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FIFTY YEARS OF HUMAN RIGHTS PROTECTION IN INDIA - THE RECORD OF 50 YEARS OF CONSTITUTIONAL PRACTICE

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I. Constitutional Provisions for Protection of Human Rights

The history of judicial protection of human rights in India revolves principally around Article 21 of the Constitution of India, 1950, and its interpretation by the Supreme Court of India. Article 21 is included in the Fundamental Rights Chapter (Part III), and it went through many tortuous changes during its progression through the Drafting Committee and then through the debates in the Constituent Assembly. When it emerged in the Constitution as finally adopted (in November, 1949), it read (and reads):

> "Article 21. Protection of Life and Liberty — No person shall be deprived of his life or personal liberty *except according to procedure established by* law". (emphasis supplied)

The words in italics were substituted for the words "without due process of law" (by the Constituent Assembly) after India's Constitutional Advisor, B.N. Rau, met with Justice Frankfurter of the US Supreme Court; who

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advised that the power of judicial review implicit in "due process" was undemocratic and imposed an unfair burden on the judiciary!

Other specific individual freedoms, also contained in the Fundamental Rights Chapter include the right to equality (Article 14), the right to freedom of speech and expression, the right to free movement within India, freedom to form associations and unions, freedom to reside and settle in any part of India, and freedom to practice any profession and carry on any occupation, trade or business in India (Article 19): these freedoms are confined to citizens and are not absolute, but subject to restrictions imposed by law in respect of matters set out in Articles 19(2) to (6). The freedoms guaranteed in Articles 14 and 21 are available to all persons, and are more imperative, more forceful in thrust and content than the freedoms set out in Article 19(1). In fact, the right to equality (Article 14) and the protection of life and liberty (Article 21) constitute the core of human rights protection in India. This paper is only about the latter — the Grand Personal Liberty Clause in our Constitution.

The right to protection of life and liberty (Art. 21) — as well as the right to equality (Art. 14) and the right to other freedoms (Art. 19) — are enforceable in the High Courts (Art. 226) or directly in the Supreme Court (Art. 32) — Art. 32 is itself a fundamental right.[1]

II. How Have They Worked? (1950-1978)

India's Constitution was brought into force on 26 January 1950. The Constituent Assembly (which became India's Provisional Parliament) passed free India's first *Preventive Detention Act,* 1950, only a month

[1] Articles 32(1) and (2) read as follows:
"Remedies for enforcement of rights conferred by this Part".
These include:
(i) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
(ii) The power vested in the Supreme Court to issue directions or orders or writs, including writs in the nature *of habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari,* whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
(iii) Without prejudice to the powers conferred on the Supreme Court by clauses (i) and (ii), the power vested in the Parliament to empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (ii).
(iv) The right guaranteed by this article shall not be suspended except as otherwise provided for by the Constitution.

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later, on 26 February 1950.[2] Under its provisions (i) courts were expressly forbidden from questioning the necessity of any detention order passed by the Government; (ii) no evidence could be given in any court either by the detenu or the authority of the grounds of detention nor could the court compel their disclosure; and (iii) courts could not enquire into the truth of the factors placed by the Executive as grounds for detaining the individual. A.K. Gopalan, a communist detenu, challenged (in the Supreme Court of India, by a writ petition under Article 32) the constitutional validity of the *Preventive Detention Act 1950* — principally on the ground that it violated Article 21 (protection of life and liberty) and Article 19(1) (*d*) (right of citizens to move freely throughout India subject to reasonable restrictions imposed by law). The challenge was repelled by a Constitution Bench (of five Judges). The historical background against which Article 21 had (only recently) taken its final shape was determinative of the decision of the Court; the Attorney-General had reminded the judges that the Constituent Assembly had consciously rejected "due process" in Article 21 — and therefore the unreasonableness of the law of preventive detention could not be examined by the court: whatever the procedure prescribed by enacted law (even if unfair or unreasonable), that in itself was sufficient justification for deprivation of life or liberty.

