence committed without premeditation or was it after due deliberation? What was the motive for the crime? Was it for gain? Was the murder committed under some stress, emotional or otherwise? What is the background of the offender? What is his social and economic status? What is the level of his education or intelligence? Or is he a person who is patently amenable to reform?⁷⁵

*Rajendra Prasad vs. State of UP*⁷⁶ observed that the reasons for imposing death penalty must relate to criminal at the basic level, and not only crime.⁷⁷ In *Yakub Abdul Razak Memon vs. State of Maharashtra thr.,*

69 *Raman & anr vs. Francis & ors*, 1988 CriLJ 1359, ¶ 4.

70 *Raman & anr vs. Francis & ors*, 1988 CriLJ 1359, ¶ 4.

71 *Raman & anr vs. Francis & ors*, 1988 CriLJ 1359, ¶ 4.

72 *Raman & anr vs. Francis & ors*, 1988 CriLJ 1359, ¶ 4.

73 (1979) 3 SCC 714.

74 *Bishnu Deo Shaw vs. State of West Bengal*, (1979) 3 SCC 714, ¶¶ 26, 27, 28.

75 *Bishnu Deo Shaw vs. State of West Bengal*, (1979) 3 SCC 714, ¶ 27.

76 (1979) 3 SCC 646.

77 [Likewise, a hardened murderer or dacoit or armed robber who kills' and relishes killing and raping and murdering to such an extent that he is beyond rehabilitation within a reasonable period according to current psycho-therapy or curative techniques may deserve the terminal

*CBI, Bombay*⁷⁸ the Supreme Court had to decide on the Bombay Blast Case⁷⁹ under TADA. The court there noted that ‘*special reasons*’ in relation to sentencing may cover a wide array. They may be connected to offender or constitutional and legislative directives or in relation to the contemporary ideas in the fields of Criminology and connected sciences. Due regards should be given to the personality of the offender and then conclude if he is beyond redemption, or he may be reformed or is there a need to make advances in the methods of treatment etc.⁸⁰

B. Psychology and Punishment: Is There a Link?

Economics of terrorism is based on the hypothesis that *Terrorism is purely an occupational choice and is based upon rationality and guided by benefits and costs*. On the contrary psychological theories suggest that a person who strikes the harm is someone who is so much aroused emotionally or is driven by his past experiences or social conditions. Not all terrorists fight for

sentence. Society survives by security for ordinary life. If officers enjoined to defend the peace are treacherously killed to facilitate perpetuation of murderous and often plunderous crimes social justice steps in to demand penalty dependent on the totality of circumstances].

78 Criminal Appeal No. 1728 of 2007 and Death Ref. Case (Crl.) No. 1 of 2011

79[Brief note on facts of the Bombay Blast Case: *On 12.03.1993, the commercial hub of the country, the city of Bombay, witnessed an unprecedented terrorist act sending shock waves throughout the world. In a span of about two hours i.e., between 13:33 to 15:40 hours, a series of 12 bomb explosions took place one after the other at the following twelve places in Bombay, namely, Bombay Stock Exchange, Katha Bazaar, Sena Bhavan, Century Bazaar, Mahim Causeway, Air India Building, Zaveri Bazaar, Hotel Sea Rock, Plaza Theatre, Juhu Centaur Hotel, Air Port Bay-54 and Air Port Centaur Hotel. In the abovesaid incident of serial bombings, 257 human lives were lost, 713 persons were seriously injured and properties worth about Rs. 27 crores were destroyed. This was the first ever terrorist attack in the world where RDX (Research Department Explosive) was used on a large scale basis after the World War II (Yakub Abdul Razak Memon vs. State of Maharashtra thr., CBI, Bombay, Criminal Appeal No. 1728 of 2007 and Death Ref. Case (Crl.) No. 1 of 2011, ¶ 1].*

