

## CRITICAL ANALYSIS OF CONFESSION UNDER TADA AND POTA

Mr. S.G. Goudappanavar\*

---

### Introduction

The Terrorist and Disruptive Activities (Prevention) Act, 1987 and the Prevention of Terrorism Act, 2002 (commonly known TADA and POTA respectively) had made provisions to admit the confessions made by the accused before the police authorities.<sup>1</sup> A confession is an acknowledgement in express words, by the accused in a criminal case, of the truth of the guilty fact charged or of some essential part of it.<sup>2</sup> The Indian Evidence Act, 1872<sup>3</sup> (hereinafter the Evidence Act) provides that confession made before police authority or under police custody is inadmissible.<sup>4</sup> The policy is that substantive rule of law that confession whenever and wherever made to police, or while in the custody of the police to any person whomsoever unless made in the immediate presence of a Magistrate shall be presumed to have been obtained under the coercion or inducement.<sup>5</sup> Article 20(3) of the Constitution of India (hereinafter the Constitution) gives the privilege of right to silence to accused. If confession to police were allowed to be proved in evidence, the police would torture the accused and thus force him to confess to crime which he might not have committed. The nature of Indian police investigation is explained by Goswami, J., noted:

“The archaic attempt to secure confessions by hook or by crook seems to be the be-all and end-all of the police investigation. The police should remember that confession may not always be a short-cut to solution. Instead of trying to “start” from a confession they should strive to “arrive” at it. Else, when they are busy on their short-route to success, good evidence may disappear.”<sup>6</sup>

In view of the changed set-up since independence it was claimed by the police officers all over India that the police should be shown a

---

\* Associate Professor, S.C. Nandimath Law College, Bagalkot, Karnataka.

<sup>1</sup> TADA § 15; POTA § 32.

<sup>2</sup> WIGMORE, 3 EVIDENCE IN TRIALS AT COMMON LAW 821 (Wolters Kluwer (India) Pvt. Ltd., New Delhi).

<sup>3</sup> Act No. 1 of 1872.

<sup>4</sup> Indian Evidence Act, 1872 §§ 25, 26.

<sup>5</sup> M.C. SARAOKAR ET AL., 1 LAW OF EVIDENCE 436 (Wadhwa and Company Pvt. Ltd., Nagpur, 14th ed. 1993).

<sup>6</sup> Dagdu v. State of Maharashtra, (1997) 3 S.C.C. 93.

greater measure of confidence and statements or confessions made to the police should be admissible in evidence.<sup>7</sup>

Whether anti-terrorist laws which allow confession made before a police officer is admissible is violative of Articles 14 and 21 of the Constitution.<sup>8</sup> Even the confession of co-accused, abettor or conspirator who is tried in the same trial is made admissible under Section 15 of TADA. The apex court has held that anti-terrorist laws are based on a reasonable classification, yet its procedure must satisfy the doctrine of reasonableness under Article 21 of the Constitution. Another limb of *marginal ratio* is that a valid classification is no passport to oppressive or arbitrary procedure.<sup>9</sup> The procedure contemplated by Article 21 must be right and just and fair, and not arbitrary, fanciful or oppressive; otherwise, it would not be procedure at all; and the requirement of Article 21 would not be satisfied.<sup>10</sup> Whether a procedure which allows admission of confession made before a police authority could be claimed as arbitrary under Article 14 or unjust procedure under Article 21 is a million dollar question. True and voluntary confession is the highest sort of evidence.<sup>11</sup> No innocent man can be supposed ordinary to be willing to risk life or property by a false confession.<sup>12</sup> The leading author on evidence, Wigmore observed that a confession may be excluded under one condition that it is “testimonialy untrustworthy”. Further he rationalized the common law doctrine of confession in the following words:

“(a) A confession is not excluded because of any breach of confidence or of good faith which may thereby be involved ... (b) A confession is not excluded because of any illegality in the method of obtaining it ... (c) ... A confession is not rejected because of any connection with the privilege against self-crimination.”<sup>13</sup>

Wigmore cites also the dissent view expressed by American eminent scholar Professor Charles McCormick on law of evidence and quotes:

---

<sup>7</sup> LAW COMMISSION OF INDIA, REP. NO. 48, SOME QUESTIONS UNDER THE CODE OF CRIMINAL PROCEDURE BILL 1970, at 5; LAW COMMISSION OF INDIA, REP. NO. 69, REVIEW OF THE PROVISIONS OF THE INDIAN EVIDENCE ACT 1872, at 206; *also see supra* note 5, at 439.

<sup>8</sup> TADA § 15; POTA § 32.

<sup>9</sup> *In re Special Courts Bill*, 1978 A.I.R. 1979 S.C. 479, at 529.

<sup>10</sup> *In re Special Courts Bill*, 1978 A.I.R. 1979 S.C. 479, at 528; *Menaka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597.

<sup>11</sup> *Supra* note 5, at 364.

<sup>12</sup> WIGMORE, *op. cit. supra* note 2, at 826.

<sup>13</sup> *Id.* at 822.

