

COLONIAL CONTINUITIES: HUMAN RIGHTS, TERRORISM, AND SECURITY LAWS IN INDIA

ANIL KALHAN,^{*} GERALD P. CONROY,^{**} MAMTA KAUSHAL,^{***}
SAM SCOTT MILLER,^{****} AND JED S. RAKOFF^{*****}

ACRONYMS AND OTHER REFERENCES.....	95
SUMMARY.....	96
I. INTRODUCTION.....	99
II. BACKGROUND.....	110
A. POLICE AND CRIMINAL JUSTICE FRAMEWORK.....	110
B. FUNDAMENTAL RIGHTS AND CRIMINAL PROCEDURE.....	116
1. Indian Constitution.....	116
2. Statutes and Procedural Rules.....	118
3. International Law.....	120
4. International Human Rights Norms and Indian Domestic Law.....	123
III. EMERGENCY AND SECURITY LAWS BEFORE 1980.....	125
A. BRITISH COLONIAL EMERGENCY AND SECURITY LAWS.....	126
B. EMERGENCY AND SECURITY LAWS FROM 1947 TO 1975.....	132

^{*} Visiting Assistant Professor, Fordham Law School (2006-present); Associate in Law, Columbia Law School (2004-06). Chair, India Project, Committee on International Human Rights, Association of the Bar of the City of New York, and author of this article.

^{**} Deputy Commissioner, Office of the Special Commissioner of Investigation for the New York City School District. Participant, ABCNY India Project.

^{***} Associate, Wachtel & Masyr, LLP (2002-05). Principal Coordinator, ABCNY India Project.

^{****} Partner, Orrick, Herrington & Sutcliffe LLP. Participant, ABCNY India Project.

^{*****} U.S. District Judge, U.S. District Court for the Southern District of New York. Participant, ABCNY India Project.

This study is based on information learned during a 2005 visit to India by several members of the Committee on International Human Rights of the Association of the Bar of the City of New York. Muzaffar A. Chishti, Director of the Migration Policy Institute office at the New York University School of Law, and Prita R. Jha, of the University of Manchester (U.K.), provided invaluable assistance and cooperation to the project participants in Delhi and Ahmedabad, respectively. For a complete list of those who generously made time to meet with the project participants and helped make this project possible, see the Appendix.

1. Formal Emergency Powers	132
2. Non-Emergency Preventive Detention Laws.....	134
3. Non-Emergency Criminal Laws	136
C. THE EMERGENCY AND ITS AFTERMATH	137
IV. CONTEMPORARY ANTITERRORISM LAWS.....	141
A. THE TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT	141
B. THE PREVENTION OF TERRORISM ACT OF 2002 AND THE AFTERMATH OF ITS REPEAL	150
1. Definitions of “Terrorist Acts” and “Terrorist Organizations”	155
3. Admissibility of Confessions to Police Officers.....	161
4. Special Courts and Procedural Rules.....	163
5. Adverse Inferences and Presumptions of Guilt.....	166
7. Official Immunity	172
V. HUMAN RIGHTS CONCERNS IN THE ADMINISTRATION OF POTA.....	173
A. ARBITRARY, SELECTIVE, AND NON-UNIFORM ENFORCEMENT BY STATE GOVERNMENTS	174
1. Discrimination against Dalit, Other “Lower Caste,” and Tribal Communities	175
2. Discrimination against Religious Minorities.....	177
3. Violations of Political Speech and Associational Rights	181
4. Malicious Prosecution and Prosecution of Ordinary Crimes.....	185
B. POLICE MISCONDUCT AND ABUSE	188
C. “BACK DOOR” PREVENTIVE DETENTION.....	192
D. THREATS AND INTIMIDATION AGAINST LAWYERS.....	197
VI. STRUCTURAL CONSIDERATIONS.....	199
A. POLICE REFORM.....	201
1. Arbitrary, Politicized, and Discriminatory Police Decision- Making.....	202
2. Accountability for Human Rights Violations	204
B. EFFECTIVENESS AND PROFESSIONAL CAPACITY OF THE CRIMINAL JUSTICE SYSTEM.....	207
VII. ROLE OF THE INTERNATIONAL COMMUNITY.....	213
A. RESOLUTION 1373 AND THE COUNTER-TERRORISM COMMITTEE	213
B. INDIAN ANTITERRORISM LAWS AND RESOLUTION 1373	215

C. HUMAN RIGHTS CONCERNS	218
VIII. CONCLUSION AND RECOMMENDATIONS.....	224
APPENDIX: ACKNOWLEDGEMENTS AND CHRONOLOGY OF MEETINGS	231

ACRONYMS AND OTHER REFERENCES

ABCNY	Association of the Bar of the City of New York
AFSPA	Armed Forces (Special Powers) Act, 1958
BJP	Bharatiya Janata Party
CBI	Central Bureau of Investigation
CTC	U.N. Security Council Counter-Terrorism Committee
ICCPR	International Covenant on Civil and Political Rights
IPS	Indian Police Service
LTTE	Liberation Tigers of Tamil Eelam
MDMK	Marumalarchi Dravida Munnetra Kazhagam
MISA	Maintenance of Internal Security Act, 1971
NHRC	National Human Rights Commission
NPC	National Police Commission
NSA	National Security Act, 1980
OHCHR	U.N. Office of the High Commissioner for Human Rights
PDA	Preventive Detention Act, 1950
PHRA	Protection of Human Rights Act, 1993
POTA	Prevention of Terrorism Act, 2002
POTO	Prevention of Terrorism Ordinance, 2001
SIMI	Students Islamic Movement of India
TAAA	Terrorist Affected Areas (Special Courts) Act, 1984
TADA	Terrorist and Disruptive Activities (Prevention) Act, 1985
TNM	Tamil Nationalist Movement
UAPA	Unlawful Activities (Prevention) Act, 1967
UDHR	Universal Declaration of Human Rights

SUMMARY

In 2004, India took a significant step forward for human rights by repealing the Prevention of Terrorism Act of 2002, which had established a permissive set of legal rules to prosecute acts of terrorism largely outside the ordinary rules of the regular criminal justice system. While POTA itself was enacted in the aftermath of the major terrorist attacks of 2001 in both the United States and India, the statute built upon a long tradition of antiterrorism and other security laws in India dating since well before independence. While India has faced serious threats from terrorism and other forms of politicized violence for decades, these special antiterrorism laws have not proven particularly effective in combating terrorism. Terrorism has persisted as a problem notwithstanding these laws, under which few of the individuals charged have been convicted.

