DESIGNED FOR ABUSE:
SPECIAL CRIMINAL LAWS AND RIGHTS OF THE ACCUSED

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The aim of this Article is to interrogate the necessity and efficacy of special criminal laws in the context of the Indian criminal justice system. It further argues that special criminal statutes have the inevitable effect of curtailing the rights of the accused in several crucial respects extending prior, during, and after trial. Special statutes creating distinct legal offences are sought to be justified on the basis of the distinctness of the crimes that they pertain to.

However, this Article argues that there exists little legal or penological justification in not treating those offences under the general criminal scheme. Finally, this Article demonstrates that procedural innovations applied under the guise of special statutes, result in further erosion of the rights of the accused persons, and the systemic effects of such laws work to the detriment of the criminal justice system.

The Article examines the various features of special criminal laws in broadly four parts. Part I of this Article looks at the theoretical justification of creating special laws. Part II will examine the procedural innovations developed by special legislations. Part III analyses the role of special legislations in engendering a system of informal plea bargaining. Part IV sheds light on the direct impact that reverse onus clauses in special legislations have on the right of the accused.

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INTRODUCTION

In terms of criminal law, the Indian Penal Code, 1860 (hereinafter "IPC"), and the Code of Criminal Procedure, 1973 (hereinafter "CrPC"), can be said to be the general laws, which deal with the entire gamut of the legal implications of crime. By this, what is meant is that substantively, the terms of various criminal offences are defined and their punishment is laid out in the IPC. It also lays down the conditions for liability, such as general defences, exceptions, and so on. Procedurally, the CrPC exists as the default and exhaustive procedure by which the criminal justice system moves forward.

Why the CrPC may be considered to be general is easily understood from a look at its provisions. The CrPC provides for what is to legally take place at all steps of the criminal process, beginning from a complaint or a first information report to the stages of investigation, inquiry, and trial. It further provides for appeals, the carrying out of sentences, and so on. One could say that if the CrPC were to be looked at, parties to a criminal trial can find provisions pertaining to their rights and duties at any stage of the criminal justice process.

The IPC and the CrPC are supplemented by the Indian Evidence Act, 1872 (hereinafter "IEA"), which pertains to the relevance of facts, admissibility of evidence, and means of proof. This Act also exists as a general statute, which applies to both civil as well as criminal trials, and is framed in general terms as to the kind of offence under trial.

For the purposes of this Article, special criminal laws refer to those laws, which create a distinct class of offences for certain acts.[1] These could be premised on a justification based on a distinct victim group, such as child sexual abuse, or the motive of the crime, such as terror. This Article has considered only those laws, which tweak the application of the procedural aspects of the criminal justice system. These could be alterations to entitlements to interim relief, such as bail,[2] to changes in the operation of evidence law, such as the alteration of standards of proof, and reverse onus clauses.

Over a period of time, the Indian legal system has adopted several criminal statutes that may be termed as 'special criminal laws'. The laws typically define these offences and proceed to stipulate certain ways in which they may be investigated and punished.[3] They do not replace the application of the IPC, which means that if the offences are additionally made out under the IPC as well as the special statute, both would be attracted. However, they do replace certain parts of the CrPC and the IEA. This is done usually through the application of non-obstante clauses within the special statute. With respect to the stages of procedure on which the special law is silent, the general procedural law still applies. Therefore, these special laws complement and attach to general statutes, creating a situation, where the rights of the accused are dealt with under the special laws, and the stringency of substantial provisions is either left unchanged or heightened as a permanent system.[4]

There are far too many special criminal statutes in the Indian legal system to all be studied in a single Article. The present Article looks primarily at anti-terrorism laws such as the Unlawful Activities (Prevention) Act, 1967 (hereinafter "UAPA")[5], and the Protection of Children from Sexual Offences Act, 2012 (hereinafter "POCSO Act").[6] Part I of this Article traces the theoretical justification of creating special laws. Part II will examine the procedural innovations developed by special legislations. Part III analyses the role of special legislations in engendering a system of informal plea

[1] I write of the generality and special law distinction in terms of the application of principles of criminal law through statutes. For philosophical distinctions on generality *see* Peter Cane, *The General/Special Distinction in Criminal Law, Tort Law and Legal Theory*, 26(5) LAW AND PHILOSOPHY 4 65 (2007).

[2] The practice of limiting or extinguishing the right to bail is common in special criminal statutes. *See* Vikramjit Reen, *Proof of Innocence before Bail: Amendments Required*, 37(2) JILI, 256 (1995).

[3] Certain statutes such as the NIA Act, 2008, create an entirely separate investigative agency for the offences under special statutes, such as the Unlawful Activities Prevention Act, 1967.

[4] Ujjwal Kumar Singh, *State and Emerging Interlocking Legal Systems: 'Permanence of the Temporary*, 39(2) ECON. & POL. WKLY. 149 (2004).

[5] The Unlawful Activities Prevention Act, 1967, No. 37, Acts of Parliament, 1967.