“Certainly the right to be immune in one’s person from the secret violence of the police seems to be even more deserving of judicial protection than the constitutional immunity from searches and seizures... The reason for extending to the person from whom a confession has been wrung by torture, a similar privilege, whether the confession be true or false, is even stronger...”<sup>14</sup>

There are two schools of thought on admissibility of confession. One school proposes that truthful confession even though extracted by compulsion is always relevant because end (justice) justifies the means. The second school propagates that coercive confession is always irrelevant because end is not justified unless means employed to achieve justice is fair. Democratic countries which follow the rule of law more inclined towards latter school of thought than the former. Common law focuses more on truthfulness of confession rather than the means of obtaining it. On the other hand, United States of America’s (U.S.) legal system focuses more on the manner in which confession is extracted. Indian legal system has also followed the policy of U.S. system. Confession is result of competitive value. On one hand, efficient investigation of offence in the interest of society makes questioning of accused and getting information inevitable. On other hand, the zeal and powers of law enforcement officers may outrun their self-restraint and wisdom and accused may become victim of torture.<sup>15</sup>

Chief Justice Warren of the Supreme Court of America declared that the government may not use statement obtained from “custodial interrogation” of defendant unless it can show that his right against self-incrimination had been carefully secured by effective “procedural safeguard” that does not violate due process law. This proposition is known as Miranda Rule.<sup>16</sup> Before the interrogation, the police must warn the accused that he has right to remain silent. Secondly, accused must be informed that whatever statement he makes would be used against him. Thirdly, accused is entitled to engage counsel during such interrogation. These three conditions must be strictly complied or defendants must have waived these rights voluntarily, knowingly and intelligently; otherwise confession is inadmissible.<sup>17</sup> American federal statute provides that confession of accused is admissible unless it is given voluntarily.<sup>18</sup> Singapore legal system

---

<sup>14</sup> *Id.*

<sup>15</sup> LAW COMMISSION OF INDIA, REP. NO. 48, SOME QUESTIONS UNDER THE CODE OF CRIMINAL PROCEDURE BILL 1970, at 5.

<sup>16</sup> *Miranda v. Arizona*, (1966) 384 U.S. 436; *Escobedo v. Illinois*, (1964) 378 U.S. 478.

<sup>17</sup> LAW COMMISSION OF INDIA, REP. NO. 69, REVIEW OF THE PROVISIONS OF THE INDIAN EVIDENCE ACT 1872, at 196.

<sup>18</sup> 18 U.S.C. § 3501 (a) & (b).

which virtually follows Indian legal system has empowered the sergeant-level officers to record the confession.<sup>19</sup>

The Malimath Committee on Reformation Criminal Justice System observed that Section 25 of the Evidence Act deprives the investigation agency of valuable piece of evidence in establishing the guilt of the accused.<sup>20</sup> Therefore recommended that Section 25 of the Evidence Act may be amended to accommodate the confession recorded by the police officer not below the rank of Superintendent of Police is admissible.<sup>21</sup> Professor Glanville Williams quotes the Bentham's strong criticism of right to silence that "one of the most pernicious and most irrational notions that ever found its way into the human mind".<sup>22</sup> Further he quotes: "Innocence never takes advantage of it; innocence claims the right of speaking, as guilt invokes the privilege of silence." Bentham questions the rationality of exempting the confession made before the police because the same confession either written on a document or conversations of such confession heard by any witness is not exempted from furnishing the evidence. Thus Bentham said: "What the technical procedure rejects is his own evidence in the purest and most authentic form; what it admits is the same testimony, provided that it be indirect, that it have passed through channels which may have altered it, and it be reduced to the inferior and degraded state of hearsay."<sup>23</sup>

The Law Commission of India's 14th Report and 48th Report suggested that confession before high ranking officer should be made admissible in the light of changed value of Indian police.<sup>24</sup> However, in *Nandini Satpathy v. P.L. Dani*<sup>25</sup> the Supreme Court spoke through Justice Krishna Iyer as follows:

---

<sup>19</sup> MALIMATH COMMITTEE REPORT, VOL. 1, COMMITTEE ON REFORM OF CRIMINAL JUSTICE SYSTEM 122 (Minster of Home Affairs, Government of India 2003).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 123.

<sup>22</sup> Right to silence justified on the ground that to try to get an accused person to give evidence against himself was not playing the game; it was hitting below the belt, or hitting a man when he was down. Bentham criticizes this philosophy which has led to evil result because it hindered the conviction of guilt. Further he said it neglected the immediate interest of society that dangerous criminals should not be left free. When guilty is acquitted, the society is punished; see GLANVILLE WILLIAMS, *infra* note 23, at 49-52.

<sup>23</sup> GLANVILLE WILLIAMS, THE PROOF OF GUILT 52 (Stevens & Sons Ltd., London, 3rd ed. 1963).

<sup>24</sup> LAW COMMISSION OF INDIA, REP. NO. 14, VOL. 2, THE REFORMATION OF JUDICIAL ADMINISTRATION, at 748; *supra* note 15, at 5.

<sup>25</sup> *Nandini Satpathy v. P.L. Dani*, A.I.R. 1978 S.C. 1025.

“The first is that we cannot afford to write off the fear of police torture leading to forced self-incrimination as a thing of the past. Recent Indian history does not permit it; contemporary world history does not condone it.”

The Supreme Court in *Karatar Singh v. Union of India*, considered the constitutional validity of Section 15 of TADA. Senior advocate Ram Jethmalani made a scathing attack on Section 15 which overrides the century old existing Evidence Act and the Code of Criminal Procedure, 1973 (Cr.P.C.) as atrocious and totally subversive of any civilized trial system and such confessions are untrustworthy. Confession before police is either affected by coercion or inducement. Confessions recorded in mechanical devices by police are certainly inferior to confession recorded by Magistrate in open court with safeguard provided in the statute. Further as such mechanical devices enable selective recording, tampering, tailoring and editing, confessions recorded using mechanical devices are not reliable. If the confession of a co-accused that accused has committed offence is proved, presumption shall be drawn by Designated Court that the accused has committed offence unless the contrary is proved.<sup>26</sup> Confession of co-accused is a weak type of evidence because it is not taken on oath, not in the presence of accused, and such confession is not subjected cross-examination.<sup>27</sup> Section 30 of the Evidence Act suggests that confession of the co-accused may be considered by the court but it does not amount to proof, there must be some other evidence to prove it.<sup>28</sup> Therefore, Ram Jethmalani argued that TADA which has made confession of the co-accused as substantial evidence is a discriminatory and unjust procedure.