Moreover, like antiterrorism laws in other countries, including the United States, aspects of India's antiterrorism laws have raised significant human rights concerns. Some of those concerns have remained even in the aftermath of POTA's repeal, since the Indian government has preserved many of the law's provisions in other statutes. Other, similar laws also remain in place at both the central and state levels, such as the Unlawful Activities (Prevention) Act. Attentiveness to these human rights concerns is not simply a moral and legal imperative, but also a crucial *strategic* imperative. As the Supreme Court of India has recognized, "[t]errorism often thrives where human rights are violated," and "[t]he lack of hope for justice provides breeding grounds for terrorism." Since terrorists often deliberately seek "to provoke an over-reaction" and thereby drive a wedge between government and its citizens – or between ethnic, racial, or religious communities – adhering to human rights obligations when combating terrorism helps to ensure that advocates of violence do not win sympathy from the ranks of those harmed and alienated by the state.

This article comprehensively examines India's recent antiterrorism and other security laws, situating those laws in historical and institutional context in order to (1) analyze the human rights concerns that arise from these laws and (2) understand the ways in which British colonial-era patterns and practices have evolved and been maintained after independence. To a considerable extent, the study is based on information learned during a research visit to India by several members of the Committee on International Human Rights of the Association of the Bar of the City of New York. In 2005, at the invitation of colleagues in India, the project participants met over a two-week period with a broad range of individuals – lawyers, human rights

advocates, scholars, prosecutors, judges, senior government officials, and individuals detained or charged under India's antiterrorism laws and their family members – in Delhi, Hyderabad, Chennai, and Ahmedabad, in order to better understand the human rights implications of these laws and to identify lessons from the Indian experience for countries facing similar challenges, including the United States. The Committee has previously conducted projects examining similar issues in other countries, which have facilitated efforts by members of the Association to build long-term relationships to promote mutual respect for the rule of law and fundamental rights. These visits also have helped to inform the Association's extensive work examining the human rights issues arising from antiterrorism initiatives by the United States since 2001.

POTA and other Indian antiterrorism laws have raised a host of human rights issues, some of which are similar to those raised by antiterrorism laws in other countries, including the United States. Such concerns include:

- overly broad and ambiguous definitions of terrorism that fail to satisfy the principle of legality;
- pretrial investigation and detention procedures which infringe upon due process, personal liberty, and limits on the length of pretrial detention;
- special courts and procedural rules that infringe upon judicial independence and the right to a fair trial;
- provisions that require courts to draw adverse inferences against the accused in a manner that infringes upon the presumption of innocence;
- lack of sufficient oversight of police and prosecutorial decision-making to prevent arbitrary, discriminatory, and disuniform application; and
- broad immunities from prosecution for government officials which fail to ensure the right to effective remedies.

Enforcement has varied widely from state to state, facilitating arbitrary and selective enforcement on the basis of religion, caste, and tribal status; violations of protected speech and associational activities; prosecution of ordinary crimes as terrorism-related offenses; and severe police misconduct and abuse, including torture. In most states, prolonged detention without charge or trial appears to have been the norm, rather than the limited exception. As a result, to a considerable degree India's antiterrorism laws

have functioned more as preventive detention laws than as laws intended to obtain convictions for criminal violations – but without heeding even the limited protections required for preventive detention laws under the Indian Constitution, much less the more exacting standards of international law. At times, human rights defenders who have challenged these violations or defended individuals accused under the antiterrorism laws have faced retaliatory threats and intimidation.

Continuing a pattern established by the British, India's antiterrorism and other security laws have periodically been enacted, repealed, and reenacted in the years since independence. To some extent, this cycle derives from underlying weaknesses in India's ordinary criminal justice institutions. Even when they create distinct mechanisms and procedural rules, India's antiterrorism laws rely upon the same institutions – police, prosecution, judiciary – used in fighting any serious crimes, and to the extent these institutions fail to protect human rights when enforcing ordinary criminal laws, they are no more likely to do so in the high pressure context of fighting terrorism. At the same time, the impulse to enact special laws stems from real and perceived problems concerning the effectiveness of the regular criminal justice system itself, which create intense pressures to take particular offenses outside of that system. To break this cycle and fully address the human rights issues arising from India's special antiterrorism laws, it is therefore necessary to improve and reform the police and criminal justice system more generally, both to protect human rights more adequately and to alleviate the pressures to enact special antiterrorism and security laws in the first place.

While debate in India over its antiterrorism laws has been shaped principally by a domestic political context which has evolved over several decades, in recent years that debate also been shaped in part by the U.N. Security Council's efforts to implement and enforce Resolution 1373, the mandatory resolution adopted after the September 11, 2001 terrorist attacks under Chapter VII of the U.N. Charter. As human rights advocates have noted, the Security Council and its Counter-Terrorism Committee have not been sufficiently attentive to human rights concerns in their efforts to monitor states' compliance with Resolution 1373. In some instances, the Security Council and CTC appear to have directly enabled human rights violations by pushing states to demonstrate compliance with the resolution's antiterrorism mandate without simultaneously making sufficient efforts to ensure adherence with applicable human rights standards. Aspects of that neglect can be seen in the role that Resolution 1373 has played domestically in Indian public discourse and in India's reports to the CTC on its compliance with the resolution.

Independent India's constitutional tradition is a proud one. In

combating some of the most serious terrorist threats in the world, a durable, enduring, and ever-improving commitment by India to protect fundamental rights can serve as an international example. And in recent years, the Indian government has taken several positive steps to limit the use of its antiterrorism laws and to renew its efforts to transform its colonial-era police and criminal justice institutions. Following the recent bomb blasts in Mumbai, the Indian government also wisely chose not to enact new draconian legislation to replace POTA, emphasizing instead the need to upgrade its intelligence and investigative capacity to prevent acts of terrorism and hold perpetrators accountable.