The decision in *Gopalan's*[3] *case* considerably inhibited judicial protection of human rights in the first two decades of the working of the Constitution. It took the Supreme Court more than 25 years to free itself from the shackles of *Gopalan*[4] (which it ultimately did, in *Maneka Gandhi case*,[5] a Constitution Bench decision of seven judges).[6] Until then, the Article did not mean much: the protection it afforded was only peripheral — every challenge to personal liberty under Article 21

[2] Preventive detention was introduced in India as a permanent measure way back in 1818, first in the Presidency of Bengal, extended later to Madras in 1819 and to the Bombay Presidency in 1827. Preventive Detention laws were also authorized under the Defence of India Act 1915 (First World War) and Defence of India Act 1939 (Second World War — during the period 1947-1950—there was a rush of Public Order and Public Safety Acts (authorising preventive detention) throughout the country. The Constitution of India (Article 22) accepts preventive detention as part of the normal administration of law and order in the country and provides for minimal constitutional safeguards.

[3] A.K. Gopalan v. State of Madras, AIR 1950 SC 27 (Supreme Court of India).

[4] *Id.*

[5] Maneka Gandhi v. Union of India, (1978) 1 SCC 248: AIR 1978 SC 597 (Supreme Court of India).

[6] *Id.*

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could be successfully met by showing the terms of the enacted law: its reasonableness, or the extent of its arbitrariness was irrelevant.

Even with the limited protection it afforded (during the *Gopalan*[7] period), "life" and "liberty" of all persons in India stood forfeited on the declaration of an Emergency — as a consequence of the suspension of Article 21, a contingency contemplated by Article 359 (Proclamation of the Emergency). In *ADM, Jabalpur* v. *Shivkant Shukla*[8] a decision taken during the "Phoney-Emergency"[9] of June 1975, four out of the five most senior judges of the court held that Article 21 was the sole repository of constitutional protection of life and liberty, and accordingly an order of preventive detention issued at a time when Article 21 was under suspension (i.e. from June 1975) could not be challenged either in the High Court or in the Supreme Court, nor could a writ of Habeas Corpus issue, neither on the ground that the order was not in compliance with the law authorizing it, nor on the ground that it was illegal or vitiated by malafides (factual or legal) or based on extraneous consideration! The Supreme Court even went further: it held a few months later, in *Union of India* v. *Bhanudas Krishna Gawde*[10] that during the period of suspension of Article 21, detainees could not complain of prison conditions or prison rules regulating conditions of their detention even if they were manifestly unfair or unreasonable. The basis of these unfortunate decisions was the courts' conceptual (mis)understanding of "personal liberty". "Liberty", said Chief Justice Ray, in *ADM, Jabalpur*,[11] "is itself a gift of the law and may by the law be forfeited or abridged" (sic).

Nine High Courts in the country had, during the same period (i.e. after the Declaration of Emergency of June 1975), taken a bolder, more liberal view — but their decisions all stood overruled after the majority decision in *ADM, Jabalpur*.[12]

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[7] A.K. Gopalan v. State of Madras, AIR 1950 SC 27 (Supreme Court of India).

[8] ADM, Jabalpur v. Shivkant Shukla, (1976) 2 SCC 521 : AIR 1976 SC 1207 (Supreme Court of India).

[9] "Phoney" because it was merely designed to keep Mrs. Indira Gandhi in office after she lost in the election petition in the Allahabad High Court.

[10] Union of India v. Bhanudas Krishna Gawde, (1977) 1 SCC 834: AIR 1977 SC 1027 (Supreme Court of India).

[11] ADM, Jabalpur v. Shivakant Shukla, (1977) 2 SCC 834: AIR 1976 SC 1207 (Supreme Court of India).

[12] ADM, Jabalpur v. Shivakant Shukla, (1977) 2 SCC 834: AIR 1976 SC 1207 (Supreme Court of India). Like the Supreme Court of the United States — after its 1857 decision in the *Dred Scott* case (the Negro was ineligible to be a citizen — since he was never a "person"), and again, after its much later decision in *Korematsu* in 1944 (forcible evacuation from

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It was the Parliament that helped restore judicial protection of rights guaranteed by Article 21; under the Constitution *Forty-fourth Amendment Act,* 1978 suspension of Articles 20 and 21 was expressly prohibited (and remains prohibited) even during an Emergency.