On the other hand, Additional Solicitor General argued that Section 15 of TADA merely provides that confession is admissible but does not say anything about its probative value and leaves it to the court to decide it. Moreover it is a well-established doctrine that court could act upon only voluntary confessions. Therefore procedure of Section 15 is well within parameter of just and reasonable. In *Gurbachan Sing v. State of Bombay*,<sup>29</sup> it was noted that a law which contains an extraordinary procedure can be made to meet the exceptional circumstances otherwise the purpose and object of the Act would be defeated. The Court took the note of National Police Commission Report which reported that the police are at the greater

---

<sup>26</sup> TADA § 21(1)(c).

<sup>27</sup> *Bhuboni Sahu v. King*, 1949 P.C. 257; *Hari Charan Kurmi & Jogia Hajam v. State of Bihar*, A.I.R. 1964 S.C. 1184.

<sup>28</sup> *Kashmir Sing v. State of Madhya Pradesh*, A.I.R. 1952 S.C. 159; *Nathu v. State of U.P.*, A.I.R. 1956 S.C. 56.

<sup>29</sup> *Gurbachan Singh v. State of Bombay*, A.I.R. 1952 S.C. 221.

disadvantage compared to other investigation agencies which are empowered to take confession.<sup>30</sup> Further it cannot be denied that greater vigilance is exercised over the behaviour of police by the vibrant media, public and there is a greater awareness of the rights of individuals. Morality of police is also changed over the last hundred years. Under such circumstances small step like making statement by accused before police admissible in evidence before court is a progressive step.<sup>31</sup>

Law Commission of India's 185th Report presents different picture of police. It stated that: "In the last three decades, as revealed from the media and innumerable law reports of the Supreme Court and High Courts, police conduct appears to have deteriorated rather than improving from what it was years ago".<sup>32</sup> Therefore it rejected the suggestion made by the 48th and 69th Reports of the Law Commissions of India. Even National Judicial Commission also expressed displeasure over the conduct of the police who regularly tortures accused in their custody to get quick results.<sup>33</sup> The Hon'ble Supreme Court acknowledged brutality, atrocity, barbaric, and inhuman treatment adopted by the police over the accused and held that confession extracted by means of third degree, torture and atrocity is inadmissible.<sup>34</sup>

On the other hand, Additional Solicitor General sighted that in United States of America,<sup>35</sup> United Kingdom,<sup>36</sup> and Australia have accommodated the confession before the police as admissible and courts have upheld the legal competence of the legislature to make law prescribing a different mode of proof. In terrorism cases the victims as well as public are reluctant to give evidence because of risk to their life. Therefore the impugned Section 15 cannot be said to be suffering from any vice of unconstitutionality.<sup>37</sup>

The Court held that Section 15 is not violative of Articles 14 and 21 after taking into consideration deletion of Section 21(1)(c) of TADA, probative value of the confession of the co-accused is now similar to

---

<sup>30</sup> The Railway Protection Force Act, 1957 § 12; the Customs Act, 1962 § 108; the Railway Property Unlawful Possession Act, 1996 §§ 8, 9-empowers the authority to record the confession of accused.

<sup>31</sup> NATIONAL POLICE COMMISSION, REP. NO. 4 (1980).

<sup>32</sup> LAW COMMISSION OF INDIA, REP. NO. 180, ARTICLE 20(3) OF THE CONSTITUTION OF INDIA AND RIGHT TO SILENCE, at 127.

<sup>33</sup> NATIONAL JUDICIAL COMMISSION, REP. NO. 4.

<sup>34</sup> Kartar Singh v. State of Punjab, (1994) 3 S.C.C. 569, at 679.

<sup>35</sup> *Supra* note 16.

<sup>36</sup> The Terrorism Act, 2000 § 76-is applicable to Northern Ireland, says that any relevant admission made by the accused is not excluded by mere fact that accused was subjected to torture, inhuman, or degrading treatment.

<sup>37</sup> *Supra* note 34, at 680.

the one under Section 30 of the Evidence Act, the fact that people are not coming forward to give evidence in terrorist related cases, that the authority to take confession is vested in higher officer, and that the strict rules required to be complied with for taking confession ensure true and voluntary confession.<sup>38</sup> The Court's decision is justifiable in the light of things that happened in the Jammu and Kashmir (J&K) and Punjab where the witnesses never came forward to give evidence against the terrorists.<sup>39</sup> However the Court set certain guidelines to ensure fairness of recording true and voluntary confession and suggested the central government to accommodate these guidelines by making appropriate amendments to the Act and the Rules.<sup>40</sup>

- i.** The confession should be recorded in a free atmosphere in the same language in which the person is examined and narrated.
- ii.** The accused must be produced before the Chief Judicial Magistrate to whom the confession is required to be sent without any unreasonable delay after making such confession before police along with recoded confession on mechanical devises.
- iii.** The Chief Metropolitan Magistrate or the Chief Judicial Magistrate should record the statement of accused, if any allegation of torture and get signature on such complaint. The accused should be immediately sent to a medical officer not lower in rank than Assistant Civil Surgeon for examination.
- iv.** Notwithstanding anything contained in Cr.P.C. no police officer below the rank of Assistant Commissioner of Police or Deputy Superintendent of Police should investigate any offence punishable under the TADA.

