AN ANALYSIS OF THE MAHARASTHRA CONTROL OF ORGANIZED CRIME ACT, 1999

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INTRODUCTION

Maharashtra Control of Organized Crimes Act, 1999 (MCOCA) is a law enacted by Maharashtra state in India in 1999 to combat organized crime and terrorism. "Terrorism", internationally has proved impossible to define in a manner that is widely acceptable. The legitimate and modern states have been under constant threat due to the activities of the terrorist group. From 1980s India is facing the menace of terrorism in different pockets of the country especially in the states of Jammu and Kashmir and Punjab, insurgent activities in the north-eastern States and continuous naxalite attacks in Bihar and Orissa. The uniqueness of terrorism lies in the continuous changes that terrorist make in their mode operations and multitude of methods they use in carrying out their activities. Terrorist activities have become brutal, with terrorist organizations also having access to the technological advancements.

The major cause behind the terrorism activities can be considered as unemployment due to which the terrorist groups lure the young generation by providing hoard of easy money. In return, the youngsters have to spread hatred, and indulge in bloodbath and killings on the street. Poverty stricken young people belonging to poor socio-economic background are the ultimate target of these organisations, as they get easily influenced to do their bidding in return of easy money.

Economic causes too contribute to terrorism in India. These include rural unemployment, exploitation of landless labourers by those who own land and lack of land reforms. The major states affected by such causes include Madhya Pradesh, Bihar, Orissa and Andhra Pradesh. The absence of land reforms, rural unemployment, exploitation of landless labourers by land

owners, economic grievances and perceptions of gross social injustice in these states have given rise to ideological terrorist groups such as the various Marxist/Maoist groups waging a war against the respective state government.

Thirdly, religious causes too lead to terrorism in India. Punjab witnessed the growth of terrorism when certain organisations of Sikhs led by Jarnail Singh Bhindranwale raised the demand for Khalistan, an independent state for Sikhs. Some elements belonging to different organisations shifted to terrorism for the creation of a separate state known as Khalistan for the Sikhs. Similarly, Jammu & Kashmir has been reeling under religious extremism which seeks to appropriate all rights for Muslim majority.

JURISDICTION OF SPECIAL COURTS

Every offence under MCOCA is to be tried only by a Special Court within whose local jurisdiction it was committed or as the case may be by the Special Court constituted for trying offences under Subsection (1) of Section 5[i].

1. In MCOCA cases, access is given to Police that instead of 90 days of cases concerned, officer can file charge sheet within 180 days.
2. After producing the accused in the court within 24 hours, in MCOCA cases, an arrested person can be kept under police custody for 30 days instead of the 15 days in ordinary criminal cases.

PROTECTION OF WITNESS

As per section 19 of the MCOCA, 1999[ii], notwithstanding anything contained in the Code, the proceedings under this Act may be held in camera if the Special Court so desires.

A Special Court may, on an application made by a witness in any proceeding before it or by the Public Prosecutor in relation to such witness or on its own motion, take such measures as it deems fit for keeping the identity and address of any witness secret.

In particular, and without prejudice to the generality of the provisions of sub-section (2), the measures which a Special Court may take under that sub-section may include:

1. the holding of the proceedings at a place to be decided by the Special Court;
2. the avoiding of the mention of the names and addresses of the witnesses in its orders or judgements or in any records of the case accessible to public;
3. the issuing of any directions for securing that the identity and addresses the witnesses are not disclosed;
4. that, it is in the public interest to order that all or any of the proceeding pending before such a Court shall not be published in any manner.

Any person who contravenes any direction issued under subsection (3) shall be punishable with imprisonment for a term, which may extend to one year and with fine that may extend to one thousand rupees.

For the protection of witness, it is laid down that, if not willing, the witness need not be produced in Court. Thus, under such a judicial dispensation, there is no fear of victimisation.

Especially in MCOCA cases, it is said that a Police Officer not below the rank of Superintendent of Police should be supervising the case (i.e. Deputy Commissioner or higher rank officials).

Only in MCOCA cases, if the arrested gang member wants to confess, his/her voice can be recorded by some Deputy Commissioner of Police or an Officer of higher rank, and such confession is admissible by Court. But, the Deputy Commissioner of Police or higher rank officer who would record the confession should not be investigating or supervising the case.

HOW MCOCA IS DIFFERENT?