III. After 1978 - a New Interpretation of Article 21

The ghost of *Gopalan*[13] was finally laid to rest in *Maneka Gandhi* v. *Union of India.*[14] A Constitution Bench of seven judges (overruling *Gopalan*[15]) read into Article 21 a new dimension: it was not enough (said the court) that the law prescribed some semblance of procedure for depriving a person of his life or personal liberty: the procedure prescribed by the law had to be reasonable, fair and just; if not, the law would be held void as violating the guarantee of Article 21. This fresh look at Article 21 has helped the Apex Court in its new role - as the institutional Ombudsman of Human Rights in India. The decision in *Maneka Gandhi*[16] became the starting point, the springboard, for a spectacular evolution of the law relating to judicial intervention in (individual) human rights cases: they were many and varied.

Listed below are some of the beneficial effects of the new interpretation of Article 21:

(a) In *M.H. Hoskot* v. *State of Maharashtra*[17] the right of a prisoner to be supplied a copy of the judgment (imprisoning him), to enable him to appeal from it, was read as flowing from the fundamental right guaranteed by Article 21; and in *Hussainara Khatoon* v. *State of Bihar*,[18] the court held that the right to a speedy trial was comprehended in Article 21;

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the Pacific Coast of all US Citizens of Japanese origin and their internment), the Supreme Court of India too, [after its decision in ADM, Jabalpur v. Shivakant Shukla, (1977) 2 SCC 834 : AIR 1976 SC 1207 (Supreme Court of India)] has "suffered severely from self-inflicted wounds".

[13] A.K. Gopalan v. State of Madras, AIR 1950 SC 27 (Supreme Court of India).

[14] Maneka Gandhi v. Union of India, (1978) 1 SCC 248: AIR 1978 SC 597 (Supreme Court of India).

[15] A.K. Gopalan v. State of Madras, AIR 1950 SC 27 (Supreme Court of India).

[16] Maneka Gandhi v. Union of India, (1978) 1 SCC 248: AIR 1978 SC 597 (Supreme Court of India).

[17] M.H. Hoskot v. State of Maharashtra, (1978) 3 SCC 544: AIR 1978 SC 1548 (Supreme Court of India).

[18] Hussainara Khatoon v. State of Bihar, (1980) 1 SCC 98 : AIR 1979 SC 1369 (Supreme Court of India).

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prolonged detention of those awaiting trial violated the constitutional guarantee of a reasonable, just and fair procedure.

(b) In *Sunil Batra* v. *Delhi Admn.*,[19] it was held that the "personal liberty" of a prisoner included his liberty to move, mix, mingle and talk with (and share company with) co-prisoners, and unjustified orders and directions (to the contrary) of jail authorities would be struck down as being in violation of Article 21.

(c) The right not be tortured by the incarcerating State authority (was also held by the Court) to flow from Article 21. It was the life convict Sunil Batra (though denied relief in his own case) who rendered yeoman service to the cause — and to prison reform. He addressed a letter to the court complaining of a brutal assault by the head warden of a jail on another prisoner, Prem Chand. The judges (in true *Gideon* fashion) entertained the complaint, appointed an *amicus* to appear, and called for affidavits from the jail authorities. The record disclosed a sorry state of affairs. Cruel and painful anal injuries had been inflicted on Prem Chand. He was hardly able to walk; and then after being hospitalized for a while he was transferred to a "punishment cell", specially reserved by the jail authorities for prisoners who could not or would not pay money to prison officials. The Court invoking the *UN Declaration against Torture — the Declaration for the Protection of all Persons from Torture and Other Inhuman and Degrading Punishment* (adopted by the UN General Assembly in December 1975) — issued writs against the jail superintendent and the Lt. Governor of Delhi, directing that the prisoner Prem Chand should not be subjected to physical manhandling by any jail official. The torture to which Prem Chand had been subjected was described as "a blot on Government's claim to protect human rights". Prem Chand was directed to be released from the "punishment cell". But the judges did not stop there. They set down guidelines for the protection of prisoners, directing that these guidelines be

[19] Sunil Batra v. Delhi Admn., (1978) 4 SCC 494 : AIR 1978 SC 1675 (Supreme Court of India).