80 *Yakub Abdul Razak Memon vs. State of Maharashtra thr., CBI, Bombay*, Criminal Appeal No. 1728 of 2007 and Death Ref. Case (Crl.) No. 1 of 2011, ¶ 480

political gain.⁸¹ It is further argued that this kind of people are very easy to be influenced and driven to work for someone with no or little interest. Hamden suggests that they can kill without any remorse.⁸² He also opines that the psychological position of such persons suggest that they tend to manipulate the circumstances to convince themselves that the people whom they are killing have hurt and they deserve to suffer for it.⁸³ Hurt often results in anger, when the anger can not be expressed it gives birth to depression, it is 'anger turned inwards'⁸⁴ and this unconscious anger develops an urge to seek revenge. And, such people suffering from these psychological traumas are very easy targets for the terror master minds to execute their mass blood shed at the cost of lives of thousands of innocent victims which includes the unconscious minions of them as well.⁸⁵

Considering the complexities involved in the offense of terrorism, an important aspect of understand and find reasonable solution to the terrorism is to diagnose the personality of a terrorist, understand psychological defense mechanisms⁸⁶, and see how a negotiations process can be developed around it.⁸⁷ This process is tempered largely clinical information.⁸⁸ Thinking like the perpetrator is essential in developing a resolution to the conflict.⁸⁹

81 Grass, S.M., UNDERSTANDING AND COMBATING TERRORISM, 2 (1989) [retrieved from <http://www.globalsecurity.org/military/library/report/1989/GSM.htm>] [Hereinafter Grass].

82 *Hamden*, Supra note 10.

83 Richmond, Raymond Lloyd, ANGER AND FORGIVENESS 3 (2005).

84 *Id.*

85 *Id.*

86 [*Psychological Defense Mechanisms are patterns of feelings, thoughts, or behaviours that are relatively involuntary and arise in response to perceptions of psychic danger*].

87 Grass, supra note 89.

88 Grass, supra note 89.

89 Grass, supra note 89.

It has been agreed that terrorism is different from other offenses and requires peculiar methods to be dealt with.⁹⁰ To evolve those methods, the reasoning and their long lasting impact on terrorism have to be examined. It is thus suggested that legislations cannot be formulated in a vacuum. Sentencing structure cannot be constructed in isolation to the social realities involved in the offense.⁹¹ Courts have agreed that terrorism is a complex crime and cannot be dealt by ordinary criminal legislation.⁹² Hence, today all the nations have special legislations governing terrorism cases and making special provisions thereof.

In *Kartar Singh vs. State of Punjab*⁹³, Supreme Court upholding the constitutional validity of TADA, observed that;

*...deplorably, determined youths lured by hardcore criminals and underground extremists and attracted by the ideology of terrorism are indulging in committing serious crimes against humanity. In spite of the drastic actions taken and intense vigilance activated, the terrorists and the militants do not desist from triggering lawlessness if it suits their purpose.*⁹⁴

In light of the observations made in *Kartar Singh*,⁹⁵if we see the rationale behind punishing a criminal, it would strengthen the case for giving heavy weightage to psychological makeup of the offender, when deciding the quantum of sentence. Jeremy Bentham says that the aim of punishment is to deter socially undesirable behaviour; people with such mental status are not

⁹⁰ For more details See *Yakub Abdul Razak Memon vs. State of Maharashtra thr., CBI, Bombay*, Criminal Appeal No. 1728 of 2007 and Death Ref. Case (Crl.) No. 1 of 2011; *Hitendra Vishnu Thakur vs. State of Maharashtra*, 1994 AIR 2623; *Kartar Singh vs. State of Punjab*, 1994 SCC (3) 569,

⁹¹ *Id.*

⁹² *Id.*

⁹³ 1994 SCC (3) 569.

⁹⁴ *Kartar Singh vs. State of Punjab*, 1994 SCC (3) 569, ¶ 21.

⁹⁵ *Kartar Singh vs. State of Punjab*, 1994 SCC (3) 569, ¶ 21.

detractable,⁹⁶ thus defeating the whole rationale of giving punishments to people who cannot practically reason and form a conception of the good.