---

<sup>38</sup> *Id.*

<sup>39</sup> LAW COMMISSION OF INDIA, REP. NO. 173, *on* PREVENTION OF TERRORISM BILL, 2000, at 60. Shri Veeranna Aivalli, who was commissioner of security of aviation in J&K wrote letter to Law Commission of India, stating that: "Our experience of TADA that in J&K has not been good. There has not been a single case, which has been decided by the court of law. The difficulties encountered have been with regard to the non-availability of witness to testify in the courts of law on account of fear and reprisal. There is another difficulty and that is the collection of evidence in cases where the search, seizure and arrest in areas where there is no habitation... In such a case, the arrested person's confession to the security forces leading to recovery of arms and ammunition and explosive is the only thing, which can be bought on record. Even the security force personnel do not come forward for tendering evidence because they keep on moving from one place to another for performance of their duties not only within J&K but even outside J&K and some time outside India... In the last 15 years of militancy in J&K, thousands of people have been arrested, lakhs of weapons seized and millions of rounds collected and quantities of explosive materials seized. These figures are real eye openers and the fact that not a single case has ended in conviction nor has there been any recording of evidence."

<sup>40</sup> *Supra* note 34, at 682.

- v. The police officer who seeks police custody of accused form judicial custody for interrogation should file affidavit with reasons for such custody.
- vi. Before the interrogation of the accused, the police officer should warn the accused that he is not bound to make confession and if he does so, the said confession may be used against him as evidence. On the other hand, if the accused asserts his right to silence the police officer must respect that right without compelling accused to make statement.

The Court should have made the recording of the confession in mechanical device along with recording in writing mandatory because mere recording of confession in writing would certainly gives more scope for abuse of police power. Another ambiguity is that the Court did not say anything about the consequences of non-compliance of these guidelines.<sup>41</sup> The same deficiency is carried even in POTA also.<sup>42</sup>

Tragedy of these guidelines which are meant for fair trial and ensuring true and voluntary confession is that they are never incorporated into either the Rules or the Act. Law Commission of India suggested that presence of defendant's advocate is mandatory in case confession is recorded by an officer, who is lower in rank than Superintendent of Police, and in other cases, presence of advocate is optional and the same has to be decided by the accused.<sup>43</sup> Had the Law Commission of India made the presence of advocate mandatory in both situations it would have been more appropriate and would certainly have reduced the scope of involuntary confessions? However, Justice Pandian, failed to take note of this important suggestion made by the Law Commission of India. Further, the Court should have interpreted the word "mechanical device" to mean only camera and not other mechanical devices because camera provides means to determine the voluntariness of confession by recording it live. Further the burden of proof that confession is voluntary should have been put on prosecution rather than putting the burden of proof that confession is involuntary on the accused. Obviously it is very difficult for accused to prove it because things have happened inside the four walls of the police station and no one was there to hear his cry.

Nevertheless, Justice Ramswamy K., who delivered the dissenting judgment, said that even though high ranking officers are presumed to have exercised the power in accordance with law yet unlike an

---

<sup>41</sup> Lal Singh v. State of Gujarat, A.I.R. 2001 S.C. 431.

<sup>42</sup> POTA § 32-was silent on the consequences of non-compliance of *proviso* related to manner in which confession was recorded.

<sup>43</sup> *Supra* note 17, at 206-207.



independent agency, the power of police from which suspicion least generates is called civilized procedure.<sup>44</sup> If once this power is allowed, further, they may claim other judicial powers in cases of lesser crisis and it may be normalized in grave crass. Therefore such erosion is anathema to the rule of law, unfair, unjust, and unconscionable and offends Articles 14 and 21 of the Constitution.<sup>45</sup> Justice Ramaswamy's logic is unfounded because merely on the premises of slippery slope that it is likely to lead to subversion of judiciary no rule can be declared unconstitutional unless supported by facts.

Justice Sahai who also delivered separate dissenting judgment and held that unlike British police, Indian police officer is trained to achieve the result irrespective of the means they employed. Indian police requires drastic changes in the outlook and culture. Therefore Section 15 of TADA is violative of Articles 14 and 21 of the Constitution. Justice Sahai's reasoning is in tune with majority judgment because Justice Pandian is ready to trust the police reformation; but Justice Ramswamy is not unless police are reformed. If confession made before the police is made admissible naturally the outlook and culture of police will change because any evidence of torture would result in rejection of such valuable evidence which would put the clock back again. Gradually it may build up some kind of discipline in police which is good in long run.

Certainly the majority judgment appears to be more logical, rational and practical and in tune with our legal system. All the suggestions made by the Supreme Court in *Kartar Singh* about confession were incorporated in Section 32 of POTA. In the POTA<sup>46</sup> case petitioner argued that when confessed accused has to be produced before Judicial Magistrate within forty eight hours from making such confession, then it can be done before the Judicial Magistrate himself. Therefore where is the necessity of empowering the police to record the confession? Justice Rajendra Babu replied that it is matter of policy and domain of Parliament to decide which confession is admissible as long as it is in tune with the Constitution.<sup>47</sup> Further the Court held that POTA has provided additional safety of producing confessed accused before Judicial Magistrate. Duty caste upon the Magistrate to record complaint of any torture by the police and send him to medical examination, makes the provision of confession fair, just and not violative of the Constitution.<sup>48</sup> However the Unlawful Activities (Prevention)

---

<sup>44</sup> *Supra* note 34, at 727.

<sup>45</sup> *Id.*

<sup>46</sup> *People's Union for Civil Liberties v. Union of India*, A.I.R. 2004 S.C. 456.

<sup>47</sup> *Id.* at 478.

<sup>48</sup> *Id.*

Amendment Act, 2008 (35 of 2008) (commonly known as UAPA) restored the normal status of confession of accused as under the Evidence Act.