[6] The Protection of Children from Sexual Offences Act, 2012, No. 32, Acts of Parliament, 2012.

bargaining. Part IV sheds light on the direct impact that reverse onus clauses in special legislations have on the right of the accused.

I. MOUNTAINS OF MOLEHILLS: ARE SPECIAL OFFENCES REALLY THAT SPECIAL?

The generality of laws is a recognised feature of a system that purports to have the rule of law.[7] Jurists such as Professor Lon Fuller have famously defended the need for laws to be general in terms of their enactment and enforcement as necessary elements of an *"inner morality"* to the law.[8] Generality is considered to be important because it ensures applicability throughout the system and to all accused, and not just a special class of offences. Fuller also insisted on congruence between the law as designed and its actual implementation, to ensure fairness.

To take the Modern Natural Law theory perspective, generality is one of the features that ensures basic fairness in the legal system as a whole and curtails the power of the government to bring about 'evil' results, or abuse, through the law. It is believed that if the general procedural law relating to offences and their punishment is complied with, a basic amount of fairness is guaranteed.[9] However, the same basic principles of criminal law can be side-stepped, if classes of special criminal laws are created to apply only in specific situations and where the general procedural requirements of the law are held to be inapplicable. However, this does not mean, that the generality of laws ensures fairness in all cases. Indeed, it can be validly argued that general laws can also be misused. Hart famously argued that principles such as generality, which may ensure a logical coherence to the law, might also be amenable to the accomplishment of 'evil' aims.[10] However, the argument here is that the lack of generality allows for special laws to derogate from well-founded procedural safeguards as a stated aim. Statutes that extinguish the right to bail for under-trial prisoners need not be misused to achieve the aim of prolonged incarceration *sans* guilt. But they can lead to arbitrary detentions as a valid and wholly legal result of following the law. Similarly, the stated policy objective of ensuring a high conviction rate manifests itself in mechanisms such as reverse onus clauses, without any consideration of the fairness of such results.

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[7] Lord Bingham, *The Rule of Law*, 66(1) CAMBRIDGE L. J., 67 (2007).
[8] Brian H. Bix, *Natural Law: The Modern Tradition* in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 61 (Oxford, OUP, 2002).
[9] Lon L. Fuller*, Positivism and Fidelity to Law: A Reply to Professor Hart*, 71(4) HARV. L. REV. 637 (1958).
[10] H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71(4) HARV. L. REV. 593 (1958).

In terms of the psychological justification of these laws, the first argument often used to defend these laws is to view the class of offences they deal with to be special. This is the justification that is taken most often in the case of anti-terror laws. The understanding is that for terrorism as a class of criminal offences to be dealt with, requires special laws, and the general criminal law is incapable and inadequate to do the same.[11] This line of thinking proceeds from the transnational character of certain terror groups, to the distinct challenge they present to national security.[12] What is notable is the logic of national security and sovereignty being invoked to justify the enactment of anti-terror legislations, where terror offences are often singled out to be the greatest challenge facing the country. However, in terms of criminal law, this distinction between terror offences and general criminal offences is not clear. A terror offence would be an offence that is fully within the scope of a general criminal offence in terms of the requirements of liability. One can even go a step further and state that a terror offence is fully covered by the IPC in the Indian context, in terms of waging war against the state, a conspiracy to wage war against the state, or in cases where the loss of life occurs, murder.[13] Indeed, it is very common that in a terror charge, these provisions of the IPC will be mentioned against the accused, along with the special laws. What is theoretically distinct for a case of terror from an IPC offence remains unclear. Factors such as the threat level that an act presents to the safety of the country are not very relevant for criminal law distinctions.

Similarly, if the offence of child sexual abuse is considered, the nature of the crime remains the same in terms of the aspects of criminal law and is covered under the IPC. The challenges that the collection of evidence from the minor may present are fully capable of being handled by suitable changes to the Criminal Rules of Practice that courts are mandated to follow. However, the creation of a special law dealing with sexual offences against children was considered by many to be a unique necessity that could not be addressed adequately by prevalent legislation. In terms of several procedural aspects as well as the method of trial, the law makes certain changes to the ordinary nature of criminal law. In terms of already being covered by the scope of criminal law, the IPC does provide for offences of a sexual nature against children. However, certain modifications, such as

[11] *Infra*, notes 20, 21. *See also* N. Manoharan, *Trojan Horses: Counter-terror Laws and Security in India*, 44(46), ECON. & POL. WKLY., 20 (2009).

[12] Sudha Pai, *TADA and Indian Democracy*, 30(50) ECON & POL. WKLY. 3203-3205 (1995). *See* Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20(1) COLUM. J. ASIAN L 93 (2006); *see also* MANISHA SETHI, KAFKALAND: PREJUDICE, LAW AND COUNTERTERRORISM IN INDIA 3-8 (Gurgaon; Three Essays Collective, 2014).

[13] These offences are fully defined in the Indian Penal Code, 1860, and are punishable by the maximum sentence of death or imprisonment for life.

recognising non-penetrative sexual abuse of children of any gender were needed.[14] However, in terms of criminal law requirements at a theoretical level, the same general principles were to be applied.