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prescribed and followed — they are since so prescribed and enforced.[20]

(d) After 1978, the following have been held to be within the scope of the right to life under Article 21. Thus, in the case of *Olga Tellis* v. *Bombay Municipal* Corporation[21] — a Constitution Bench decision, "the right to life" has been held to include "the right to livelihood". Subsequently, in *Prabhakaran Nair* v. *State of T.N.*,[22] "the right to shelter"; in *Shantistar Builders* v. *Narayan Khimalal Totame,*[23] the right to food and clothing ; and recently, in *Subhash Kumar v State of Bihar,*[24] "the right to enjoy pollution-free air and water", have all been held to be a part of the right to life under Article 21. The right of citizens (especially in hilly areas) to require the state to provide proper roads has also been held to be comprehended in the expression "right to life".[25]

The Courts have always come down hard on police atrocities as being in violation of "personal liberty" guaranteed in Article 21. Thus, in the notorious Bhagalpur blindings case, (blinding of convicted as well as undertrial prisoners whilst in police custody), and *Khatri (2)* v. *State of Bihar*.[26]

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[20] *See also*, Charles Sobhraj v. Supdt. Central Jail, Tihar, (1978) 4 SCC 104 : AIR 1978 SC 1514 (Supreme Court of India): manacling of the legs of an undertrial prisoner is violative of Article 21; and Francis Coralie Mullin v. Union Territory of Delhi, (1981) 1 SCC 608: AIR 1981 SC 746 (Supreme Court of India): a prison regulation prescribing that a detenue could interview his legal advisor only after obtaining prior permission of the district magistrate, the interview having to take place in the presence of a prison official, was struck down as being in violation of the right to human dignity (comprehended in Article 21).

[21] Olga Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545: AIR 1986 SC 180 (Supreme Court of India).

[22] Prabhakaran Nair v. State of T.N., (1987) 4 SCC 238: AIR 1987 SC 2117 (Supreme Court of India).

[23] Builders v. Narayan Khimalal Totame, (1990) 1 SCC 520 (Supreme Court of India).

[24] Subhash Kumar v State of Bihar, (1991) 1 SCC 598: AIR 1991 SC 420 (Supreme Court of India).

[25] State of H.P. v. Umed Ram Sharma, (1986) 2 SCC 68 : AIR 1986 SC 84 (Supreme Court of India).

[26] Khatri (2) v. State of Bihar, (1981) 1 SCC 627: AIR 1981 SC 928 (Supreme Court of India). In this case, the Court first ordered the State of Bihar to produce all documents, correspondence and notings throwing light on the extent of involvement, whether by acts of commission or omission, of State Officials in the episodes of blinding of convicts and undertrial prisoners: the Court retained the essence of the cases and gave many successive range of directions. See, Khatri (1) v. State of Bihar, (1981) 1 SCC 623 (Supreme Court of India); Khatri (2) v. State of Bihar, (1981) 1 SCC 627 (Supreme Court of India); Khatri (3) v. State of Bihar, (1981) 1 SCC 635 (Supreme Court of India); Khatri (4) v. State of Bihar, (1981) 2 SCC 493 : (1982) 1 SCALE 519 (Supreme Court of India); Khatri (5) v. State of Bihar, (1983)

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IV. Compensation for Wrongful Detention - Law and Practice:

When India ratified the political Covenant — *the International Covenant on Civil and Political Rights 1966* - in June 1978, it stipulated its reservation to the applicability of Article 9(5) of the Covenant, which read:

> "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right of compensation".

The Government of India went on record to state that Indian law did not permit Courts to award compensation for tortuous acts of State officials, including wrongful orders of arrest/detention.

But the Supreme Court of India has itself often made, and compelled compliance of ad hoc awards of compensation (in substantial sums) against State authorities for illegal intrusions into an individual's personal liberty[27].