To protect human rights and advance both the rule of law and long-term security, we urge the Indian government to maintain and build upon these recent positive steps. Part of these efforts may require the central government to develop mechanisms that provide for greater administrative and judicial oversight of investigative and prosecutorial decision-making, and transparency in that decision-making, to ensure nationwide uniformity and adherence to fundamental rights. Mechanisms for citizens to seek redress and hold government officials accountable for abuses should be improved. While broader efforts to reform the police and judiciary have proven elusive, such reforms will be essential in seeking to eliminate the human rights concerns that arise under antiterrorism laws and, indeed, in many instances under India's ordinary criminal laws. Finally, as we have also urged the U.S. government with respect to its antiterrorism laws and policies since 2001, we urge the Indian government to take a number of steps to cooperate more fully with international institutions responsible for monitoring and implementing compliance with human rights standards.

I. INTRODUCTION

India's decades-long struggle to combat politicized violence has created what one observer has termed a "chronic crisis of national security" that has become part of the very "essence of [India's] being."¹ Thousands have been killed and injured in this violence, whether terrorist, insurgent, or communal, and in the subsequent responses of security forces. Terrorism, in particular, has affected India more than most countries. By some accounts,

¹ K.P.S. Gill, *The Imperatives of National Security Legislation in India*, SEMINAR, Apr. 2002, at 14, 14, available at <http://www.india-seminar.com/2002/512/512%20k.p.s.%20gill.htm>; see Yogendra Yadav & Sanjay Kumar, *How India Thinks About Security*, THE HINDU, Aug. 15, 2006, at 1, available at <http://www.hindu.com/2006/08/15/stories/2006081502091200.htm> (discussing recent opinion poll on public perceptions of security and terrorism).

India has faced more significant terrorist incidents than any other country in recent years, and as the recent attacks on the Mumbai commuter rail system make clear, the threat of terrorism persists.²

Like other countries, India has responded by enacting special antiterrorism laws, part of a broader array of emergency and security laws that periodically have been enacted in India since the British colonial period. Most recently, in the aftermath of the terrorist attacks of September 11, 2001, and the attacks soon thereafter on the Jammu & Kashmir Assembly and the Indian Parliament buildings, India enacted the sweeping Prevention of Terrorism Act of 2002. POTA incorporated many of the provisions found in an earlier law, the Terrorist and Disruptive Activities (Prevention) Act of 1985, which remained in effect until 1995. While POTA was prospectively repealed in 2004, cases pending at the time of repeal have proceeded, and the government has preserved some of POTA's key provisions by reenacting them as amendments to the Unlawful Activities (Prevention) Act of 1967.

As human rights advocates have recognized, it is vital for governments to protect their citizens from terrorism, which endangers liberty in self-evident ways.³ At the same time, democratic societies committed to the rule of law must resist the pressures to "give short shrift" to fundamental rights in the name of fighting terrorism, and the sweeping antiterrorism initiatives of many countries raise serious human rights issues.⁴ In the United States, advocates have expressed concern that since 2001, the government has selectively targeted individuals (and especially recent immigrants) of Arab, Muslim, and South Asian descent, essentially using race, religion, and national origin as "prox[ies] for evidence of dangerousness."⁵ In India, similar concerns have been raised that

² See Arun Venugopal, *India Worst Hit by Terrorism in 2004*, INDIA ABROAD, Aug. 19, 2005, at A14 (discussing report by U.S. government's National Counterterrorism Center stating that 293 of 651 significant acts of international terrorism in 2004 took place in India). Nineteen of India's 28 states face internal armed conflict in some form. Asian Centre for Human Rights, *No Succour for the Victims of the Armed Opposition Groups in India*, ACHR REVIEW, May 10, 2006, <http://www.achrweb.org/Review/2006/124-06.htm>; *Terror strikes Mumbai, Over 147 Killed*, THE HINDU, July 12, 2006, at 1, available at <http://www.hindu.com/2006/07/12/stories/2006071211850100.htm>.

³ See Ravi Nair, *Confronting the Violence Committed By Armed Opposition Groups*, 1 YALE HUM. RTS. & DEV. L.J. 1 (1998); HUMAN RIGHTS WATCH, *PUNJAB IN CRISIS: HUMAN RIGHTS IN INDIA 170-204* (1991) [hereinafter HRW, *PUNJAB IN CRISIS*] (discussing human rights and humanitarian law violations by militants in Punjab).

⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (O'Connor, J.) (plurality opinion).

⁵ MIGRATION POL'Y INST., *AMERICA'S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11*, at 8 (2003); see also CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, NYU SCHOOL OF LAW, *IRREVERSIBLE CONSEQUENCES: RACIAL PROFILING AND LETHAL FORCE IN THE "WAR ON TERROR"* 26-34 (2006), available at <http://www.nyuhr.org/docs/CHRGJ%20Irreversible%20Consequences.pdf>.

extraordinary laws such as TADA and POTA have been used to target political opponents, human rights defenders, religious minorities, Dalits (so-called “untouchables”) and other “lower caste” individuals, tribal communities, the landless, and other poor and disadvantaged people.⁶

Protection of human rights – including freedom from arbitrary arrest and detention, freedom from torture or cruel, inhuman, or degrading treatment, freedom of religion, freedom of speech and association, and the right to a fair criminal trial – certainly constitutes a moral and legal imperative. In the words of the Supreme Court of India, “[i]f the law enforcing authority becomes a law breaker, it breeds contempt for law, it invites every man to become a law unto himself and ultimately it invites anarchy.”⁷ In the United States, the September 11 Commission has echoed this concern, noting that “if our liberties are curtailed, we lose the values that we are struggling to defend.”⁸

But frequently neglected is that attention to human rights in the struggle against terrorism is also a crucial *strategic* imperative. As the Supreme Court of India has recognized, “[t]errorism often thrives where human rights are violated,” and “[t]he lack of hope for justice provides breeding grounds for terrorism.”⁹ Since terrorists often self-consciously seek “to provoke an over-reaction” and thereby drive a wedge between government and its citizens – or between ethnic, racial, or religious communities – adhering to human rights obligations when combating terrorism helps to ensure that advocates of violence do not win sympathy from the ranks of those harmed and alienated by the state.¹⁰ Alienated

⁶ And in both countries, these present-day concerns are shaped by the memories of past abuses. In the United States, for example, the internment of Japanese Americans during World War II and the tactics undertaken during the McCarthy era give us pause about deferring too readily to the executive’s representations concerning security. In India, human rights concerns arising from security and emergency laws date back to the British colonial era, and these concerns have persisted in the years since independence. *See infra* Part III.