### **Use of confession obtained under anti-terrorist laws against offences committed under ordinary laws is arbitrary and unjust procedure**

TADA and POTA had empowered the police officer to extract confession.<sup>49</sup> Further the Designated Court was empowered to try any other offence committed by accused under any other laws along with terrorist offences.<sup>50</sup> The crucial question is, can a confession obtained under TADA be used against other offences committed by the accused. The Supreme Court in *Bilal Ahmed Kaloo v. State of A.P.* held that once accused is acquitted from the offence under TADA, there is no question of looking confession for other offences.<sup>51</sup> It means that confession extracted under TADA can be used against accused for other offences only when accused is convicted for terrorist offence otherwise not that interpretation is harmonious with the object TADA that says an act to make special provisions for terrorist offences and matters connected therewith or incidental thereto. Nevertheless, the three-judges bench of the Supreme Court in *State of Tamil Nadu, v. Nalani*<sup>52</sup> *per curiam* overruled the *Bilal Ahmed Kaloo ratio*. Justice Thomas K. observed:

“The correct position is that the confession statement duly recorded under Section 15 of TADA would continue to remain admissible as for the other offence under any other law which too were tried along with TADA offences, no matter that the accused was acquitted of offences under TADA in that trial.”<sup>53</sup>

---

<sup>49</sup> TADA § 15(1)-prescribed that notwithstanding anything in the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872, the police officer not below the rank of Superintendent of Police recorded confession of the accused either in writing or mechanical device shall be admissible in the trial of such person for an offence under this Act or rules made thereunder; *also see* POTA § 32(1).

<sup>50</sup> TADA § 12(1)-provided that: “When trying any offence, a Designated Court may also try any other offence with which the accused may, under the Code, be charged at the same trial if the offence is connected with such offence.” TADA § 12(2)-says that: “If, in the course of any trial under this Act of any offence, it is found that the accused person has committed any other offence under this Act or any rule made thereunder or under any other law, the Designated Court may convict such person of such other offence and pass any sentences’ authorized by this Act or such rule or, as the case may...”; *also see* POTA § 26.

<sup>51</sup> *Bilal Ahmed Kaloo v. State of A.P.*, (1977) 7 S.C.C. 431.

<sup>52</sup> *State of Tamil Nadu v. Nalani*, A.I.R. 1999 S.C. 2640.

<sup>53</sup> *Id.* at 2663.

The Court virtually followed the literal interpretation of Section 12(2) of TADA without taking into the consideration of ramification of such interpretation. The use of confession obtained under TADA for other offences committed by accused is appreciable where the accused is convicted for terrorist offences also along with other offence. But it is hard to digest other way, where accused is acquitted for terrorist offences and making use of such confession against other ordinary offence is undoubtedly unjust procedure. This kind of interpretation creates rift between the Indian Penal Code, 1860 (IPC) and the Evidence Act one side, and TADA on the other side. That means the confession which is inadmissible under Sections 25 and 26 of the Evidence Act for ordinary offence under IPC becomes admissible under Section 15(1) read with 12(2) of TADA.

The Supreme Court's interpretation tends to encourage the police to just add any provision of TADA to the charge sheet of the accused, get the confession from accused and make use of that confession against other offences to convict accused. It encourages the police to do indirectly what cannot be done directly. That is why, the Supreme Court in 1990 itself, cautioned the police against this kind of practice because anti-terrorist laws visit the accused with serious penal consequences.<sup>54</sup> Rational interpretation suggests that: "[W]here the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconveniences or absurdity, hardship or injustice, presumably not intended by the legislature."<sup>55</sup> A two-judge bench of the Supreme Court, in *Gurprit Singh v. State of Punjab*, declined to follow the *ratio decidendi* of *Nalani* but endorsed the *Bilal Ahmed* case and held that unless the accused is convicted under TADA provisions, the confession recorded under TADA provisions cannot be used against accused to convict him for murder under IPC.<sup>56</sup> However, a constitutional bench of the Supreme Court in *Prakash Kumar v. State of Gujarat*, finally held that confession recorded under TADA can be used against accused for other offences notwithstanding accused is convicted or not under TADA.<sup>57</sup> The confession provision has not found place in the UAPA. Nevertheless, the interpretation of *Nalani* and *Prakash Kumar* cases needs to be re-

---

<sup>54</sup> *Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijja*, A.I.R. 1990 S.C. 1962, at 1968.

<sup>55</sup> MAXWELL, THE INTERPERTATION OF STATUE 221 (P.St.J. Langan ed., N.M. Tripathi Pvt. Ltd., New Delhi, 12th ed. 1962) *approved in* *Tirath Singh v. Bachittar Singh*, A.I.R. 1955 S.C. 830, at 835; *State of M.P. v. Azad Bharat Finance Co.*, A.I.R. 1967 S.C. 276, at 278; *Molar Mal v. Kay Iron Works Ltd.*, A.I.R. 2000 S.C. 1261, at 1266.

<sup>56</sup> *Gurprit Singh v. State of Punjab*, A.I.R. 2002 S.C. 2390.

<sup>57</sup> *Prakash Kumar v. State of Gujarat*, (2005) 2 S.C.C. 409, at 422-23.

examined because they are not in tune with the due process law under Articles 14 and 21 of the Constitution.