V. Further Advances in the Field of Article 21

In *Nilabati Behera* v. *State of Orissa*,[28] the Court was activated by a letter sent to it, in which the signatory claimed compensation for the death of her son aged 22 years in police custody. The letter was treated as a Writ Petition under Article 32 and dealt with as such — the prayer made in the petition was for award of compensation for deprivation of life guaranteed under Article 21. The Court gave a direction to the District Judge in Orissa where the petitioner's son was picked up by the police, to hold an inquiry into the matter and submit a Report. As a result of the findings in the Report the Court held that the petitioner's son died as a result of injuries inflicted on him while he was in police custody. The Court ultimately held that the petitioner could claim damages in public law based on strict liability for the violation of her Fundamental Rights (the right to life).[29]

2 SCC 266 (Supreme Court of India). Later, the court also awarded compensation for torture to the victims of blinding, i.e. for violation of their rights of personal liberty guaranteed under Article 21.

[27] *See*, Rudul Shah v. State of Bihar, (1983) 4 SCC 141: AIR 1983 SC 1086 (Supreme Court of India)— award of damages for wrongful detention; and Bhim Singh v. State of J. & K., (1985) 4 SCC 677 : AIR 1986 SC 494 (Supreme Court of India) — award of damages for wrongful arrest.

[28] Nilabati Behera v. State of Orissa, (1993) 2 SCC 746 (Supreme Court of India).

[29] The Supreme Court decision in *Nilabati Behera* v. *State of Orissa,* (1993) 2 SCC 746 (Supreme Court of India), is mentioned in the judgment of Cooke, J., in the case of

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VI. Preventive Detention Laws, and Penal Legislation Strictly Construed

The contention that preventive detention is impermissible under the Constitution of India has been categorically rejected by the Constitution Bench: *A.K. Roy* v. *Union of India*[30] (upholding the constitutional validity of the *National Security Act 1980).* The Constitution as originally enacted itself contemplated laws for preventive detention and provided some safeguards (as under Article 22).

But the constitutional (and legal) safeguards for persons detained under preventive detention laws have been construed by the Apex Court very strictly – against the detaining authorities. For instance, in *Pritam Nath Hoon* v. *Union of India*[31] where the detaining authority (bound under the Constitution to give an opportunity to the detenues to make a representation against detention) supplied copies of documents which formed the basis of the grounds of detention about a month after they were detained, the detentions were held illegal on the ground of denial of adequate opportunity to make representation against the detentions[32]. Similarly, where a detenue's representation was lying unattended in the office of the detaining authority for over three weeks, it was held that the delay amounted to a violation of Article 22(5) and the detenues was ordered to be released forthwith.[33]

Simpson v. *Attorney General (Baigent case)*, 1994 NZLR 667, where a Court of Appeal in New Zealand held that despite the absence of a remedy clause in New Zealand's Bill of Rights, 1985, the Judiciary had power to grant pecuniary compensation for contravention of its rights guaranteed under the provisions. In the concurring judgment of Hardie Boys, J., in *Baigent case*, the observations of Anand, J., in his concurring judgment in *Nilabati Behera case*, (1993) 2 SCC 746, are cited. In turn, *Baigent case* has been quoted with approval by India's Supreme Court in *D.K. Basu* v. *State of W.B.*, (1997) 1 SCC 416. All this affords an interesting example as to how the commonwealth network of human rights jurisprudence operates in practice. Lord Cooke has described this exercise (extrajudicially) as "a valid illustration of judicial reciprocity"; *See,* Lord Cooke of Thorndon, *Courts of Final Jurisdictions*, 138-145 (1998).

[30] A.K. Roy v. Union of India, (1982) 1 SCC 271: AIR 1982 SC 710, 727 (Supreme Court of India).

[31] Pritam Nath Hoon v. Union of India, (1980) 4 SCC 525 : AIR 1981 SC 92 (Supreme Court of India).