MCOCA was the first enactment in India with a stated objective of intercepting communications to obtain evidence of crime. Its statement of objects and reasons noted that: The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission would be an indispensable aid to law enforcement and the administration of justice. Government, therefore, decided to enact a special law with stringent and deterrent provisions including in certain circumstances power to intercept wire, electronic or oral communication to control the menace of the organised crime.[iii]

Sections 14 to 16 of MCOCA authorise interception of wire, electronic or oral communication, render such intercepted communication admissible as evidence against the accused in a trial, require a review committee to review every order passed by the authority competent to authorise such interception, and impose certain restrictions on the interception. Section 14 empowers a police officer not below the rank of the Superintendent of Police supervising the investigation of an organised crime under MCOCA to submit an application in writing to the competent authority for an order authorising or approving interception of wire, electronic or oral communication by the investigating officer, when such interception may provide or has provided evidence of any offence involving an organised crime. Section 14(2) – (13) lay down the detailed procedure for conducting such interception as also the requirements to be fulfilled before approval is granted. Section 16 prohibits interception and disclosure of wire, electronic, or oral communication by any police officer except as otherwise specifically provided, and makes any violation of the provision punishable.[iv]

Identical to section 16 of TADA[v], section 19(1) of the MCOCA permits the Court to order in camera proceedings if it so wishes, while section 19(2)-(3) empowers the Court to take any measures it deems fit for protecting the identity and location of any witness. Contravention of the Court's orders may attract imprisonment of up to a year and fine of only up to Rs. 1,000.408 These wide powers and 'stringent' provisions have been justified because the Act deals with such incorrigible organised criminals whose activities cannot be controlled and it is not ordinarily possible to bring them to books by the ordinary law of the land.

Thus, we again see a continuation of the trend of upholding more stringent provisions in anti-terrorism legislation, with the justification that they were dealing with a special kind of crime.

Cases relating to terrorism have often been decided under MCOCA and it appears that section 21(2) of MCOCA[vi], which is largely similar to section 43D (2) of UAPA[vii], has been interpreted in the same vein. In a case before the Bombay High Court, the Court ruled on a situation that had only been considered hypothetically but not addressed by the Supreme Court in an earlier case under UAPA. In this case, the application for statutory bail and application for extension of detention were before the court at the same time. Relying on the Supreme Court's judgment of Hitendra Vishnu Thakur[viii], discussed above, the High Court ruled that the prayer for bail and the prayer for extension of period of detention are to be considered together, and if one is granted the other is to be rejected. If the judge finds sufficient cause for extending detention, then the bail application automatically fails. The Court rejected the notion that an indefeasible right to be released immediately arose once the prescribed period of detention had passed – if an application for extension of detention is presented before the Court at the same time as the bail application, the former would be decided upon first, and the latter would give way to it.

In conclusion, even though coupled with several procedural safeguards at the time of arrest, courts have consistently upheld the wide departures from established criminal law and undermined civil liberties, permitting pre-charge detention for up to 180 days on the ground that the law has provided for adequate safeguards. This is notwithstanding the fact that the 180-day period seems much more than the 28-day period for judicially-authorised pre-trial detention in the UK, seven days for aliens suspected of committing a terrorist act under the US Patriot Act, and 24 hours in Australia, excluding 'dead time' when the suspect is not being questioned. Another common theme is the scourge of terrorism and the justification of national security, often with lip service on the attempt to balance it with fundamental rights of the detainee. This is best reflected in cases such as the Kerala High Court's decision in Ashruff v State of Kerala, where even though procedural safeguards had not been adhered to, instead of ordering release of the accused, courts have instead ordered compliance with the requirements of the statute. However, the requirements of the statute are inadequate. Merely inquiring into the progress of the investigation, without examining the material evidence against the accused

will allow investigating agencies to routinely extend the pre-charge detention period and possibly, even engage in torture/custodial violence. More importantly, with the latest amendments introducing vague standards such as the 'likelihood' and economic security test, investigating agencies are likely to favour detaining persons under such provisions instead of the CrPC. However, the higher courts have usually upheld the right to statutory bail on the expiry of the pre-charge detention period, although this excludes cases where the accused in unable to furnish bail.

PROPOSED CHANGES INCLUDING AMENDMENTS AND/ OR DELETION OF PROVISION IN THE PRESENT MCOCA, 1999

The primary issue that seems inherent in the act is the absence of applicability in the other states when compared to the parent state where the act was actually originated. When the act was enacted, the idea was to combat the prevailing situation as it was back then in Bombay, primarily and in other affected areas. The inability of the legislature is apparent on the face of it when the legislation simply took the act at its face value and adopted the act as it is without materially changing the provisions according to the prevailing circumstances in the place where it was made applicable one after the other in the absence of actual evaluation.

The act, as on date might be a powerful tool but from the lens of transparent analysis it seems and record show that the act is a venomous tool to exploit general public and sometimes the innocent and the ones that are framed owing to any compelling yet unexplained circumstances. The following head of the dissertation aims to look at the loopholes and the areas where the act needs amendments or rather needs to be struck off in the wake of the misuse of the provisions to the act in place. The primary facet that the dissertation needs to point out is the fact that the for the purposes that the act was actually enacted could not be achieved in as much as the act has failed to achieve its purposes of nabbing the "syndicate" that had back then taken control over the territory of Bombay or the present-day Mumbai. The failure of the act is evident from the fact that the authorities have not been able to nab the so-called organisers of the "syndicate"

or the original handlers of the "syndicate" thus far despite having enacted the Maharashtra Control of Organised Crimes Act, 1999 roughly 22 odd years back.