### **Immaturity of judiciary in evaluating co-accused confession**

After the deletion of clauses (c) and (d) of Section 21(1) of TADA by the Parliament, Justice Pandian observed in *Kartar Singh*<sup>58</sup> case that the value of the confessional statement of the co-accused is similar to that under Section 30 of the Evidence Act.<sup>59</sup> Confession of the co-accused in true sense is not an evidence but it can be used for corroboration other evidences.<sup>60</sup> A two-judge bench in *Kalpanath Rai v. State (Through CBI)* speaking through Justice Thomas held that the evidentiary value of the confession of a co-accused under Section 15 of TADA is similar to that under Section 30 of the Evidence Act and this ruling is in conformity with Justice Pandian's reasoning in *Kartar Singh* case.<sup>61</sup> It means that the confession of a co-accused against others is not substantive evidence but has only corroborative value. In *State of Tamil Nadu v. Nalani*, Shri Altaf Ahmad, Additional General Solicitor of India pleaded that the non-obstante clause in Section 15(1) of TADA ("notwithstanding anything contained in the Code or Evidence Act") is a clear indication of the legislative intent to treat the confession of a co-accused as substantive evidence against others. Therefore *ratio* of *Kalpanath Rai* needs to be reconsidered. Justice Wadhwa and Quadri agreed with Additional General Solicitor of India and held that confession of co-accused is substantive evidence against others and there is no room to import the requirement of Section 30 of the Evidence Act in Section 15 of TADA 87.<sup>62</sup> Hence, *ratio* of *Kalpanath Rai* case is overruled. Reasons cited for arriving at this conclusion that the confession of a co-accused is substantive evidence, however, do not necessarily mean that it is qualitative evidence and as a matter of prudence, the court may look for some corroboration if such confession is to be used against a co-accused.<sup>63</sup>

The Court itself was in confusion; on the one side it admitted that confession of the co-accused is substantive evidence, while on the other side it cautioned that the confession needs to be corroborated by other evidence which is to be qualitative. The word "substantive"

---

<sup>58</sup> *Supra* note 34, at 780.

<sup>59</sup> The Indian Evidence Act § 30-provides that when co-accused persons are tried jointly for the same offence, any confession of co-accused may be considered against others.

<sup>60</sup> *Bhuboni Sahu v. The King*, A.I.R. 1949 P.C. 1257; *Kashmir Sing v. State of Madhya Pradesh*, A.I.R. 1952 S.C. 159; *Nathu v. State of U.P.*, A.I.R. 1956 S.C. 56.

<sup>61</sup> *Kalpanath Rai v. State (Through CBI)*, (1977) 8 S.C.C. 732, at 754.

<sup>62</sup> *Supra* note 52, at 2732 and 2847.

<sup>63</sup> *Id.*

itself indicates that it is qualitative evidence and no need to be corroborated by other evidences. That is why convictions proceeding merely on the confession which is voluntary and truthful against makers are justified.<sup>64</sup> Therefore apex court in *Kartar Singh* rightly held that confession of a co-accused is not substantive but subject to the provisions of Section 30 of the Evidence Act. Another noteworthy point is that neither the *ratio* of *Kartara Singh* case which was decided by five-judges' bench was cited nor distinguished. Thus *ratio* of *Nalani* case is *per incuriam*.

Now the question is, whether confession of a co-accused should be corroborated by independent evidence or by another co-accused's confession. Fairness of justice demands that such confession should be corroborated by independent evidence rather than by another co-accused confession. Nevertheless, the Supreme Court in *Jamel Ahamed v. State of Rajasthan* thought otherwise and held that confession of one co-accused can be corroborated by confession of another co-accused.<sup>65</sup> It can be said without second thought such procedure transgresses the due procedure because TADA tends to be very-harsh and drastic.<sup>66</sup>

The Supreme Court in series of cases<sup>67</sup> followed the *ratio* of *Nalani* case in respect of confession of co-accused against others as substantive evidence and no attempt was made by any lawyers of the accused to convince the court that *ratio* of *Nalani* was *per incuriam* and that the *ratio* of *Kartar Singh* was right. POTA did not contain any specific provisions in respect of confession of co-accused. However Section 32 (1) of the POTA starts with: "Notwithstanding anything contained in the Code or in the Indian Evidence Act, 1872..." In *Indian Parliament Terrorist Attack* case,<sup>68</sup> an attempt was made to convince the Court that confession of co-accused is still applicable with equal force against others because Sections 25, 26 and 30 of the Evidence Act are not applicable to Section 32 of POTA, and therefore, confession of accused can be used against himself as well as against others. Justice Venkatarama Reddi who delivered judgment rejected that attempt and held that: "[T]he language of the section cannot be stretched so as to bring the confession of the co-accused within the fold of admissibility."<sup>69</sup>

<sup>64</sup> Davendra Pal Singh v. State N.C.T. of Delhi, A.I.R. 2002 S.C. 1661; Sahib Singh v. State of Haryana, (1997) 7 S.C.C. 231.

<sup>65</sup> Jamel Ahmed v. State of Rajasthan, A.I.R. 2004 S.C. 588, at 603.

<sup>66</sup> *Supra* note 34, at 653.

<sup>67</sup> Bharati Bhai *alias* Jimi Premchandbhai v. State of Gujarat, (2002) 8 S.C.C. 4471; S.N. Dube v. N.B. Bhoir, A.I.R. 2000 S.C. 776; Lal Singh v. State of Gujarat, A.I.R. 2001 S.C. 746; Jamel Ahmed v. State of Rajasthan, A.I.R. 2004 S.C. 588.

<sup>68</sup> State (N.C.T. of Dehli) v. Navjot Sandhu, A.I.R. 2005 S.C. 3820.

<sup>69</sup> *Id.* at 3853.

## Supreme Court's strict guidelines for procedural norms of recording confession are sidelined

The Supreme Court had suggested additional guidelines to ensure free, fair and voluntary recording of confessions which have to be strictly complied with while recording the confession.<sup>70</sup> Those guidelines should have been incorporated either in Rules or TADA itself as desired by the Supreme Court; but unfortunately that did not happen.<sup>71</sup> These guidelines were silent on the point of validity of confessions that have been recorded in breach of these guidelines. Nevertheless Section 32 of POTA incorporated those guidelines of Supreme Court but *casus omissus* continued to exist in respect of the validity of confession recorded without complying with the provision relating to the recording the confession. In *S.N. Dube v. N.B. Bhoir*, the Supreme Court solved this problem to some extent by holding that the confession recorded in breach of Rules 15(2)<sup>72</sup> and (3)<sup>73</sup> of the TADA Rules is inadmissible.<sup>74</sup> It is substance, not the formality is vital for deciding the validity of confession. Further, Court held that even in *Kartar Singh's* case itself it is not suggested that if the guidelines are not complied the confession is said to be inadmissible.<sup>75</sup>