It is interesting to note the legislative history of the enactment of the Protection of Children from Sexual Offences Act, 2012. All constituencies involved in the matter, starting from the Parliamentary Standing Committee, to the actual debate in the Rajya Sabha, seem to have fully accepted the need for a special law without looking at the reasons as to why the same could not be achieved through amendments to the existent law to incorporate newer offences. Reasons seem to range from low rates of conviction, high incidence of crime against children, to the cumbersome process involved in amending the IPC.[15] What becomes clear from the Standing Committee Report is that scant regard is paid to the penological justification for creating new legislation, but that focus is only directed towards the ostensible policy justification for it. This is also true for the debate that occurred in the Rajya Sabha on the Bill, where the necessity of this law was taken as accepted.[16] This view of the criminal law may subscribe closely to what has been called the view of law as an external constraint.[17] Here, the promise of greater efficiency of a new law and the certainty of having a law specifically to deal with sexual offences against children are seen as paramount goals of society. Taken in this view, having a special law is always considered better than not having one. The efficacy of more laws over fewer is presumed.

A similar story emerges when one looks at the enactment of the Prevention of Terrorism Act, 2002 (hereinafter "POTA").[18] The 173rd Report of the Law Commission of India contained a draft Prevention of Terrorism Bill for consideration.[19] The Law Commission foresaw the possibility of the legislation being tabled in a subsequent session of the Parliament. An interesting development

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[14] Penetrative sexual assault of males would be covered under § 377, IND. PEN. CODE.

[15] DEP'T-RELATED PARLIAMENTARY STANDING COMM. ON HUMAN RES. DEV., TWO HUNDRED AND FORTIETH REPORT 21st December, 2011, https://prsindia.org/sites/default/files/bill_files/SCR_Protection_of_Children_from_Sexual_Offences_Bill_2011.pdf (last visited May 17, 2020).

[16] Debate in the Rajya Sabha, 10th May, 2012, https://rsdebate.nic.in/bitstream/123456789/603084/1/ID_225_10052012_p361_p391_29.pdf (last visited May 17, 2020).

[17] David L. Bazelon, *Foreword- The Morality of the Criminal Law: Rights of the Accused*, 72(4) J. CRIM. L. & CRIMINOLOGY 1143 (1981).

[18] The Prevention of Terrorism Act, 2002, No. 15, Acts of Parliament, 2002 (repealed).

[19] LAW COMMISSION OF INDIA, ONE HUNDRED AND SEVENTY THIRD REPORT, 13th April 2000. For comments on the Report and recommendations of the LCI *see* K. Balagopal, *Law Commission's View on Terrorism*, 35(25) ECON. & POL. WKLY. 2114 (2000).

prior to the Bill being introduced in the Parliament was the unanimous opinion expressed on the matter by the National Human Rights Commission (hereinafter "NHRC"). Invoking its jurisdiction under Section 12 of the Protection of Human Rights Act, 1993, the NHRC expressed its unanimous opinion that a special legislation on the subject of terror was not required, and the general criminal laws, with amendments if needed and better investigation and enforcement, would be sufficient to deal with the problem of terrorism. In a detailed opinion, the NHRC was of the view that the then existent set of criminal laws covered terror offences. They opined that the proposed provisions in the special anti-terror law were against the settled principles of criminal law and eroded the constitutionally guaranteed rights.[20] The Prevention of Terrorism Bill was passed by the Lok Sabha and rejected by the Rajya Sabha, leading to a joint session of the Parliament being convened for its discussion on the 26 March 2002.

In a day-long and extensive debate, several factors dealing with the desirability of a special anti-terror law were discussed. The usual aspects of the debate centered on the need of raising conviction rates in terror cases and on the nature of state sponsored terror against India. Arguments highlighting the potential of the law's misuse were also made. The opinion expressed by the NHRC was raised by members of the opposition parties. What is instructive is that there was no reply on the subject matter of the NHRC's objection to the Bill. Once again, it appears that the efficacy of the new law was presumed by the central government, and the foundational question of why general criminal laws are insufficient was never addressed. In the case of the POTA, it is especially instructive since the contrary point had been made and highlighted but was still not considered.[21]

II. THE DEVIL IN THE DETAIL: PROCEDURAL VIOLATIONS WRIT IN THE LAW

The aspects of special legislation that will be looked into, in this part, deal with the procedural changes these laws introduce into the law, which would have otherwise applied. These procedural aspects apply to both interim reliefs that the accused would be otherwise entitled to, such as bail, to changes that have a bearing on the adjudication of the cases itself, such as the operation of

[20] NATIONAL HUMAN RIGHTS COMMISSION, PREVENTION OF TERRORISM BILL, 2000: NHRC'S OPINION, https://nhrc.nic.in/press-release/prevention-terrorism-bill-2000-nhrc's-opinion (last visited May 17, 2020).

[21] Debate in the Joint Session of Parliament, 26th March, 2002, http://loksabhaph.nic.in/Debates/Result13.aspx?dbsl=3795 (last visited May 17, 2020).

certain kinds of reverse onus clauses, or the admissibility of confessional statements made to the police.