[32] *See also,* S. Gurdeep Singh v. Union of India, (1981) 1 SCC 419: AIR 1981 SC 362 (Supreme Court of India). Later cases affirming this position include: Union of India v. Haji Mastan Mirza, (1984) 2 SCC 427 (Supreme Court of India); State of U.P. v. Kamal Kishor Saini, (1988) 1 SCC 287 (Supreme Court of India); M. Ahamed Kutty v. Union of India, (1990) 2 SCC 1 (Supreme Court of India) and Abdul Sathar Ibrahim Manik v. Union of India, (1992) 1 SCC 1 (Supreme Court of India).

[33] Saleh Mohammed v. Union of India, AIR 1981 SC 111 (Supreme Court of India). Later cases affirming this position include: Piara Singh v. State of Punjab, (1987) 4 SCC 550: AIR

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It has been held that the obligation imposed on the detaining authority by Article 22(5) to afford to the detenue the earliest opportunity of making a representation, carries with it the imperative implication that the representation has also to be considered at the earliest opportunity: the courts have a rigid duty to insist that preventive detention procedures were fairly and promptly observed. A breach of the procedural imperative, said the Court, must necessarily lead to the release of the detenue.[34] In the same case, it was held that since the decision to detain depended on the subjective satisfaction of the detaining authority, a duty was imposed on the detaining authority to communicate the grounds of detention, which meant not merely the inference of fact arrived at by the detaining authority, but also the whole of the factual material considered by the detaining authority as sufficient to warrant an order of preventive detention. If the detenue was not so informed of all this material, the opportunity guaranteed by the Constitution (to make an effective representation to the Advisory Board consisting of sitting and retired High Court Judges) was breached, and the detenue was entitled to be released.

VII. The TADA Case - A Set Back to the Court's Unblemished Record Since 1978

TADA — the *Terrorist & Disruptive Activities Prevention Act 1985,* and its later manifestation (Act of 1987) — were a group of statutes intended effectively to deal with terrorists, and contained very drastic provisions by way of punishment: not less than five years imprisonment of, extending to life imprisonment.[35] 'Disruptive activity' was defined as including the

1987 SC 2377 (Supreme Court of India); State of Punjab v. Sukhpal Singh, (1990) 1 SCC 35 : AIR 1990 SC 231 (Supreme Court of India) and Kubic Darusz v. Union of India, (1990) 1 SCC 568 : AIR 1990 SC 605 (Supreme Court of India).

[34] Shalini Soni v. Union of India, (1980) 4 SCC 544: AIR 1981 SC 431 (Supreme Court of India). For later cases, *See*, Gazi Khan v. State of Rajasthan, (1990) 3 SCC 459: AIR 1990 SC 1361 (Supreme Court of India); Mahesh Kumar Chauhan v. Union of India, (1990) 3 SCC 148 : AIR 1990 SC 1455 (Supreme Court of India); M. Ahamed Kutty v. Union of India, (1990) 2 SCC 1 (Supreme Court of India) and Abdul Sathar Ibrahim Manik v. Union of India, (1992) 1 SCC 1 (Supreme Court of India).

[35] TADA has since expired — but continues to apply to pending cases. *See, Abdul Aziz* v. *State of W.B.*, (1995) 6 SCC 47. Section 1(4) of the 1987 Act provided as follows:

"It shall remain in force for a period of eight years from the 24th day of May, 1987, but its expiry under the operation of this sub-section shall not affect —

(a) the previous operation of, or anything duly done or suffered under, this Act or any rule made thereunder or any order made under any such rule, or

(b) any right, privilege, obligation or liability acquired, accrued or incurred under this Act or any rule made thereunder or any order made under any such rule, or

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questioning by speech or act, directly or indirectly, the territorial integrity and sovereignty of India or supporting the cession of any part of India: such speech or act need not be accompanied by any violence or show of force. Such person was by definition a 'disruptionist', and whoever 'harboured' a disruptionist was punishable with a minimum term of five years imprisonment. These harsh cases were to be tried not before the normal courts, but before Special Designated Courts, under special procedures. Even police confessions, traditionally, for over a century, impermissible in criminal trials, became admissible evidence before designated Courts. When interpreting the provisions of TADA, a liberal approach was adopted by the Court.[36] But when the TADA Acts were challenged the Court strangely went back into its conservative shell.