⁷ Kartar Singh v. State of Punjab, (1994) 2 S.C.R. 375, 1994 Indlaw SC 525, ¶ 366.

⁸ NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, FINAL REPORT 395 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf>; *see also* Gurharpal Singh, *Punjab Since 1984: Disorder, Order, and Legitimacy*, 36 ASIAN SURV. 410, 418 (1996) (“[A] liberal democratic system that replicates the methods of terrorists in its anti-terrorist policies threatens to undermine its own foundations”); Soli J. Sorabjee, *Subverting the Constitution*, SEMINAR, May 1988, at 35, 39 (“The whole basis of the fight against terrorism is that we want to preserve the security and integrity of India. But surely it is an India which adheres to . . . basic [constitutional] values of justice and liberty . . . [not] an India whose government does not shrink from resorting to lawlessness and criminality in its endeavour to root out terrorism”).

⁹ People’s Union for Civil Liberties v. Union of India, A.I.R. 2004 S.C. 456, 467.

¹⁰ *Id.* at 464; *see* Chaman Lal, *Terrorism and Insurgency*, SEMINAR, Nov. 1999, at 7, available at <http://www.india-seminar.com/1999/483/483%20lal.htm> (noting “tactical objective” of militants in Jammu & Kashmir of “fir[ing] at the security forces in congested areas” in order to “provok[e] retaliatory

communities are also less likely to cooperate with law enforcement, depriving the police of information and resources that can be used to combat terrorism.¹¹

This strategic imperative demands caution before concluding that new, ever-tougher laws are always the most effective means of curbing terrorism. As Jaswant Singh – who later served in the cabinet of the government that enacted POTA and is now one of the opposition leaders in Parliament – commented in 1988 on the use of such laws in Punjab,

Unfortunately, [the Indian] government is a classic example of proliferating laws, none of which can be effectively applied because the moral authority of the Indian government has been extinguished, and because the needed clarity of purpose (and thought) is absent. Not surprisingly, therefore, [the government] falls back to creating a new law for every new crime . . . and a new security force for every new criminal. . . . [But t]he primary error lies in seeking containerized, instant formulae; there is no such thing as the ‘solution.’¹²

As the Indian experience demonstrates, special antiterrorism laws have not always proven effective in preventing serious acts of terrorism.¹³ Indeed, the recent train blasts in Mumbai took place in a state, Maharashtra, that itself already has had a comprehensive antiterrorism law in place for several

fire resulting in civilian casualties”).

¹¹ See MIGRATION POL’Y INST., *supra* note 5, at 145-51.

¹² Jaswant Singh, *Beleaguered State*, SEMINAR, May 1988, at 14, 19; see Lal, *supra* note 10 (since “[t]errorism and insurgency are complex phenomena imbued with political, social, economic, and psychological factors,” they “call for a comprehensive strategy . . . involving administrative, legal, military and diplomatic measures”); see also THE TERROR OF POTA AND OTHER SECURITY LEGISLATION: A REPORT ON THE PEOPLE’S TRIBUNAL ON THE PREVENTION OF TERRORISM ACT AND OTHER SECURITY LEGISLATION 21-22 (Preeti Verma ed., 2004) [hereinafter TERROR OF POTA] (distinguishing between different categories of terrorism within India, and noting that effective responses to these different categories may require different strategies, methods, and approaches).

¹³ See, e.g., *PM Tells Pakistan to Act Against Terror; Rules Out Reviving POTA*, ZEE NEWS, July 16, 2006, available at <http://www.zeenews.com/articles.asp?rep=2&aid=309301&sid=BUS&ssid=51> (noting several major terrorist acts, including attack on Akshardham temple complex and 2003 Mumbai blasts, that “took place even when POTA was there,” and emphasizing instead the need to strengthen intelligence gathering and the security apparatus); Manoj Mitta, *No POTA, But New Law Every Bit As Stringent*, TIMES OF INDIA, July 13, 2006, available at <http://timesofindia.indiatimes.com/articleshow/1742840.cms> (noting that December 2001 attack on Indian Parliament took place when antiterrorism ordinance already was in place).

years.¹⁴ Even at a purely strategic level, therefore, any effective effort to combat the extraordinarily complex problem of terrorism requires attention to a complex range of factors, not least of which includes vigilant protection of human rights.

Given the complexity and importance of these issues in both India and the United States, the Committee on International Human Rights of the Association of the Bar of the City of New York conducted a research visit to India in 2005 to better understand the human rights implications of India's antiterrorism laws and to identify lessons from the Indian experience for countries facing similar challenges, including the United States. For many years, the Committee has sponsored projects in other countries, including Northern Ireland and Hong Kong, examining similar issues. These visits have facilitated efforts by members of the Association to build long-term relationships with lawyers, advocates, and government officials to promote mutual respect for the rule of law and fundamental rights.¹⁵ The Committee's visits to these countries also have helped to inform the Association's extensive work examining the human rights issues arising from antiterrorism initiatives by the United States since 2001. Through these efforts, the Association has repeatedly encouraged the government of the United States to take care to protect fundamental rights under the U.S. Constitution and international law when taking steps to combat terrorism and ensure security.¹⁶

¹⁴ See Kanchan Gupta, Op-Ed, *Terror Law: Yes For Mumbai, No For Gujarat*, THE PIONEER (Delhi), July 23, 2006, available at http://www.dailypioneer.com/columnist1.asp?main_variable=Columnist&file_name=kanchan%2Fkanchan44.txt (discussing Maharashtra Control of Organized Crime Act).

¹⁵ For example, since the first Northern Ireland visit in 1987 and first Hong Kong visit in 1995, the Committee has sponsored several follow-up visits and other projects and has remained actively engaged in dialogue with government officials, human rights advocates, and lawyers in both countries on issues of mutual concern.