The present anti-terror law in the country is preceded by the now non-applicable, Terrorism and Disruptive Activities (Prevention) Act, 1989 (hereinafter "TADA Act"), and POTA, both of which, allowed confessions to be made to police officers admissible in evidence.[22] This is a deviation from the provisions of the IEA, which make any confession made by an accused person to a police officer or in police custody, inadmissible in evidence.[23] The protection offered by the IEA extends to the extent that the accused person does not have to prove duress or torture during confessing to a police officer in order to make it inadmissible. It extends as a blanket provision covering all such confessions.[24] The purpose of the provision is to ensure that the police are not incentivised in any manner to induce or threaten the accused to confess, especially in the context of recording false and fabricated confessions. Confessions under the CrPC may be recorded only under Section 164 by a Judicial Magistrate and of an accused in judicial custody, and only after compliance of the requirements laid down in the provision.[25]

However, the provisions of anti-terror laws such as the POTA and the TADA Act allowed for confessions to be made to police officers under police custody to be proved.[26] This was achieved by making the relevant provisions of the IEA inapplicable to cases under these laws.[27] As a substitute, certain safeguards were added in the law, such as the requirement of the confession to be recorded before a particular rank of police officer and certain post confessional measures to ensure that the confession was voluntarily made.[28] These provisions undercut and deviated from some of the most fundamental aspects of criminal law, such as the right against self-incrimination. It would be very difficult for any person, who was in the custody of the police and whose safety and security

[22] Trials continue under the Terrorism and Disruptive Activities (Prevention) Act and POTA across courts where the allegations pertain to the times during which these laws were in force.
[23] §§ 25-26, Indian Evidence Act, 1872; These sections protect a person even when he is not formally accused at the time of the making of a confession, and are, in that sense, broader than the right against self-incrimination under Article 20(3) of the Constitution. *See* Aghnoo Nagesia v. State of Bihar*,* AIR 1966 SC 119.
[24] §§ 25-26, IEA do not require the accused to prove any extraneous factor leading to the making of the confession.
[25] § 164, CRIM PROC. CODE; The provision requires, *inter alia,* that the confession of an accused only be recorded when he has been warned by the Judicial Magistrate of the consequences of making such a confession, and the Magistrate as satisfied himself by such questioning, that the confession is being made voluntarily. It further requires that the Magistrate only record the confession of an accused who has not been produced from police custody but only from judicial custody.
[26] § 15, TADA, 1987; § 32, POTA, 2002.
[27] *Id.*
[28] *Id.*

depended on the police itself, to ever prove that he was tortured by the police and compelled to make a confession. Barring clear medical evidence, there would be little that he would have in his favour to ever show the same.

The TADA Act was challenged on, *inter alia,* a violation of Article 20(3) in the Supreme Court. In its decision upholding the constitutionality of the provisions of the TADA Act in *Kartar Singh v. State of Punjab* (hereinafter "*Kartar Singh*"),[29] the Court completely bought into the argument of the necessity of such special laws to deal with the scourge of terrorism and the protection of national security. It is interesting to note how much this dichotomy affects the minds of the judges, who adjudicated this case, with them noting but yet disregarding instances of custodial brutality and torture of the accused.[30] What predicates the judicial decision-making in the case is the fact that the legislation in question deals with terror offences, which threaten the security of the nation. Therefore, terror offences stand on a different footing from regular criminal offences.

This 'exceptionalism' in the nature of the offence, which as Part I showed, is not very different from regular criminal offences and justifies in the eyes of the Court a looser application of the rights in the Constitution. Therefore, even while recognising the fact that the law has full potential for misuse, which would directly affect the fundamental rights of persons, the Court does not strike down the law. It instead provides additional safeguards to the application of the law.[31]

The constitutional challenge to the POTA was decided by the Supreme Court in *PUCL v. Union of India* (hereinafter "*PUCL*").[32] The Court accepted the Union of India's argument that terrorism was a problem that was distinct from ordinary crimes and law and order problems. Thereby, the central government had the competence to legislate upon the subject, which would have otherwise been within the purview of the states by virtue of falling under the first entry to List II of the Seventh Schedule.[33] The logic of the Court is circular and completely accepts the argument that since terrorism is a special offence, it cannot be dealt with, by ordinary criminal laws, and therefore, requires special laws such as the POTA. There is no critical discussion of the penological

[29] Kartar Singh v. State of Punjab, (1994) 3 SCC 569. *See also* Shylashri Shankar, *Judicial Restraint in an Era of Terrorism: Prevention of Terrorism Cases and Minorities in India*, 11(1) SOC. L. REV. 103 (2015).
[30] *Id.*
[31] *Id.*
[32] Peoples' Union for Civil Liberties v. Union of India, AIR 2004 SC 456.
[33] List II, Schedule VII, IND. CONST., ("Public order (but not including the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power)").

difference between terrorism and ordinary crimes, or why general criminal laws cannot deal with the problem. As regards the admissibility of confessions made to police officers, Section 32 of the POTA was considered to be an improvement upon the corresponding Section 15 of the TADA Act, insofar as it mandated a subsequent production before a Magistrate. Therefore, following *Kartar Singh,* and with meagre analysis on why such a provision should exist at all, the Court upheld it.