The mental element of a person committing an offence is the essence of punishment. But, if a person committing the act is not in a condition to understand the nature of the act then punishing him in the same way as other voluntary offenders is a failure on the part of the criminal justice system⁹⁷.

The 48th Law Commission Report⁹⁸ recommended that the current sentencing policy of the country suffers from a major deficiency of lack of comprehensive information as to characteristics and background of the offender. In the absence of such information, it becomes impossible to give direction to the correctional process. In the *Yakub Memom Case*⁹⁹, the court noted that the Section 235, CrPC was enacted to fill this deficiency as pointed out by the Law Commission.¹⁰⁰ This provision affirms that courts shall consider various factors such as the prior criminal record of the offender, his age, employment, educational background, home life, sobriety and social adjustment, emotional and mental condition, and the prospects of his returning to normal path of conformity with the law etc. before deciding on quantum of sentence.¹⁰¹ The mitigating and aggravating circumstances may sometimes intertwine, it is the duty of the court to resolve them and decide accordingly.¹⁰²

96 JOSHUA DRESSLER (ED.), ENCYCLOPEDIA OF CRIME AND JUSTICE 639 (2nd Ed., 2002) [hereinafter DRESSLER, ENCYCLOPEDIA OF CRIME AND JUSTICE].

97 *Id.*

98 Law Commission of India, Some Questions under the Code of Criminal Procedure Bill, 1970, Report No. 48 (1972).

99 *Yakub Abdul Razak Memon vs. State of Maharashtra thr., CBI, Bombay*, Criminal Appeal No. 1728 of 2007 and Death Ref. Case (Crl.) No. 1 of 2011.

100 *Yakub Abdul Razak Memon vs. State of Maharashtra thr., CBI, Bombay*, Criminal Appeal No. 1728 of 2007 and Death Ref. Case (Crl.) No. 1 of 2011, ¶ 485.

101 *Yakub Abdul Razak Memon vs. State of Maharashtra thr., CBI, Bombay*, Criminal Appeal No. 1728 of 2007 and Death Ref. Case (Crl.) No. 1 of 2011, ¶ 485.

102 *Yakub Abdul Razak Memon vs. State of Maharashtra thr., CBI, Bombay*, Criminal Appeal No. 1728 of 2007 and Death Ref. Case (Crl.) No. 1 of 2011, ¶ 491.

However, as already argued that terrorism may be a result of buried conflicts in mind, courts have time and again already acceded to the fact that young men and women are allured into terrorism, and used as tools by conspirators. They participate in terror activities as a result of mistaken notions.¹⁰³ In such circumstances, anti-terror policies have multi-dimensional tasks to perform. the first task is to understand the reason why the youth find these terror activities alluring, and the ends bombing/killing/kidnapping/hijacking etc. aims to achieve; whether the aim is just to de-stabilize democracy or to achieve an ideological or religious goal. The legislations have to provide for a due understanding of different people involved in a terror strike and make specific provisions dealing with perpetrators and inflictors of terror.

4. UNCERTAINTY OF SENTENCING: ISSUES OF SHAM REASONING AND FLAWED UNDERSTANDING

In *Hitendra Vishnu Thakur vs. State of Maharashtra*¹⁰⁴, the Supreme Court noted that it is not possible to precisely define terrorism, but its effect travels across the physical, mental and psychological space of victims and society. It cannot be dealt under ordinary criminal laws, as its effects surpass those of an ordinary criminal act. In India, the *Terrorist and Disruptive Activities (Prevention) Act, 1987*¹⁰⁵, and the *Prevention of Terrorism Act, 2002*¹⁰⁶, are the only laws which can correctly be termed anti-terrorism laws. Terrorism here is located as a special offense, requiring special legislation for effective dealing. However, the legal mechanism to necessary to convict and punish terrorist is still not very strong in the country.¹⁰⁷ These acts have been time and again attacked on the grounds of being ‘draconian’, oppressive, un-

¹⁰³ *Yakub Abdul Razak Memon vs. State of Maharashtra thr., CBI, Bombay*, Criminal Appeal No. 1728 of 2007 and Death Ref. Case (Crl.) No. 1 of 2011, ¶ 491.