¹⁶ For details concerning ABCNY's work on issues in Northern Ireland and Hong Kong, and in the United States since the terrorist attacks of September 11, 2001, see, e.g., Margaret Satterthwaite et al., *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"*, 60 REC. ASS'N B. CITY N.Y. 13 (2005); Gerald P. Conroy et al., *Northern Ireland: A Report by a Mission of the Committee on International Human Rights*, 59 REC. ASS'N B. CITY N.Y. 314 (2004); ABCNY Comm. on Int'l Human Rights & Comm. on Military Affairs & Justice, *Human Rights Standards Applicable To the United States' Interrogation of Detainees*, 59 REC. ASS'N B. CITY N.Y. 183 (2004); ABCNY Comm. on Federal Courts, *The Indefinite Detention of "Enemy Combatants": Balancing Due Process and National Security in the Context of the War on Terror*, 59 REC. ASS'N B. CITY N.Y. 41 (2004); ABCNY Comm. on Immigration & Nationality Law & Comm. on Communications & Media Law, *Dangerous Doctrine: The Attorney General's Unfounded Claim Of Unlimited Authority to Arrest and Deport Aliens in Secret*, 59 REC. ASS'N B. CITY N.Y. 5 (2004); ABCNY Comm. on Int'l Human Rights & Joseph R. Crowley Program in Int'l Human Rights, Fordham Law School, *Interim Report on the Rule of Law, Democracy, and the Protection of Fundamental Human Rights in Hong Kong*, 57 REC. ASS'N B. CITY N.Y. 397 (2002); ABCNY Comm. on Professional Responsibility, *Statement Regarding the United States*

This particular visit to India emerged from dialogues in 2003 between Indian lawyers and members of the Association. The project participants, two of whom were involved with the Association's previous human rights projects addressing similar issues in Northern Ireland, were Gerald P. Conroy, Deputy Commissioner in the Office of the Special Commissioner of Investigation for the New York City School District and former Assistant District Attorney in the New York County District Attorney's Office, Anil Kalhan, Visiting Assistant Professor at Fordham University School of Law (and then-Associate in Law at Columbia University Law School), Mamta Kaushal, then-associate in the law firm of Wachtel & Masyr, LLP, Sam Scott Miller, partner in the law firm of Orrick, Herrington & Sutcliffe LLP, and Judge Jed S. Rakoff of the United States District Court for the Southern District of New York.

In conducting this project, the Association has followed the same approach taken with its previous human rights projects. Following a number of preliminary discussions with Indian colleagues, the project participants traveled to and spent approximately two weeks in India, and this study draws extensively from the information learned during that visit. As with the Association's other research visits, the project participants met with a broad range of individuals – lawyers, bar association leaders, human rights advocates, scholars, prosecutors, judges, senior government officials, and individuals detained or charged under India's antiterrorism laws and their family members – throughout the country, traveling to and spending several days in Delhi, Hyderabad, Chennai, and Ahmedabad.¹⁷ These dialogues and conversations encompassed a wide spectrum of issues concerning antiterrorism initiatives and human rights in both India and the United States, focusing largely on the most recent Indian antiterrorism laws enacted within

Department of Justice Final Rule Allowing "Eavesdropping" on Lawyer/Client Conversations, 57 REC. ASS'N B. CITY N.Y. 228 (2002); ABCNY Comm. on Communications & Media Law, *The Press and the Public's First Amendment Right of Access to Terrorism on Trial*, 57 REC. ASS'N B. CITY N.Y. 94 (2002); ABCNY Comm. on Military Affairs & Justice, *Inter Arma Silent Leges: In Times of Armed Conflict Should the Laws Be Silent? A Report of the President's Military Order of November 13, 2001 Regarding "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism,"* 57 REC. ASS'N B. CITY N.Y. 39 (2002); ABCNY Comm. on Int'l Human Rights & Joseph R. Crowley Program in Int'l Human Rights, Fordham Law School, *One Country, Two Legal Systems? The Rule of Law, Democracy, and the Protection of Fundamental Human Rights in Post-Handover Hong Kong*, 55 REC. ASS'N B. CITY N.Y. 325 (2000); Peter G. Eikenberry et al., *Northern Ireland: A Report to the Association of the Bar of the City of New York from a Mission of the Committee on International Human Rights*, 54 REC. ASS'N B. CITY N.Y. 427 (1999); William E. Hellerstein, et al., *Criminal Justice and Human Rights in Northern Ireland: A Report to the Association of the Bar of the City of New York*, 43 REC. ASS'N B. CITY N.Y. 110 (1988).

¹⁷ A list of individuals who met with the project participants in India may be found in the Appendix.

the past several years, but also considering at some length the historical and institutional context within which these recent laws have been situated.

In India, bar associations and individual lawyers have long played an important role in challenging human rights violations that have occurred in the name of security. When democracy and human rights were directly challenged by the widespread misuse of detention, censorship, and other emergency powers between 1975 and 1977, a period now referred to simply as “the Emergency,” lawyers and bar associations actively resisted these measures.¹⁸ In the years since then, Indian lawyers have played an important role in seeking to protect fundamental rights in the effort to combat terrorism. In December 2004, after extensive efforts by Indian lawyers and human rights advocates to raise awareness about the human rights issues arising from POTA, that law was repealed, at least in part because of the newly-elected government’s recognition of those very concerns.

Even in the aftermath of POTA’s formal repeal, however, several human rights concerns remain. First, as noted above, the repeal of POTA was not complete. The repeal did not apply retroactively to pending cases or other cases arising from incidents that occurred during the period in which the law was in effect. For those individuals, the human rights issues arising from POTA have been unaffected by the statute’s prospective repeal. In addition, several of POTA’s provisions remain in effect even prospectively, since at the very moment that it repealed POTA, the government simultaneously reenacted those provisions as amendments to UAPA.

Second, lawyers and advocates in India described for the project participants a broader pattern concerning the enactment and repeal of emergency, antiterrorism, and other security laws that itself warrants examination. Because rights consciousness in India is quite high, the most visible and draconian laws – ostensibly enacted in most cases in response to particular crises – have often been repealed when faced with strong political opposition, concerns about fundamental rights violations, or a perception that the crisis moment has passed. However, the provisions of these laws have often not completely disappeared. Rather, in the immediate aftermath of repeal, the government has invariably been able to resort to other laws conferring similar, overlapping authority.¹⁹ While these other laws have not

¹⁸ *E.g.*, GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE 335, 339 (1999) (discussing roles played by prominent lawyers in resisting Emergency); Ram Jethmalani, Commentary, *The Indian Crisis*, 23 WAYNE L. REV. 248, 249 (discussing role of Bar Council of Bombay in resisting Emergency); *see infra* section III.C.