A two-judge bench in *Lal Singh v. State of Gujarat*<sup>76</sup> held contrary to the *ratio* of *Kartar Singh*, and reduced the nature of entire guidelines to mere directory than mandatory. In the present case accused challenged the validity of confession on the ground that he was kept in police custody for five days after making confession therefore his confession inadmissible in the light of *Kartar Singh's* guidelines. Justice Shah, speaking through the Court observed that these guidelines were neither incorporated in the Rules nor in the Act; therefore it would be difficult to accept the contention that non-compliance of these guidelines leads to inadmissibility of confession.<sup>77</sup> It is not debatable that all the rules of recording

---

<sup>70</sup> *Supra* note 34, at 682.

<sup>71</sup> *Id.*

<sup>72</sup> Rule 15(2) prescribed that police officer must explain the accused that he is not bound to make confession and if he makes it will be used against him, police officer shall not record confession unless he has reason to believe that he is making confession voluntarily.

<sup>73</sup> Rule 15(3) stated that confession is signed by the accused, police officer certify in his own handwriting that confession is recorded in his presence and recorded by him and records contains a full and true account of the confession, and such officer shall make memorandum at a the end of confession to the effect of above conditions and confession is read over to the accused and he admitted that it is true.

<sup>74</sup> *S.N. Dube v. N.B. Bhoir*, A.I.R. 2000 S.C. 776, at 794.

<sup>75</sup> *Id.*

<sup>76</sup> *Lal Singh v. State of Gujarat*, A.I.R. 2001 S.C. 431.

<sup>77</sup> *Id.* at 757.

confession carry equal weight. But nonetheless some of the rules which touch conscience of justice are very vital and such rules should be held mandatory.<sup>78</sup>

This interpretation is erroneous. Those guidelines are not *obiter dicta* but *ratio decidendi* and even though they are not incorporated in statute, still by virtue of Article 141 of the Constitution they have to be respected as law by all courts including the Supreme Court until they are overruled by a larger bench. Undoubtedly the *ratio* of *Lal Singh v. State of Gujarat* is *per incuriam*. In *Devendra Pal Singh v. State of N.C.T. of Delhi*,<sup>79</sup> the police authorities added their own sentences to the confession of the accused which was admitted by court. Nevertheless the Court following the rule of evidence that officials are presumed to discharge their functions honestly<sup>80</sup> held that mere irregularities in recording confession do not make the confession inadmissible.<sup>81</sup> The Supreme Court should not have admitted such confession the contents of which were manipulated by the authorities.

## Conclusion

Confession is the best and qualitative evidence among all the evidence which prosecution can possibly produce before the court. Great utilitarian Jeremy Bentham's two simple propositions would better explain the justification of confession: one, that every person is the best judge of his own interest; the other that no man will consent to what he thinks hurtful to himself.<sup>82</sup> It means that no sane accused will make statement against himself unless it is true. There are two schools of thought on admissibility of confession. One school proposes that truthful confession even though extracted by compulsion is always relevant because end (justice) justify the means. Second school propagates that coercive confession is always irrelevant because ends are not justified unless employed means to achieve justice are fair. Democratic countries based upon the rule of law more inclined towards latter school of thoughts than former.

---

<sup>78</sup> Suggestions regarding recording the confession in the language of accused, taking signature of accused, producing accused before Magistrate, taking complaint of police torture and sending accused to judicial custody.

<sup>79</sup> *Devendra Pal Singh v. State N.C.T. of Delhi*, A.I.R. 2002 S.C. 1661.

<sup>80</sup> The Indian Evidence Act § 114(e)-mentioned as general presumptions of law illustrating maximum: that a man, in fact acting in a public capacity, was properly appointed and is duly authorized so to act, that in the absence of proof to the contrary, credit should be given to public officers who have acted prima facie within the limits of their authority, for having done so with honesty and discretion.

<sup>81</sup> *Supra* note 79, at 1667.

<sup>82</sup> JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 164 (N.M. Tripathi Pvt. Ltd., Bombay, 1995).

Admissibility of confession is the result of competitive value between the right of accused that no person is punished on forced extracted confession even though the confession is true and right of society that no undeserved person should be acquitted merely on the basis of his right to silence. American and Indian Constitutions have explicitly provided the right to silence to accused.<sup>83</sup> Protection against forced self-incrimination is the product of due process concept of common law. This is mere privilege of accused who can waive it. Further, he can make voluntarily confession which does not violate the accused right to silence because it does not involve the element of compulsion. Therefore the voluntary confession is always made admissible under the Evidence Act and Cr.P.C.<sup>84</sup>

The only question investigating authority raises is that why there is general ban on the admissibility of confession made before us by an accused without considering the basic element of voluntariness of confession which is arbitrary and offends due process. Sections 25 and 26 of the Evidence Act attaches social stigma to all Indian police that they are untrustworthy to be believed in respect of extraction of confession. The irony is that the presumption which law has made that Indian police have extracted confession under coercion or reward is conclusive and even not made rebuttable in appropriate case is the bone of contention. It is un-debatable fact that no confession affected by coercion against the conscience of justice is admissible. But every confession of accused before police is subjected to that presumption without providing an opportunity to police to prove that confession was voluntary one is harsh and unjust. The law is heavily loaded in-favour of accused and even not balanced also. Look at the right to silence which is so rigorously protected by law even the prosecution is not allowed to prove the adverse inference where accused is refused to answer the question of police on the premises of his right to silence.