In *Kartar Singh* v. *State of Punjab,*[37] a Bench of five Judges rejected the constitutional challenge to the *Terrorist Affected Areas (Special Courts) Act, 1984, the Terrorists and Disruptive Activities (Prevention) Act, 1985, and the Terrorist and Disruptive Activities (Prevention) Act, 1987* (commonly known as the TADA). The Justices have conceded that the Acts (TADA) "tend to be very *harsh* and *drastic* ... containing stringent provisions". They were most harsh and very drastic in that:

(i) the definition of "terrorist" and "disruptive activities" were so broad so as to encompass even peaceful expression of views about sovereignty and territorial integrity;

(ii) the Acts permitted detention in custody for investigation for upto six months (formerly, one year) without formal charge;

(c) any penalty, forfeiture or punishment incurred in respect of any offence under this Act or any contravention of any rule made under this Act or of any order made under any such rule, or

(d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty forfeiture or punishment may be imposed as if this Act had not expired."

[36] Thus, the Supreme Court had insisted that "the investigation of such cases (under TADA) be not only thorough but also of a high order"; where hardly any investigation worth the name was made before the accused was charge-sheeted, the Supreme Court can set aside his chargesheet in *Balbir Singh* v. *State of Haryana*, (1987) 1 SCC 533 : AIR 1987 SC 1053 (Supreme Court of India). Again in *Usmanbhai Dawoodbhai Memon* v. *State of Gujarat*, (1988) 2 SCC 271 : AIR 1988 SC 922 (Supreme Court of India), the highest court emphasised that TADA being an extremely drastic measure, it could be invoked only when the police could not tackle the situation under the existing criminal law, and when this relevant matter was not adverted to by the Designated Court, conviction orders passed (in such cases) were set aside, and remitted for proper consideration.

[37] Kartar Singh v. State of Punjab, (1994) 3 SCC 569 (Supreme Court of India).

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(iii) trials were not to take place in the ordinary criminal courts in public view, but before special "Designated Courts", in camera, and adopting procedures at variance with the *Criminal Procedure Code:* in the name of "speedy trial";

(iv) if the person arrested and charged came from a terrorist affected area (so declared by the Central or State Government) then the burden of proving that he had not committed a terrorist act was on him;

(v) confinement before trial was the rule, and bail the rarest exception;

(vi) and above all, the material safeguards entrenched in the substantive law for more than a century were all swept away under the TADA Acts — a person could be convicted on the uncorroborated testimony of a co-accused (who was granted a pardon), or on the recorded "confession" made by an accused before a Police Officer (the admissibility of which was abhorrent to the framers of the *Indian Evidence Act* way back in 1872, and was rightly regarded as almost an invitation to custodial torture!).

So "harsh and drastic" was the special procedure that it was plainly arbitrary — and thus violative of Article 21 (read with Article 14). And yet, the TADA Acts, (except one particular section[38]), were upheld in the year of grace 1994, as not violating Article 21. Why? Because of a glaring error in the majority judgment -an error of approach. The Justices continued to look at the letter of Article 21 — as the majority did in *Gopalan*[39] — even after their distinguished predecessors (in the year 1978) had bared its soul! The procedure prescribed by the law must not be arbitrary or unreasonable, the Constitution Bench of Seven Judges had said in *Maneka Gandhi*[40] "arbitrary" or "unreasonable" qua what? Obviously qua "deprivation of life or liberty", not qua the "law, or the object of the

[38] Sec. 22 of the Act of 1987 — permitting identification of a person accused of an offence on the basis of a photograph.
[39] A.K. Gopalan v. State of Madras, AIR 1950 SC 27 (Supreme Court of India).
[40] Maneka Gandhi v. Union of India, (1978) 1 SCC 248: AIR 1978 SC 597 (Supreme Court of India).