¹⁹ For example, at the time that POTA was first proposed, other Indian laws conferred similar authority upon law enforcement, a point that some Indian human rights advocates made at the time in questioning the need for POTA in the first place. *E.g.*, SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE,

always garnered as much public attention, they frequently have given rise to similar concerns. In addition, over time – as a result of changes in government, the perceived need to respond to new crises, or other factors – new comprehensive laws have been reenacted along much the same lines as those previously repealed, sometimes with heightened sensitivity to fundamental rights, but sometimes in even more draconian form. The net result, at times, has been a tendency towards the “routinising of the extraordinary,” through the institutionalization of emergency powers during non-emergency times and without formal derogation from human rights obligations.²⁰

The pattern itself is not necessarily one to which the United States or other countries will prove immune. Indeed, in India this pattern is intertwined with the legacy of colonial laws and institutions inherited from the British, and close examinations of other countries’ experiences might yield similar patterns. India’s experiences therefore are instructive for all democracies, including the United States, that face the challenge of developing effective responses to terrorism and other security threats while also developing the commitment and institutional capacity to protect human rights in an enduring way.

Our conversations and experiences in India suggested several possible ways to break this cycle and to place fundamental rights on a stronger, more lasting footing. In India, the cyclical pattern of enactment and repeal suggests that a broader, underlying set of structural issues might contribute to the human rights concerns that have arisen from India’s antiterrorism laws. Such issues might effectively be addressed only over the long term, but might therefore lend themselves well to consideration by Indian lawyers in partnership and dialogue with members of the Association, whose previous research visits have cultivated relationships that have facilitated ongoing conversations over an extended period of time to promote institutional development and mutual respect for the rule of law. In conducting this project, we have collaborated closely with our Indian colleagues, informing our analysis with the insights of individuals and organizations who work regularly and extensively on these issues in India. As with our previous studies, we recognize that different countries have

PREVENTION OF TERRORISM ORDINANCE, 2001: GOVERNMENT DECIDES TO PLAY JUDGE AND JURY 18-19 (2001) [hereinafter SAHRDC, PREVENTION OF TERRORISM ORDINANCE] (noting several existing laws that confer similar authority as POTO).

²⁰ See Usha Ramanathan, *Extraordinary Laws and Human Rights Insecurities*, ASIARIGHTS J., July 2004, <http://rspas.anu.edu.au/asiarightsjournal/Ramanathan.pdf>; Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 MICH. J. INT’L L. 311 (2001).

distinct experiences with these issues, and that models that work in one legal system cannot simply be “transplanted” into another without sensitivity to context.²¹ We have accordingly kept India’s distinct history and experiences in mind when examining the issues arising from its antiterrorism initiatives.

The article begins with an overview of the legal and institutional framework within which India’s security and antiterrorism laws are situated. While criminal law matters in India are governed by a post-independence constitutional and international legal framework which includes a strong commitment to fundamental rights, that framework has been layered on top of a set of colonial-era laws and institutions that were designed not to ensure democratic accountability, but to establish British control. Many of these laws and institutions have remained largely unchanged since independence, and as a result India has faced the challenge of reconciling these inherited institutions of colonialism with its strong post-independence commitment to democracy, fundamental rights, and the rule of law.

The article then traces India’s extensive history of using extraordinary laws to combat terrorism and other security threats, which long predates independence from Britain. These laws include (1) constitutional provisions and statutes authorizing the declaration of formal states of emergency, (2) constitutional provisions and statutes authorizing preventive detention during non-emergency periods, and (3) substantive criminal laws defining terrorist and other security-related offenses during non-emergency periods. While periodic efforts have been made to limit the use of these laws, the overall trajectory since independence has been to maintain the pattern established by the British, which blurred the lines between these categories by periodically seeking to extend the extraordinary powers initially exercised during periods of emergency into non-emergency periods. The net result of this pattern has been a tendency to institutionalize or routinize the use of extraordinary powers during non-emergency periods. As new laws have been enacted in response to terrorism and other threats to security in recent years, they have shared a number of continuities with these earlier emergency and security laws, both before and after independence, and accordingly have

²¹ See, e.g., Hiram E. Chodosh, *Reforming Judicial Reform Inspired by U.S. Models*, 52 DEPAUL L. REV. 351, 362 (2002) (noting that “[r]eform models are more likely to succeed if they are not merely copied or transplanted” into another legal system). Given space and resource constraints, we also do not purport to explore comprehensively every antiterrorism- or security-related issue that implicates human rights concerns in India. For example, we largely do not consider in this study the particular human rights issues arising in Jammu & Kashmir or the states in the Northeast, where the more extensive use of the armed forces and central paramilitary forces raise distinct concerns. For a discussion of human rights concerns arising in Jammu & Kashmir, see, for example, HUMAN RIGHTS WATCH, “EVERYONE LIVES IN FEAR”: PATTERNS OF IMPUNITY IN JAMMU AND KASHMIR (2006), available at <http://hrw.org/campaigns/kashmir/2006/index.htm>.

raised a number of the same human rights concerns.

The article then analyzes in detail the principal antiterrorism laws that India has enacted during the last twenty-five years, drawing extensively from conversations between the project participants and lawyers, advocates, government officials, and citizens in India. Aspects of these laws have raised significant concerns under the fundamental rights provisions of the Indian Constitution and international human rights treaties, including:

- overly broad and ambiguous definitions of terrorism that fail to satisfy the principle of legality,
- pretrial investigation and detention procedures which infringe upon due process, personal liberty, and limits on the length of pretrial detention,
- use of special courts and procedural laws that infringe upon judicial independence and the right to a fair trial,
- provisions that require courts to draw adverse inferences against the accused in a manner that infringes upon the presumption of innocence,
- lack of sufficient administrative or judicial oversight of police and prosecutorial decision-making to prevent arbitrary, discriminatory, and disuniform application, and
- broad immunities from prosecution for government officials which fail to ensure the right to effective remedies.

Continuing the pattern established by the British and maintained after independence for other emergency and security-related laws, these antiterrorism laws have been enacted and repealed in cyclical fashion over the past twenty-five years. While each subsequent law has incrementally improved upon its immediate predecessor, the human rights concerns raised by these laws have been significant and, under POTA and UAPA, persist today.