The dissertation proposes the following changes in the act: -

The act despite being a short and a crisp act containing 30 sections is a very stringent act in as much the provisions can be life turning for the person against whom it is used. The changes according to the writer should be imposed right from the definition clause in

- Section 2(d)

The section 2(d) of the act defines "continuing offence". From the eye of the writer of the present paper, the time of 10 years for the charge sheet to be submitted and the cognizance to be taken for an offence where the imprisonment is three years or more is a very anti accused provision. The time period of 10 years, it seems has been intentionally framed with the intent of entangling the accused in the provision and ultimately getiing conviction.

- Section 2(e)

The section uses ambiguous words like "any offence" and then also goes on to explain by using the word "by use of threat or violence" and also the words "with the intent of pecuniary benefits, or undue economic advantage or other advantage to himself or any other person" shows that the intent of the legislature was to include possibly all offences in the act or otherwise the use of the word "any" does not make any logic.

- Section 4

The section talks about punishing anyone who possess any property for or on the behalf of the syndicate. The problem as the writer sees is that the section is an abstract section in as much as the intent, it seems is to forfeit the property by bringing it under the purview of the MCOCA. To the understanding of the writer, the provisions for keeping unaccounted property are covered well within the purview of the Income Tax Act and for that matter under the PMLA. The section is only a tool to forfeit the property of someone accused under the act.

- Section 17

Under sub section 2 of the aforementioned section, the inherent trouble that the writer witnesses are that of an inherent bias against the accused and the surpassing of the principle of "innocent until proved guilty".

- Section 18

The cardinal principle of criminal law is that a confession made to the police officer is inadmissible under the criminal law has been done away with in letter and spirit as per the provisions of this act. The section provides that any confession made to an officer of the police not below the rank of DCP is admissible not only against self but also against co-accused, conspirator. The presence of (2) and (3) of the provision seems to be drafted only for the purposes of balancing the evil contained under section (1) of the act.

- Section 20

The writer of the dissertation is a strict oppose of the principle of attaching properties before conviction as the act of the state seems to be of passing conviction sentence and imposing punishment even before actual conviction is made. The issue is that once a property is attached, during the course of trial, there are a lot of ancillary issues like there being no whisper for an award of compensation in case the accused is acquitted and the properties are then to be released. The state shall also make itself liable for paying compensation to the accused in case due to the attachment of property, the accused suffers.

- Section 23

Though section 23 provides certain safeguard to the accused in as much as it requires the officers of the rank of Additional Commissioner of Police to apply mind to the situation and give sanction and also mandates that the investigation be done by an officer not below the rank of an ACP. The enjoining of such duties on officers of such rank gives the investigation of such offence certain strength and at the same time some credibility to the investigation too.

By mentioning the aforementioned provisions of the act, the writer of the present dissertation has made an attempt at outlining the possible and probable lacunas from the reading, analysis

and understanding of the act coupled with his own hands-on experience at witnessing trials under the MCOCA in the state of Delhi.

Whereas the critical analysis is just a healthy criticism and not made with an intent to disrespect and demean the very act, the intent of the dissertation is to make clear that it is the legal acumen of the writer that has brought up the following possible grey areas that can be used against the accused in a blatant violation of their basic rights and by the way of outlining these lacunas, the writer seeks to put forth his ideas for the better striking of balance in the provisions of the act and that of the rights of the accused and at the same time keeping in mind that at the behest of achieving one purpose, the other purpose should not be defeated.

The writer of the present dissertation is also open to other suggestions in the area since the other suggestions might ultimately prove to be more logical, have far reaching consequences and might be sound, both legally and logically.

CONCLUSION

Terrorism has now become an international phenomenon. There are terrorists in developed and advanced countries as well as developing countries like India. We must find out the reasons for emergence of terrorism. There has been exploitation of the weak and the poor for centuries by the rich and the powerful. All representations and appeals of non-violent nature failed to yield any response. Hence the frustrated and the oppressed resort to violence as there is no other alternative. Such protests are also called terrorist activities. There is another type, that is, where one uses force on the weak to gain his ends; sit may be to serve the cause of a religion, a language or to establish a new pattern of government.

Governments all over the world are doing their best to put an end to terrorism. There are a few who encourage and support terrorism in other countries to meet their own political ends. The U.N.O. also is unable to completely eliminate this evil, even though it is able to contain it. But use of violence to check violence is not a permanent solution.

The only remedy to this evil appears to be the diagnosis of the root cause for each act of terrorism and if there is a genuine reason behind it, it is better to concede the demand. If terrorism is based on issues which are immoral and not acceptable, the sure and powerful weapon against it appears to be nonviolent "satyagraha" introduced by Mahatma Gandhi.

ENDNOTES

[i] Maharashtra Control of Organised Crimes Act 1999
[ii] Maharashtra Control of Organised Crimes Act 1999
[iii] Maharashtra Control of Organised Crime Act 1999
[iv] Maharashtra Control of Organised Crime Act,1999
[v] Terrorist Anti Disruptive Activities Act, 1985
[vi] Maharashtra Control of Organised Crime Act 1999
[vii] Unlawful Activities Prevention Act
[viii] Manupatra Search Engine