In both *Kartar Singh* as well as the *PUCL* judgment, what comes forth is the reluctance of the Supreme Court to apply any standard of constitutional scrutiny to the impugned provisions of the statutes under challenge.[34] The cursory justification of the provisions made by the central government was mostly premised on the special nature of terrorism and the need to effectively curtail fundamental rights. In both these cases, we see the Court wholly accepting this logic of necessity and assurance of non-abuse by the State. It is possible that the Court would have upheld these egregious provisions of law only if it had internalised the very logic that justifies these laws. The logic that justified the unique necessity of such laws is that such laws deal with offences distinct from those under general criminal laws and that they, therefore, need not be made to satisfy the safeguards that other laws have to. Any honest scrutiny of special laws on constitutional principles would have led to different results.[35]

The abuse of the provisions allowing confessional statements to police officers to be proved during the trial has been well documented.[36] It became routine practice in terror cases to have extra-judicial confessions recorded from the accused and proved in court using these provisions. Upon trial, the accused would attempt to retract the confession relying on the argument that the same had not been made voluntarily. However, the accused would be required to show that the confession had been extracted involuntarily and not merely that he is retracting it as an afterthought. A retracted confession can otherwise be relied on by the Court to convict an accused, provided the Court is of the opinion that the confession was voluntarily made at the time it was recorded and upon

[34] K. Balagopal, *In Defence of India- Supreme Court and Terrorism*, 29(32) ECON. & POL. WKLY. 2054 (1994).
[35] The Supreme Court upheld the validity of § 49 of the POTA in PUCL, *supra*, note 31; A similar provision in the Prevention of Money Laundering Act, 2006, namely § 45, was struck down as being manifestly arbitrary in Nikesh Tarachand Shah v. Union of India, AIR 2017 SC 5500; Comparison between the Supreme Court's lack of scrutiny of provisions in anti-terror legislation and general Fundamental Rights adjudication has highlighted this inconsistency on the part of the Court *see* Mrinal Satish & Aparna Chandra, *Of Maternal State and Minimalist Judiciary: The Indian Supreme Court's Approach to Terror-related Adjudication*, 21(1) NLSIR 51 (2009).
[36] *Black Law and White Lies- A Report on TADA 1985-1995*, 30(18-19), ECON. & POL. WKLY. 977 (1995).

corroboration.[37] Therefore, the effects that an extra-judicial confession can have on the rights of the accused may go to the ultimate conclusion and adjudication of the trial itself.

The result of the provisions allowing police recorded confessions to become admissible is to place the accused effectively at the mercy of the police. This is exacerbated by the fact that pre-charge sheet custody under such laws is extendable to one hundred and eighty days, as compared to ninety days for the most serious IPC offences. If one believes that the right against self-incrimination is a fundamental principle of criminal law and that no accused may be denied it, the provisions as well as the application of these erstwhile terror laws is clearly problematic. However, because these laws were portrayed as specific and justified on the basis of policy, they withstood constitutional challenges, which perhaps a general amendment to the IEA could not have. In the process, they also dispensed with some vital safeguards for the accused persons. As previously discussed, there exists no theoretical justification to not treat terror offences under the general substantive criminal law. The only real goal that is therefore achieved by the use of these special terror laws, seems to be a successful circumvention of the procedural safeguards and the fundamental rights of the accused.

III. DAMNED IF YOU DO, DAMNED IF YOU DON'T: AN INFORMAL PLEA BARGAINING SYSTEM

Anti-terror legislation is notorious for the extinguishment of the right to bail of the accused pending investigation or trial. These legislations usually place restrictions on the powers of the Court to grant bail, which has added to the great taboo surrounding allegations of this nature in the first place. Often, mere allegations of indulging in terrorist activities are sufficient for Courts to deny bail, which results in long periods of incarceration pending trial, sometimes extending to many years.[38] There have been numerous cases, where the accused have finally been acquitted of the terror charges against them, but after having served more than ten years in prison as under-trials, merely because the right to bail was restricted. Further, Courts are generally averse to granting bail in such

[37] Subramania Gounden v. State of Madras, AIR 1958 SC 66.

[38] JAMIA TEACHERS' SOLIDARITY ASSOCIATION, FRAMED, DAMNED, ACQUITTED: DOSSIERS OF A VERY SPECIAL CELL, (New Delhi; Pharos, 2011); Indulekha Aravind, *Wrong arm of the law: 12 years in jail for terror crimes not committed*, THE ECONOMIC TIMES, 27th August, 2017, https://economictimes.indiatimes.com/news/politics-and-nation/wrong-arm-of-the-law-12-years-in-jail-for-terror-crimes-not-committed/articleshow/60237787.cms?from=mdr (last visited May 17, 2020).

offences, to begin with.[39] To reiterate the point, this is a direct result of considering these offences to be special and not general, and on a connected note, of making the provisions of general laws such as the CrPC inapplicable to them. This results in a gross miscarriage of justice and the violation of the rights of the accused.