The article then discusses some specific human rights concerns raised by the application and enforcement of these antiterrorism laws, drawing from the project participants' meetings with Indian colleagues to learn about the experiences with these laws in several different Indian states. Administration of these antiterrorism laws has varied widely from state to

state, facilitating arbitrary and selective enforcement against members of Dalit, other lower caste, tribal, and religious minority communities, violations of protected speech and associational activities, prosecution of ordinary crimes as terrorism-related offenses, and severe police misconduct and abuse, including torture. In each state, however, prolonged detention without charge or trial appears to have been the norm under these laws, rather than the carefully limited exception. As a result, to a considerable degree these laws have functioned more as preventive detention laws than as laws intended to obtain convictions for criminal violations – but without heeding even the limited constitutional protections required for preventive detention laws, much less the more exacting standards under international law. Additionally, human rights defenders who have challenged these violations or defended individuals accused under these antiterrorism laws at times have faced retaliatory threats and intimidation.

Recognizing that these antiterrorism laws do not operate in a vacuum, the article also addresses the broader Indian legal and institutional context in which these laws are situated, and particularly the implications of such special legislation for the system as a whole. Even when they create a distinct set of mechanisms and procedural rules, antiterrorism laws draw upon the same institutions – police, prosecution, judiciary – used in fighting any serious crimes, and to the extent these institutions fail to sufficiently protect human rights when enforcing ordinary criminal laws, they are no more likely to do so in the high pressure context of investigating and prosecuting terrorism-related crimes. At the same time, the very existence of these special laws stems from real and perceived problems concerning the effectiveness of the regular criminal justice system, which create intense pressures to take particular offenses outside of that system. To fully address the human rights issues arising from India's special laws against terrorism, therefore, the article briefly considers ways to improve and reform the police and criminal justice system more generally, both to ensure that human rights are better protected and remedied and to alleviate the pressures to enact special laws that result from the underlying weaknesses within the regular criminal justice system.

Finally, the article concludes by discussing the influence of the international community on the debate in India over these antiterrorism laws, and in particular the role of Resolution 1373, the mandatory antiterrorism resolution adopted after the September 11, 2001 terrorist attacks by the U.N. Security Council under Chapter VII of the U.N. Charter. While debate in India over its antiterrorism laws has been shaped principally by a domestic political context which has evolved over decades, Resolution 1373 has played a significant role in framing that debate. However, invocations of

Resolution 1373 have tended to be selective, failing to distinguish carefully between those proposed antiterrorism provisions that may be required by the Security Council and those that are not, and have rarely, if ever, been accompanied by discussion of any countervailing human rights obligations under domestic or international law which also demand compliance. The Security Council and its Counter-Terrorism Committee themselves bear some responsibility for this neglect of human rights concerns, by failing to have been sufficiently attentive to human rights in either the drafting of Resolution 1373 or subsequent efforts to monitor and facilitate states' compliance. In some instances, the CTC may be enabling human rights violations by pushing states to demonstrate compliance with the resolution without at the same time making any effort to ensure that these compliance efforts are consistent with applicable human rights standards.

II. BACKGROUND

Criminal law matters in India, including antiterrorism initiatives, are governed by a post-independence constitutional and international law framework which includes a strong commitment to fundamental rights. However, that framework has been layered on top of a set of colonial-era laws and institutions that were designed to establish British control and often facilitated infringements of basic rights. Many of these institutions remained largely intact after independence.²² While institutional continuity has served India well in some respects, in other respects India has struggled to fully reconcile the inherited institutions of colonialism with its post-independence commitment to democracy, fundamental rights, and the rule of law.²³

A. *Police and Criminal Justice Framework*

The legal and institutional framework that independent India inherited from the British to govern criminal law, criminal procedure, and policing largely remains in place today. Police matters are governed primarily by the Police Act of 1861, one of several framework statutes

²² See *State of Gujarat v. Mithibarwala*, A.I.R. 1964 S.C. 1043 (Indian Constitution “did not seek to destroy the past institutions; it raised an edifice on what existed before”).

²³ See K.S. Subramanian, *Response: The Crisis of the IPS*, FRONTLINE, Feb. 2-15, 2002, available at <http://www.flonnet.com/fl1903/19031100.htm> (arguing that “administrative crisis” facing contemporary India derives from “fundamental contradiction in Indian polity between the historically evolved, regulatory structure of” Indian administrative and police services and “the basic features of our republican Constitution involving parliamentary democracy, federalism and development administration”).

enacted in the wake of the Indian uprising of 1857 to more firmly establish British control.²⁴ The 1861 statute self-consciously followed the paramilitary model of policing that the British had established in Ireland, structuring the police not to promote the rule of law, serve the community, or ensure accountability, but rather to “perpetuate British rule.”²⁵ In doing so, the British incorporated the feudal values already present in Indian society, hiring into the police rank and file Indians perceived to be loyal and willing to acquiesce to the place of British leadership within the social hierarchy.

The strength of the police as an instrument of coercive imperial power grew as the days of empire waned.²⁶ The role of the police in efforts to suppress the nationalist movement intensified during the 1920s and 1930s, peaking during the civil disobedience campaign between 1930-33, and the overall clout of the police within the colonial bureaucracy also increased during this period.²⁷ The size of the police increased from approximately 215,000 in 1932 to over 300,000 in 1943, and the force strength of the armed police, in particular, grew disproportionately during this period, from 15 percent of all forces in 1932 to 45 percent by 1943.²⁸

Upon independence, the British “bequeathed” to India and Pakistan the laws, institutions, philosophy, and norms of the colonial police.²⁹ The new government implemented no significant changes in policing, and the

²⁴ On the 1857 uprising, see SUGATA BOSE & AYESHA JALAL, *MODERN SOUTH ASIA: HISTORY, CULTURE, POLITICAL ECONOMY* 70-85 (2d ed. 2004); JUDITH M. BROWN, *MODERN INDIA: THE ORIGINS OF AN ASIAN DEMOCRACY* 85-94 (2d ed. 1994).

²⁵ G.P. Joshi, *A Requiem For the NPC?*, SEMINAR, Nov. 1999, at 48, available at <http://www.india-seminar.com/1999/483/483%20joshi.htm>; PRAKASH SINGH, *KOHIMA TO KASHMIR: ON THE TERRORIST TRAIL* 21 (2001); see also *The Problem*, SEMINAR, Nov. 1999, at 12, available at <http://www.india-seminar.com/1999/483/483%20problem.htm>; David Arnold, *The Police and Colonial Control in South India*, 4 *SOCIAL SCIENTIST* 3, 4-5 (1976); DAVID H. BAYLEY, *THE POLICE AND POLITICAL DEVELOPMENT IN INDIA* 43-45 (1969). The British themselves noted at the time that the line dividing the “protective and repressive functions of the civil police from functions purely military, may not, always, in India be very clear.” Arvind Verma, *To Serve and Protect*, INDIA TOGETHER, Jan. 10, 2006, <http://www.indiatogether.org/2006/jan/gov-policeact.htm> (quoting Police Commission of 1860).