¹⁰⁴ 1994 AIR 2623.

¹⁰⁵ Hereinafter *TADA*.

¹⁰⁶ Hereinafter *POTA*.

¹⁰⁷ *Hitendra Vishnu Thakur vs. State of Maharashtra*, 1994 AIR 2623.

constitutional and against the principles of natural justice and have been examined by courts on various occasions.¹⁰⁸ However, POTA was finally repealed in 2004 and now the country has *Unlawful Activities Prevention Act* as the sole anti-terror law.

A. Failure of Legislations to Guide

i) Mens Rea: How Important?

Section 3(2) prescribes punishment for terrorist activities. In case of death of any person due to such act, death or imprisonment for life is prescribed;¹⁰⁹ otherwise a minimum sentence term of 5 years is provided for, which may extend up to life imprisonment¹¹⁰ The Section differentiates punishments for conspirators, abettor, and inflictor of the terrorist act.¹¹¹ The most controversial provision of POTA is related to the admissibility of ‘confessional statements’ as evidence under the Act, as it increases the possibility of coercion and torture in securing confessions.

In addition to a lot of human rights concerns, it is very obvious by the very structure of the legislation that it presents a very broad and ambiguous system of dealing with terrorism and leaves out lot of important aspects of the multi-dimensional problem.¹¹² The overly broad definitions of terrorism fail to

¹⁰⁸ *Hitendra Vishnu Thakur vs. State of Maharashtra*, 1994 AIR 2623.

¹⁰⁹ See Section 3(2)(a), POTA.

¹¹⁰ See Section 3(2)(b), POTA.

¹¹¹ [Section 3(3), POTA: *Whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine*] [Section 3(4), POTA: *Whoever voluntarily harbors or conceals, or attempts to harbour or conceal any person knowing that such person is a terrorist shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life and shall also be liable to fine: Provided that this subsection shall not apply to any case in which the harbour or concealment is by the husband or wife of the offender*].

¹¹² For more details See *Kartar Singh vs. State of Punjab*, 1994 SCC (3) 569.

satisfy the principle of legality, as the provisions of the Act fail to specify the *mens rea* required for conviction, giving a sideline to basic criminal justice jurisprudence.¹¹³ Even the definitions of ‘*terrorism related offenses*’ under POTA are ambiguous. For example, POTA criminalizes “*any other unlawful act with the said intent*”, but the phrase ‘*said intent*’ is left open to interpretation and may be applied arbitrarily.

Even though POTA has been repealed, *Unlawful Activities Prevention Amendment Act, 2004* retains most of its substantive provisions. Under POTA, the court is allowed to draw adverse inferences against the accused, and Governments are bestowed with unilateral power to presume involvement in terrorist activities, in cases of denial to give blood/other samples to police or in cases of recovery of arms, explosives, or other specified substances from the accused or in case the accused’s fingerprints are found at the site of the offense.¹¹⁴ Even in case prosecution proves that financial assistance has been provided by the accused, the court can draw inferences regarding his participation in conspiring or attempting to commit a terrorist act, or for advocating, abetting, advising, inciting, or knowingly facilitating the commission of a terrorist act.¹¹⁵ UAPA provides for similar approach to the offense in relation to membership of a terrorist organisation, but repeals all other presumptions.

¹¹³ For e.g. Even in deciding on question of nature of an organisation (terrorist or not), the intent of forming the association is not considered and since it provides for a vague definition of a ‘*terrorist organisation*’, ends up facilitating arbitrary decisions.