The denial of bail to under-trials for long periods of custody is a direct violation of the right to life and liberty. It has also helped create a unique method of further exploitation of these under-trials. This is the system of informal plea bargaining or a change of plea during the trial. This system has been informally referred to in Hindi as "*Katti"*. Variations of this practice are now found across the country, in terror trials. An accused or a group of accused in a terror trial, who have typically undergone several years of custody as the proceedings drag on, will usually make an application before the Court under Section 265A of the CrPC, which pertains to plea bargaining. Since the provisions of plea bargaining under the CrPC only extend to offences, which are punishable with a maximum of seven years of imprisonment, and most terror offences are punishable with much higher sentences, this application would inevitably be rejected. Thereafter, the accused usually changes his plea from 'not guilty' claimed at the start of the trial to one of 'guilty'. In many cases, this leads to the trial being concluded at this stage, and the punishment is typically awarded as being the time already served as an under-trial, or a reduced sentence, which can range to several years.[40]

In recent years, there have been several cases that have reached verdicts through the method described above, and it remains an understudied and underreported phenomenon. Even when it does get coverage, the narrative does not count for the actual machinations that have been employed to achieve the result.[41] It is possible that such a change of plea during trial is only made when facilitated by the prosecution agency on the promise that it would not seek a greater sentence for the accused than what they have already undergone. A rationally-thinking accused person would choose to plead guilty when they see the prospect of being confined in prison for the foreseeable future while the trial drags on for years and the remotest possibility of a sentence of life imprisonment at

[39] § 43D(5), UAPA, *supra* note 5.

[40] Court sends ISIS men to jail for seven years in terror case, THE ECONOMIC TIMES, 13th July, 2018, https://economictimes.indiatimes.com/news/defence/court-sends-isis-men-to-jail-for-7-years-in-terror-case/articleshow/58295971.cms?from=mdr. (last visited May 17, 2020).

[41] *Four accused in Chinnaswamy blast case to confess*, THE HINDU, 4th July, 2018, https://www.thehindu.com/news/national/karnataka/four-accused-in-chinnaswamy-stadium-blast-case-to-confess/article24325262.ece. (last visited May 17, 2020).

the end of it. This practice also allows the investigative agencies to secure a conviction regardless of the quality of evidence in the given case.

Some inferences can be drawn from the practice of changing pleas in terror trials. At least one causative factor is the lack of bail that is granted to the accused during proceedings. An average trial from the stage of arrest to judgment may take several years and can be delayed easily by the tardiness of the prosecution in bringing forth its witnesses to Court. An accused typically spends many years in custody waiting for the trial to conclude, and agrees to the prospect of conviction with release as a better one than contesting the matter for several more years while being incarcerated. If an accused were to be granted bail, it is unlikely that such an incentive to plead guilty would exist.

Furthermore, under the CrPC, a change of plea does not necessarily mean that the Court may, in all cases, conclude the trial. The Court has to satisfy itself as to the clarity and specificity of the plea of guilt and has the discretion to insist on the completion of the recording of evidence and reach a verdict on the merits of the same.[42] However, it appears that both the prosecution and the defence reach some semblance of an agreement and certainty as to the likely outcome of this change of plea, and act accordingly. It would be irrational for an accused to take the risk of changing their plea to that of guilty unless they have been assured that they will not suffer additional imprisonment, which in most cases will be a life term, because of it. They would also need to have been assured that the trial would be concluded with their plea of guilt and not drag on with their plea also recorded. This raises questions as to what kind of arrangement is entered into informally between the parties prior to the change of plea.

The practice of change of plea midway during a terror trial is the cumulative effect of the unfairness of the procedure that is built into terror statutes. By denying bail to under-trials, these laws subvert an essential safeguard of the criminal justice system, which is to not punish unless a person has been proved guilty. Long incarcerations during trial effectively ensure that these accused persons are punished without convictions. Needless to say, the law gives statutory force to this mechanism and pushes an accused to bargain his right to a fair and full trial with that of a speedy conviction. At the level of the trial courts, where this practice occurs, this translates to a denial of rights.

[42] §§ 229, 241, 252, 254, CRIM. PROC. CODE; *see* State of Maharashtra v. Sukhdeo Singh, AIR 1992 SC 2100.

Ironically, one of the arguments used to justify the creation of special courts by special criminal laws has always been the need to conduct a speedy adjudication of guilt or innocence. This has been routinely invoked and accepted by the Supreme Court in constitutional challenges to these laws, such as in *Kartar Singh*. However, the narrative that emerges from this practice of informal plea bargaining is starkly different. It appears that not only are terror trials delayed to periods of several years but also that this delay, coupled with the lack of interim relief to the accused, leads to the success of the prosecution case in these cases. The machinations of these laws in trial courts are leading to a perhaps not foreseen but absolutely preventable destruction of the rights of the accused in such cases. This is over and above the extinguishment of the right to bail, which in itself is a violation of the fundamental rights. This phenomenon needs to be studied in greater detail, perhaps empirically, which is outside the scope of the present Article.