The 18th and 19th century societies were founded on high moral ethical value which led to the invention of doctrine that accused is presumed to be innocent until guilt is proved. Further, it invented another doctrine that *nemo tenebatur prodere seipsum* which is in the form of right to silence.<sup>85</sup> It means fault of accused was not wrung out

---

<sup>83</sup> US CONST. amend. V-provides that: "No person....shall be compelled in any criminal case to be a witness against himself..." US CONST. amend. XIV-states that: "...nor shall any State deprive any person of life, liberty, or property, without due process of laws..." INDIA CONST. art. 20(3)-states: "No person accused of any offence shall be compelled to be witness against himself."

<sup>84</sup> The Code of Criminal Procedure, 1973 § 164-empowers the either Metropolitan Magistrate or Judicial Magistrate to record the confession of accused who is in the custody of police and expressed his desire to make voluntary confession.

<sup>85</sup> WILLIAMS, *op. cit. supra* note 23, at 37.



himself but rather to discovered by other means and other men.<sup>86</sup> Professor Glanville Williams quotes the Bentham's strong critic of right to silence that: "[O]ne of the most pernicious and most irrational notions that ever found its way into the human mind".<sup>87</sup> Further he quotes: "Innocence never takes advantage of it; innocence claims the right of speaking, as guilt invokes the privilege of silence". Bentham questions the rationality of exempting the confession made before the police because the same confession either written in the document or any witness heard conversations of such confession is not exempted from furnishing the evidence. Thus Bentham said: "[W]hat the technical procedure rejects is his own evidence in the purest and most authentic form; what it admits is the same testimony, provided that it be indirect, that it have passed through channels which may have altered it, and it be reduced to the inferior and degraded state of hearsay".<sup>88</sup>

The right to silence based upon the idea that 'it is better that a hundred of the guilty should escape than that one innocent person should perish'.<sup>89</sup> The security of innocence may be complete without favoring the impunity of crime.<sup>90</sup> Every precaution, which is not absolutely necessary for the protection of innocence, affords a dangerous lurking-place to crime.<sup>91</sup> Finally Bentham said: "If it is wished to protect the accused against punishment, it can be done at once, and with perfect efficiency, by not allowing any investigation".<sup>92</sup> It is accused who has committed the offence. Obviously he has abundance of information about the commission of offence. Naturally rationality allows the investigation authority to explore that source of information at optimum level. But ironically law suggests otherwise that the evidence of guilt of accused must be found from other source that is ridiculous and absurd. Clarence Darrow wrote:

---

<sup>86</sup> Bentham has used another maxim *Nemo tenetur seipsum accusare* (or *prodere*) which means that no one was bound to start a prosecution against himself. That leads to the assertion that no one should be punished for refusing to make a confession of guilt; see WILLIAMS, *op. cit. supra* note 23, at 52.

<sup>87</sup> Right to silence is justified on the ground that try to get an accused person to give evidence against himself was not playing the game; it was hitting below the belt, or hitting a man when he was down. Bentham criticizes this philosophy which has led to evil result because it hindered the conviction of guilt. Further he said it neglected the immediate interest of society that dangerous criminals should not be left free. When guilty is acquitted, the society is punished; see WILLIAMS, *op. cit. supra* note 23, at 49-52.

<sup>88</sup> WILLIAMS, *op. cit. supra* note 23, at 52.

<sup>89</sup> BENTHAM, *op. cit. supra* note 82, at 258.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Supra* note 88.

“The methods of the criminal courts are hundreds of years old and their conceptions a thousand years older than that. The whole material world has been made over, but the law and its administration have stood defying time and all the intellectual changes of our day and ages.”<sup>93</sup>

Justice V.R. Krishna Iyer said: “[L]aw is a human institution created by human agents to serve human ends, therefore the rule of law must run close to the rule of life”.<sup>94</sup> Criminal law with all its built-in safeguards to protect the innocent hesitates to bite and is reluctant even to bark. Criminal law breaks down in its primary purpose of social protection when there is no general obedience to legal norm by number of people and they get with it because of ineffectiveness of law. Inefficient law is worse than no law because it undermines the faith of the community in the rule of law. Thus, the confession made before the police is made admissible not only in the terrorist related offence even in the ordinary offence. Therefore there is need to reform the Sections 25 and 26 of the Evidence Act. The confession before the police should be made admissible unless prosecution proves that it is voluntary. The apprehension that such rule is likely to be abused therefore such rule should not be enacted is unacceptable philosophy because every law is subjected to its abuse and misuse. IPC is the most abused law by the authority. Therefore it would be immature to suggest that government should delete IPC. The remedy lies in providing safeguards in the law to prevent its abuse and misuse but not in either not enacting or deleting the law. State cannot have law that is absolutely free from its abuse. If experience of such laws proves that, it is defective one, then let the government, amends and corrects the loopholes. In *Kesavananda Bharathi v. State of Kerala*, Khanna, J., said: “The door has to be left open for trial and error... Opportunity must be allowed for vindicating reasonable belief by experience”.<sup>95</sup> The Law Commission of India rightly commented while drafting the POTA Bill: “It is one thing to say we must create and provide internal structures and safeguards against possible abuse and misuse of the act and altogether a different thing to say that because the law is liable to be misused, we should not have such Act at all”.<sup>96</sup>



<sup>93</sup> WILLIAMS, *op. cit. supra* note 23, at 37.

<sup>94</sup> V.R. KRISHNA IYER, PERSPECTIVES IN CRIMINOLOGY, LAW AND SOCIAL CHANGE 67 (Allied Publication Pvt. Ltd., New Delhi, 1990).

<sup>95</sup> A.I.R. 1973 S.C. 1461.

<sup>96</sup> LAW COMMISSION OF INDIA, REP. NO. 173, *on* PREVENTION OF TERRORISM BILL 2000, Ch. III, 1.10.1, at 5.