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law"![41] *Maneka Gandhi*[42] *case* is now made to stand on its head: however, arbitrary or unreasonable the procedure for deprivation of life or liberty, however harsh and drastic the provisions of the law, they would be valid under Article 21, if the *object* of the law is laudable[43] — a most dangerous conclusion - and worrisome for the future. That India was a signatory to, and had ratified the *International Covenant on Civil and Political Rights* (ICCPR), which had set standards for adjudging the reasonableness of laws affecting life and liberty, went unnoticed. The TADA Acts were plainly in breach of Articles 9 and 14 of the ICCPR. The right of a person arrested to be "promptly" informed of any charge against him [Article 9(2)], the right of such person to be brought "promptly" before a judicial authority to stand trial within a reasonable time [Article 9(3)], the right to a public hearing [Article 14(1)], the right to be presumed innocent until proved guilty [Article 14(2)], the right not to be compelled to confess guilt [Article 14(3)(8)]: none of these provisions are even mentioned in the TADA Acts: they go unnoticed in the judgment of the Court as well.

It is said that to ensure our safety and security, the TADA Acts *must* be enforced with all their harshness and rigor against persons who are admittedly and unquestionably "terrorists". Yes - but not where they are only *alleged* to be so. The untrammelled and uncontrolled powers exercisable under the Acts are made more horrendous by the official statistical revelation that *not more than one percent of those tried before the Designated Court have been ultimately convicted the rest are acquitted for "want of evidence"*: there is no further statistical

[41] In para 97 of the judgment of the majority, their Lordships state that they would examine the key questions: (1) whether the procedure prescribed under the Acts of 1984 and 1987 is the antithesis of the just, fair and reasonable procedure; (2) whether the procedural safeguards to which the accused is entitled, have been completely denied to the prejudice and disadvantage of the accused. In para 148, they conclude: "Therefore, having regard to the object and purpose of the Act of 1987 as reflected from the Preamble and the Statement of Objects and Reasons of the Act, the submission made questioning the legality and efficaciousness of Section 3 and 4 on the grounds (1) and (2) mentioned above cannot be countenanced ..."

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[43] Kartar Singh v. State of Punjab, (1994) 3 SCC 569 (Supreme Court of India).

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information: as to in how many cases this was because witnesses who had given sworn statements had refused to testify, and as to in how many cases it was because there were no genuine witnesses at all in the first place, no plausible "evidence" worth the name when the accused was first arrested and detained: And we pride ourselves on being a country governed by the rule of law! All the judicial embellishments to Article 21 — the judicially contrived super-structure built around the great Life and Liberty Clause of our Constitution - a heartening feature of the post June 1975 Emergency era, appear to stand dismantled with the judgment in *Kartar Singh*[44] *case*: we are where *Gopalan*[45] *case* left us way back in 1951, only lip service (if at all) being paid to the Constitution Bench decision of Seven Judges in *Maneka Gandhi.*[46] The conclusions of the Court upholding the constitutionality the drastic and arbitrary of TADA bring to mind the warning of an American Judge (Justice Frankfurter) - the same Judge whose advice had been sought when drafting Article 21. He had said: "Don't rely on Judges and the Courts to save your freedoms". He knew — that Judges (and lawyers) were masters of the written word. They could rationalize (and so legitimize) the most tyrannical of laws — our Judges have done it before - in *ADM, Jabalpur*[47] — they have done it again — in *Kartar Singh.*[48]

But under our Constitution, we have to rely on our Judges to save our freedoms. No one else will. So, my humble advice to all those who learn about the Constitution and the laws in this excellent institution of higher learning is to stimulate public opinion, and (when admitted to practice) by robust disputation, strive to remove, by the established processes of law, the blot of the *Kartar Singh*[49] decision on an otherwise unblemished record of the Supreme Court of India in the field of Human Rights since 1978.

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[44] Kartar Singh v. State of Punjab, (1994) 3 SCC 569 (Supreme Court of India).
[45] A.K. Gopalan v. State of Madras, AIR 1950 SC 27 (Supreme Court of India).
[46] Maneka Gandhi v. Union of India, (1978) 1 SCC 248: AIR 1978 SC 597 (Supreme Court of India).
[47] ADM, Jabalpur v. Shivakant Shukla, (1977) 2 SCC 834: AIR 1976 SC 1207 (Supreme Court of India).
[48] Kartar Singh v. State of Punjab, (1994) 3 SCC 569 (Supreme Court of India).
[49] *Id.*

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