IV. REVERSE BURDENS OF GUILT

The last of the special features that shall be discussed in this Article, which have a direct bearing on the rights of the accused, is the use of reverse onus clauses. The general principle of criminal law is that an accused is presumed innocent until proven guilty.[43] This principle is universally recognised and incorporates within it the idea that the prosecution bears the burden of proof in a criminal trial to the standard of 'beyond reasonable doubt'. The development of this doctrine has been historical and is not discussed in this Article.

Reverse onus clauses, in the context of criminal law, are provisions of law, which, for certain specific facts, reverse the burden of proof onto the accused. Some examples may be taken from the IEA as well, which allows for certain facts to be proved by the accused. If the prosecution proves that a particular fact is specially within the knowledge of the accused, then the accused is under a burden to explain those facts, which he has special knowledge of.[44] Such a reverse onus clause requires the prosecution to first prove that a certain fact lies within the special knowledge of the accused and only then is the accused required to explain them. Therefore, there exists an initial burden on the prosecution to make the reverse onus clause applicable. It follows, therefore, that

[43] Andrew Ashworth, *Four Threats to the Presumption of Innocence*, 10, INT'L. J. EVIDENCE & PROOF, 241 (2006).
[44] § 106, IEA.

even when reverse onus clauses generally apply, they do not take away the entire burden from the prosecution and place it on the accused.

However, certain special legislations have made extensive use of reverse onus clauses to, in fact, reverse the entire burden of proof onto the accused and relieving the prosecution of any duty whatsoever. These provisions allow the Court to presume the guilt of the accused itself, imposing the burden on the accused to disprove guilt or prove innocence. Another novel application of the reverse onus clause is its use to reverse the burden of proof of 'facts in issue'.[45]

Seemingly benign legislation such as the POCSO Act incorporates such a provision in the statute. Section 29 of the law allows for the guilt of the accused to be presumed for certain offences if the accused is prosecuted for the same. This provision is in the teeth of all tenets of civilised criminal jurisprudence and the rights of the accused.[46] It merely requires that the accused be prosecuted for an offence, and his guilt would be presumed for the same. To deprive any accused of the rights of liberty following such a procedure would be unfair and would not amount to due process, which is concomitant of the guarantee under Article 21 of the Constitution of India.[47]

The Calcutta High Court has interpreted the provision to mean that the prosecution must establish the ingredients of the offence to a 'preponderance of probabilities' standard, as opposed to 'beyond reasonable doubt'. Part of the reasoning of the Court seems to be that absolving the prosecution from all burden would render the provision "*constitutionally suspect*".[48] One can, therefore say, that the provision, as it stands today, does cast some burden on the prosecution. However, the question of the standard of proof must also be confronted here. Unlike the provisions in the IEA, the reverse onus clause here attaches to the question of the commission of the offence itself, which is the ultimate fact in issue in a trial. It is a settled position of law that the burden on the prosecution to establish guilt in a criminal trial can never shift to the accused, and that burden must be satisfied to the standard of beyond reasonable doubt to sustain a conviction.[49] Even considering the Calcutta High Court's interpretation of the provision, the provision lowers the burden of proof on the

[45] The term 'facts in issue' is used here as it is defined in § 3 of the IEA, 1872.
[46] DEP'T-RELATED PARLIAMENTARY STANDING COMM. ON HUMAN RES. DEV., *supra* note 15, considers this provision to be similar to provisions in the IEA such as S.113A. As has been discussed, the presumptions under the IEA do not stand on the same footing, as they do not remove the entire prosecutorial burden in a case.
[47] Maneka Gandhi v. Union of India, AIR 1978 SC 597.
[48] Subrata Biswas v. State, 2019 SCC Online Cal 1815.
[49] Dahyabhai Chhaganbhai Thakker v. State of Gujarat, AIR 1964 SC 1563.

prosecution in an unacceptable manner in two ways, namely, by allowing a reverse onus clause on the question of commission and by lowering the standard of proof on the question of guilt.

Prior to the POCSO Act, another special criminal legislation, which allowed for the drawing of presumptions as to facts in issue during trial, was the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter "NDPS Act"). Specifically, Sections 35 and 54 of the Act allow for the Court to presume a culpable mental state of the accused and also to presume the commission of an offence under the Act, where possession has been proved respectively. The constitutionality of these reverse onus clauses was challenged in the case of *Noor Aga* v. *State of Punjab* (hereinafter "*Noor Aga*").[50] The Supreme Court upheld the constitutionality of these Sections while altering the standards of proof required to prove foundational facts to trigger the presumption. Therefore, the fact of physical possession would have to be proved by the prosecution beyond reasonable doubt, whereas the accused need not disprove it to such a standard. However, the burden on the defence was also held to be a persuasive one, and therefore, one may conclude that the presumed fact would have to be disputed to a preponderance standard.