¹¹⁴ See Section 27, POTA: Power to direct for samples, etc.- (1) *When a police officer investigating a case requests the Court of a Chief Judicial Magistrate or the Court of a Chief Metropolitan Magistrate in writing for obtaining samples of handwriting, finger-prints, foot-prints, photographs, blood, saliva, semen, hair, voice of any accused person, reasonably suspected to be involved in the commission of an offence under this Act, it shall be lawful for the Court of a Chief Judicial Magistrate or the Court of a Chief Metropolitan Magistrate to direct that such samples be given by the accused person to the police officer either through a medical practitioner or otherwise, as the case may be.*

(2) If any accused person refuses to give samples as provided in sub-section (1), the Court shall draw adverse inference against the accused.

¹¹⁵ See Section 3(3), POTA.

It is thus opined that neither POTA nor UAPA, in today's scenario, seems to be addressing the wide spread problem of terrorism; both of them reflect a mechanical exercise of police powers by States, which is most of the times misused. Today we need a detailed legislation to not only punish the terrorists, but to prevent creation of terrorists, like the UK Policy on Anti-Terrorism;.

B. Sentencing in Terrorism Cases: A Case against the Indian Judiciary

Both, PoTA and UAPA specify harsher punishments for the inflictor of terrorism, when compared to the perpetrators. The difference drawn is also vague and needs detailing of roles played by members of a terrorist organisation in the planning, plotting and execution of a terrorist activity.

There has been a recognition of the generally prevalent master-agent relation between the perpetrator and inflictor of terrorism and that vulnerable targets are selected to execute the terror plots, by the Indian Judiciary time and again. In *Anas Abdul Rashid Machiswala vs. State of Gujarat*¹¹⁶ the court noted that perpetrators of bomb blasts in Gujarat aimed to *pamper and instigate the religious feelings of a particular community* to take revenge and get vulnerable youths to execute their plan.

In *People's Union for Civil Liberties and anr vs. Union of India*,¹¹⁷ Sections 20, 21 and 22, POTA were challenged to be invalid as they exclude mens rea as an element for constituting offences.¹¹⁸ The court here noticed that these three sections are similar to that of the Terrorism Act, 2000 of United Kingdom¹¹⁹ and such provisions being penal in nature are necessary and demand stricter construction.¹²⁰ The court

¹¹⁶ MANU/GJ/0009/2011

¹¹⁷ AIR 2004 SC 456.

¹¹⁸ *People's Union for Civil Liberties and anr vs. Union of India*, AIR 2004 SC 456, ¶ 46.

¹¹⁹ [Corresponding Section under the UK Act are Sections 11, 12 & 15].

¹²⁰ *People's Union for Civil Liberties and anr vs. Union of India*, AIR 2004 SC 456, ¶ 46.

acknowledged the fact that these provisions mark a departure from the usual criminal justice jurisprudence, but are necessary to fight the evil of terrorism, as it is a serious offense against humanity. But, this judgment runs counter to what Supreme Court in *Kartar Singh*¹²¹, noted. The court in that particular case observed that “*unless a statute either expressly or by necessary implication rules out ‘mens rea’ in case of this kind, the element of mens rea must be read into the provision of the statute.*”¹²² The court also held that in relation to TADA the word “*abets*” has to be tempered with intention or knowledge. However, the court in *PUCL v Union of India*¹²³ disregarded this decision saying such an import is not necessary in the case of POTA, noting that if it had been the intention of the legislature to include mental element as an element for commission of terrorism related activity, it would have added it as is done under Section 3(1), POTA.

The courts have shown a tendency inclination towards getting to know and reach the perpetrators of the offense with the help of the terrorist being detained by the police. In *Bimal Kaur vs. State of Punjab*¹²⁴, the Punjab High Court opined that,

“Unless the police is able to secure clue as to who are the persons behind this movement it cannot hope to put an end to this movement and restore public order. The police can secure this knowledge only from the arrested terrorists after effective interrogation.”

In *Anas Abdul Rashid Machiswala vs. State of Gujarat*¹²⁵ the court was concerned with the perpetrator of terrorist activity by setting up bombs in ATMS. The court observed that his *mens rea* is evident from considerations about the sufferings of Muslim community after Godhra carnage, setting up of base camps of terrorist activity, availability of the space, requirement of space in context to the political atmosphere prevailing at the relevant point of

¹²¹ *Kartar Singh vs. State of Punjab*, 1994 SCC (3) 569, ¶ 115

¹²² *Kartar Singh vs. State of Punjab*, 1994 SCC (3) 569, ¶ 115.

¹²³ *People's Union for Civil Liberties and anr vs. Union of India*, AIR 2004 SC 456, ¶ 46

¹²⁴ 1986 (1) Cr Law Cases 604 (P&H).

¹²⁵ MANU/GJ/0009/2011.

time by a particular political party having affinity with a particular section of the Society.¹²⁶ The court noted that the purpose was to *pamper and instigate the religious feelings of a particular community* to take revenge.¹²⁷

i) *Kasab vs. Memon: Mitigating Factors to Tamper Sentence in Terrorism Cases?*

In the case of *Mhd. Ajaml Mhd. Amir Kasab @ Abu Mujahid vs. State of Maharashtra*¹²⁸, the counsel for Kasab argued in the Supreme Court that strongest reason for not giving the death penalty to Kasab was his young age; he was barely twenty-one years old at the time of the commission of the offences.¹²⁹ He also brought in the family and educational background and the economic circumstances of Kasab for consideration of Court to decide on Sentence.¹³⁰

*“.....At that immature age, living away from home and family and earning his livelihood by manual labour, he was allured by a group of fanatic murderers seemingly engaged in social work. He thought that he too should contribute towards helping the Kashmiris who he was led to believe were oppressed by the Indian Government.”*¹³¹

It was also argued that that Kasab was used as an automaton by Lashkar-e-Toiba to execute the attacks.¹³² It was also urged in the court that death penalty should be kept reserved for the perpetrators, not Kasab. However, the court rejected the arguments saying that the offences committed by Kasab are expressions of his free will, for which he alone was

¹²⁶ *Anas Abdul Rashid Machiswala vs. State of Gujarat*, MANU/GJ/0009/2011, ¶ 16.

¹²⁷ *Anas Abdul Rashid Machiswala vs. State of Gujarat*, MANU/GJ/0009/2011, ¶ 16.

¹²⁸ *Mhd. Ajaml Mhd. Amir Kasab @ Abu Mujahid vs. State of Maharashtra*, Criminal Appeal No.1961 of 2011.

¹²⁹ *Mhd. Ajaml Mhd. Amir Kasab @ Abu Mujahid vs. State of Maharashtra*, Criminal Appeal No.1961 of 2011, ¶ 561.

¹³⁰ *Id.*

¹³¹ *Id.* [Kasab's Confession as recorded by the Magistrate].

¹³² *Id.*

responsible and must face the punishment.¹³³ The court also rejected the plea that Kasab was a mere tool in the hands of the Lashkar-e-Toiba,¹³⁴ on the grounds that he had a lot of opportunities to leave the organisation but he didn't, showing his intention to be a part of the organization and participate in its designs.¹³⁵

Also the Court didn't analyse the argument of Kasab being brain-washed or used as an automaton,¹³⁶ on the grounds that he was a very good and quick learner, had a tough mind and strong determination, he was clever and shrewd, didn't show remorse and considered himself as a patriotic Pakistani.¹³⁷

For our purpose, it is important that Kasab mentioned to the Magistrate during recording of his confessional statement that

"..... he had absolutely no regret for whatever he had done and he wanted to make the confession to set an example for others to become Fidayeen like him and follow him in his deeds."¹³⁸

Based on these observations, the court decided that there is no possibility of any reform or rehabilitation for Kasab.¹³⁹ However, it is interesting to note that while deciding on his demeanour, and analysing the hidden meanings of his statements, no expert was called to testify or advice. The judgment is an example of isolated application of multitude of legislations available, which could be equated with the brute use of force. It

133 *Mhd. Ajaml Mhd. Amir Kasab @ Abu Mujahid vs. State of Maharashtra*, Criminal Appeal No.1961 of 2011, ¶ 562.