Noor Aga's case is instructive to us on the kind of analysis that the Court entered into on the question of the constitutionality of reverse onus clauses. In essence, the Court's evaluation is based on proportionality, with it trying to balance the rights of the accused with the aim of the special legislation. Though fully accepting the status of the presumption of innocence as a human right and fairness as a cardinal virtue of the criminal process, the Court did conclude that such rights were subject to statutory exceptions. It has to be observed here that this trend of balancing the rights of an accused *vis-à-vis* the interests of the society as statutorily formulated, is often, if not always, tilted towards the curtailment of the accused's rights. This is so because this analysis is an acceptance of the argument that actuates special criminal legislation, namely that distinct social or national interests require their enactment and mandate their special provisions. The result is that to constitutional courts, these restrictions or curtailments of rights by legislation seem proportionate and reasonable, and are consequently upheld.

However, the NDPS Act would still stand on a different footing from the POCSO Act as regards the application of reverse onus clauses. This is because the presumptions under the former legislation would still require a foundational fact to be proved prior to the triggering of the

[50] Noor Aga v. State of Punjab, (2008) 9 SCALE 681.

presumption. Further, after *Noor Aga*, the standard of proof for the foundational fact is also the highest. No such safeguards exist under Section 29 of the POCSO Act, as has been explained earlier. Special legislations other than the POCSO Act also make use of reverse onus clauses although none of them as extensively and widely as the former legislation.

Section 43E of the UAPA allows the Court to presume the commission of an offence by the accused, if his fingerprints are found at the scene of the crime or on articles associated with the crime, or if similar arms or explosives that were used in an offence are recovered from the accused. Under ordinary criminal law, fingerprints of an accused at the scene of the crime would be a relevant fact that would indicate the presence of the accused at the spot. It would, however, be open to multiple interpretations. Mere presence at the scene of the crime does not by itself, following any rule of logic, prove the commission of the offence.

However, the UAPA allows for this leap of logic to take place under the guise of national security. Further, Section 43E(a) incentivises the investigation agency to ensure that recoveries and seizures of the explosives are made from the accused. Incidents of planting of fake evidence against the accused by the investigating agencies are not unknown. The recovery of explosives similar to those that were used in a criminal act would be an incriminating circumstance against the accused. However, it cannot, by itself, give rise to the presumption that the accused had, in fact, committed the said act. Such a presumption seriously affects the rights of the accused in the context of a criminal trial, which may have serious consequences for him.

The more fundamental question that needs to be asked in the context of the Indian criminal justice system is whether reverse onus clauses should be allowed to operate as to facts in issue in a criminal case. Should any criminal legislation give the courts the power to presume as opposed to inferring from the evidence, guilt? In such a context, reverse onus clauses need to be reassessed for their fairness.[51] It is not in doubt that special legislation is usually enacted to respond to what is perceived as great social challenges or to incidents that are considered to be extremely disruptive. However, the challenge of great threats to security or safety cannot be to respond by curtailing the very guarantees of liberty that are promised by the Constitution and truncating the rights of those, who may be the most affected by such laws. To allow the State to discharge its burden by the mere

[51] In the context of U.S. constitutional law and statutory presumptions *see* Note, *Constitutionality of Rebuttable Presumptions*, 55(4) COLUM. L. REV. 527 (1955); *See also* Peter D. Bewley, *The Unconstitutionality of Statutory Criminal Presumptions* 22(2) STAN. L. REV. 341 (1970).

act of an allegation or by the mere collection of some wholly inadequate evidence is to ensure that all citizens are rendered more vulnerable to misuse of such power.

CONCLUSION

This Article has endeavoured to highlight some of the challenges presented to the rights of the accused by special criminal legislations. The points raised here are not exhaustive and even those that are raised may be dwelt upon in much greater detail. However, the twin points that are made in this Article are that the theoretical justification for treating certain crimes as distinct and thus requiring special procedure or substantive laws is unfounded. Second, it has also endeavoured that the reader will find that in both the application as well as the statutory design of these special laws, the otherwise basic and inalienable rights of the accused are deliberately lost sight of, and are suppressed. Often, the justification for this subversion of the rights of the accused is the serious nature of the offences involved, which by itself is both inadequate as well as disingenuous. It can also be seen that this disregard of rights in the statutory design, leads to further violations in practice.

One may argue that any law need not address the situations of its misuse and that the points made in this Article only point to the misuse of these special laws, and therefore, my criticism of the statutes *per se* is unjustified. However, it can be pointed out here, that the laws that have been analysed are not merely those, which are prone to misuse but are designed for the particular kinds of misuse to be perpetrated.

A law which disregards the general prohibition on the recording of police confessions, and at the same time, also ignores the alternate provisions of the recording of confessions given to judicial officers, is not merely facilitating investigation but ensuring that confessions are only recorded before police officers, who have a direct interest in ensuring that a confession does come to be recorded. A law, which extinguishes the right of bail when the Court may feel that there is some evidence against an accused, has unjustified detention and incarceration built into its provisions – which is not the byproduct of any abuse but a well-designed mechanism. To such an extent, any defence of these laws, which is premised on this misuse argument, is misconceived.