134 *Mhd. Ajaml Mhd. Amir Kasab @ Abu Mujahid vs. State of Maharashtra*, Criminal Appeal No.1961 of 2011, ¶ 563.

135 *Mhd. Ajaml Mhd. Amir Kasab @ Abu Mujahid vs. State of Maharashtra*, Criminal Appeal No.1961 of 2011, ¶ 563.

136 *Id.*

137 *Id.*

138 *Mhd. Ajaml Mhd. Amir Kasab @ Abu Mujahid vs. State of Maharashtra*, Criminal Appeal No.1961 of 2011, ¶ 564.

139 *Id.*

does not pacify, rather aggravates the view that terrorism is a war for rights, as it fails to address the root causes of the issue, portraying the justice delivery system as an insensitive suppress of their legit religious/political/ideological beliefs, thus develops a feeling of vengeance.¹⁴⁰ Even though the argument *one man's terrorist is another man's freedom fighter* seems superficial to us in our society, it might be a true motivation in others.¹⁴¹

In *Yakub Abdul Razak Memon vs. State of Maharashtra thr., CBI, Bombay*, the counsel for Memon argued that Memon was under dominance and influence of his elder brother, Tiger Memon, who was master mind of this terror act.¹⁴² Though the court acceded to the fact that no direct act could be attributed to Yakub Memon, it observed (?) that the entire act was a consequence of his planning and plotting along with Tiger Memon and Dawood Ibrahim.¹⁴³ The court pondered on the fact of differentiating perpetrators of terrorism from that of inflictors. In relation to latter, the court noted that *they [perpetrators] targeted the meek souls who were underprivileged and easily impressible to accomplish their ulterior motive*.¹⁴⁴ All the other 10 accused in the said case belonged to the lower economic strata of the society and worked as mechanics/road-vendors/taxi-driver etc., none with a regular source of livelihood.¹⁴⁵ The court noted that these 10 accused persons fell prey to the ulterior motive of the perpetrators of the said act and were used as tools to accomplish their hidden motives.¹⁴⁶ The court acknowledged the fact that their participation was a result of

¹⁴⁰ Hamden, Supra note 20, at 11.

¹⁴¹ Hamden, Supra note 20, at 11.

¹⁴² *Yakub Abdul Razak Memon vs. State of Maharashtra thr., CBI, Bombay*, Criminal Appeal No. 1728 of 2007 and Death Ref. Case (Crl.) No. 1 of 2011, ¶ 496.

¹⁴³ *Yakub Abdul Razak Memon vs. State of Maharashtra thr., CBI, Bombay*, Criminal Appeal No. 1728 of 2007 and Death Ref. Case (Crl.) No. 1 of 2011, ¶ 501.

¹⁴⁴ *Id.*

¹⁴⁵ *Yakub Abdul Razak Memon vs. State of Maharashtra thr., CBI, Bombay*, Criminal Appeal No. 1728 of 2007 and Death Ref. Case (Crl.) No. 1 of 2011, ¶ 514.

¹⁴⁶ *Id.*

misguided notions, but did not look into the requirement of *mens rea* along with *actus reus*, the court presumed intention and full knowledge on their part to give effect to the act.¹⁴⁷

The court mentioned that if one were to lift the veil, it would be revealed that the acts of these accused persons are actually guided by the strategy of the masterminds, and the actors were mere minions.¹⁴⁸ This was accepted to be a mitigating circumstance. Hence, the court distinguished the degree of sentence of Yakub Memon, who was a conspirator and the other 10 accused persons, who were inflictor of offence.¹⁴⁹ As a concluding observation, the court cautioned that it is true that as a general rule accused persons charged with a similar offense shall not be treated differently in relation to sentencing, however, the consideration of mitigating and aggravating circumstances may vary the quantum of sentence in some cases.¹⁵⁰

Analysing the two judgments, the reasoning of the Supreme Court in *Kasab* marks a departure from that in *Yakub Memon*, at the basic level. In the former, the court denied to accede to the argument that *Kasab* acted as a tool in the hands of the conspirators as he had opportunities to leave the camp. The court imposed an adverse intention on *Kasab*, showing implied intention to be a part of the terror attacks. It showed no intention to look behind what is apparent. The reason that *Kasab* was clever and a quick learner, stopped court from analysing whether he had knowledge and intention to participate in the manner he actually did. On the other hand, in *Memon*, Supreme Court goes much ahead of *Kasab*, and acknowledges certain social truths. The court there noted that people were used as

¹⁴⁷ *Yakub Abdul Razak Memon vs. State of Maharashtra thr., CBI, Bombay*, Criminal Appeal No. 1728 of 2007 and Death Ref. Case (Crl.) No. 1 of 2011, ¶¶ 514, 515.

¹⁴⁸ *Yakub Abdul Razak Memon vs. State of Maharashtra thr., CBI, Bombay*, Criminal Appeal No. 1728 of 2007 and Death Ref. Case (Crl.) No. 1 of 2011, ¶ 516.

¹⁴⁹ *Yakub Abdul Razak Memon vs. State of Maharashtra thr., CBI, Bombay*, Criminal Appeal No. 1728 of 2007 and Death Ref. Case (Crl.) No. 1 of 2011, ¶ 517.

¹⁵⁰ *Yakub Abdul Razak Memon vs. State of Maharashtra thr., CBI, Bombay*, Criminal Appeal No. 1728 of 2007 and Death Ref. Case (Crl.) No. 1 of 2011, ¶ 518.

automaton by the conspirators; they were *underprivileged and easily impressible to accomplish ulterior motives*. The court differentiated between sentence given to the conspirator of the master plan of Bombay Blasts and the human tools he used to execute that plan.

5. CONCLUSION

It is uncontested that sentencing today cannot be equated to retributivism totally; it carries various functions involving deterrence, denunciation and reform. To ensure that this functionary of sentence remains unhindered, various surrounding circumstances, aggravating or mitigating in nature, are considered before deciding the gravity of the sentence. Talking about efficacy of sentencing in terrorism cases, the manner with which Indian Supreme Court has dealt with the major terrorism cases seems like a mechanical application of positive laws. The court though has recognised the complexity of the offense and sociological and psychological issues involved therein, however, denied reflecting that while deciding on gravity of sentence. The idea of mitigating circumstances in terrorism cases has been construed very narrowly by the Indian Court.

The judgment in *Yakub Memon vs. State of Maharashtra* marks a departure from this trend. The Supreme Court here showed its inclination to allow various sociological, criminological and scientific findings to play an important role when deciding the nature and quantum of the sentence for terrorism. This marks a new era in light of various criminological findings that terrorism might be a result of psychological disturbances and sociological realities that the underprivileged and vulnerable youths are being allured into terrorism traps by the conspirators to execute the terror plans. The legislation fails to distinguish between the roles of different people involved in terror attack and allows adverse implications in relation to participation in terrorism, and prescribes indiscriminate sentencing guidelines for all. The purpose of framing a specific legislation dealing with the terrorism in such circumstances seems to have failed because of insensate dealing of offense, despite acknowledging firstly, terrorism is complex than an ordinary crime and

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secondly, terrorism cannot be handled and curbed without dealing with the psychological and sociological issues involved therein.

The judgment seeks to reinforce the basic ideas of criminal justice jurisprudence to terrorism cases, in terms of considerations for sentencing of terrorists. One more important contribution which the judgment makes is to accept a long debated distinction between the two classes of conspirator and inflictor involved in an act of terrorism; and differentiates sentencing guidelines for the two, considering limited rationality and mistaken notions involved on the part of the inflictors to be mitigating circumstances, majorly pointing out that these people work under the control, as automatons of the conspirators, hence, sentence for the two classes even though arising out of the same offense, cannot be equated.