²⁶ David Arnold, *Police Power and the Demise of British Rule in India, 1930-47*, in *POLICING AND DECOLONISATION: POLITICS, NATIONALISM, AND THE POLICE, 1917-65*, at 42, 58 (David Anderson & David Killingray eds., 1992).

²⁷ *Id.* at 44.

²⁸ *Id.* at 56-57.

²⁹ BAYLEY, *supra* note 25, at 49-50; Joshi, *supra* note 25. This process of transferring control began well prior to independence. After 1902, the police began to hire more educated Indians as officers, intensifying the process further after 1920. BAYLEY, *supra* note 25, at 49; Arnold, *supra* note 26, at 53-54. While Europeans constituted approximately 75 percent of the overall membership of the Indian Police as of 1933, this figure steadily decreased in the years that followed, reaching approximately 62 percent by June 1947. *Id.* at 58. In 1935, authority over the provincial police forces was partially devolved to the newly-elected, semiautonomous provincial governments, although the central government did retain significant control. *Id.* at 46-47.

police remained principally an instrument of coercive state power and political intelligence. The strength of the armed police continued to grow, reaching approximately 60 percent of all forces by the late 1960s.³⁰ Despite reform proposals in the intervening years, the Police Act of 1861 continues to govern policing throughout India today.³¹ In the police institutions of contemporary India, notes a former senior police officer, “the Raj lives on.”³²

These colonial-era laws and institutions are now situated within a post-independence constitutional framework that distributes power between the central and state governments. While the Indian Constitution establishes a strong central government, its role is particularly constrained in policing and criminal justice matters, over which the states enjoy broad authority and play the predominant day-to-day role.³³ The Constitution grants the central and state governments concurrent jurisdiction to enact substantive and procedural criminal laws, and authorizes the central government to legislate exclusively on matters involving national security and the use of the military or central police forces to help state civilian authorities maintain public order.³⁴ At the

³⁰ T. Anantha Chari, *Democracy and Social Defence*, SEMINAR, Oct. 1977, at 26, 29 (quoting Report of the Delhi Police Commission, 1966-68).

³¹ See, e.g., P.S. Bawa, *Urban Policing*, SEMINAR, Nov. 1999, at 29, available at <http://www.india-seminar.com/1999/483/483%20bawa.htm> (police in India continue to rely on “outmoded . . . colonial strategy” of “overawing the people” with use of force). In Pakistan, the Police Act of 1861 similarly governed police matters until 2002, when a new Police Ordinance was promulgated to replace the 1861 statute. This ordinance followed the recommendations of a government commission established in 1999 to investigate and recommend reforms. For discussions of the police reform process in Pakistan, see Muhammad Shoab Suddle, *Reforming Pakistan Police: An Overview*, in U.N. Asia and Far East Inst. for the Prevention of Crime & the Treatment of Offenders, *120th International Senior Seminar, Effective Administration of the Police and the Prosecution in Criminal Justice, Annual Report 2001 and Resource Material Series No. 60*, at 94, 101-03 (2003), available at http://www.unafei.or.jp/english/pdf/PDF_rms_all/no60.pdf; G.P. Joshi, *Police Reforms in Pakistan: A Step Forward*, CHRI NEWSLETTER (Commonwealth Hum. Rts. Initiative, New Delhi), Spring 2005, http://www.humanrightsinitiative.org/publications/nl/newsletter_spring_2005/article14.htm.

³² Verma, *supra* note 25.

³³ See H.M. Rajashekara, *The Nature of Indian Federalism: A Critique*, 36 ASIAN SURV. 245, 246 (1997). Under the Constitution, the central government has exclusive authority over subjects of particular national importance or that require national uniformity, leaving the states with exclusive authority over matters with less national significance or where local variation may be desirable. The central and state governments have concurrent authority over subjects that do not clearly fall into either category. INDIA CONST. art. 246(1)-(3). The states customarily have consulted the central government before enacting laws concerning matters on the concurrent list, and conflicts between state and central laws are subject to the central government’s overall supremacy. AUSTIN, *supra* note 18, at 512; M.P. JAIN, INDIAN CONSTITUTIONAL LAW 539-48 (5th ed. 2003). Unlike in the United States, residual powers rest with the central government, not the states. Compare U.S. CONST. amend. X with INDIA CONST. art. 248; see JAIN, *supra*, at 548-51.

³⁴ INDIA CONST., 7th sched., List I (Union List), §§ 1-2, 2A, List III (Concurrent List), §§ 1-2; see BAYLEY, *supra* note 25, at 55-56; JAIN, *supra* note 33, at 482-83. The central government also has exclusive authority to enact preventive detention laws to protect the security of India, and shares concurrent authority with the states to enact preventive detention laws to protect the security of a particular

same time, the Constitution leaves public order and police matters principally to the states, which accordingly regulate, supervise, and exercise highly centralized control over the majority of police resources in their day-to-day operations.³⁵

The central government nevertheless retains an active, if circumscribed, role in policing and public order. First, the central government maintains several police and paramilitary forces of its own, including the regular police forces of the seven so-called “union territories” and the national capital territory of Delhi, which lack full autonomy from the central government. The central government also operates a number of police, investigative, and paramilitary services that have jurisdiction over specialized areas. The Central Bureau of Investigation handles complex criminal investigations involving matters such as internal security, espionage, narcotics, and organized crime, particularly when such investigations concern matters of particular national importance or extend across interstate or international borders.³⁶ Several central paramilitary forces, with a total force strength of over 685,000 individuals, may be deployed to help state police maintain order under appropriate circumstances.³⁷ Ordinarily, these central forces may be deployed only at the request or with consent of the relevant state government, given the Constitution’s division of central and state powers, but the precise scope of the central government’s authority to deploy these forces has been controversial.³⁸

state or to maintain public order. INDIA CONST., 7th sched., List I (Union List), § 9, List III (Concurrent List), §§ 3-4.

³⁵ INDIA CONST., 7th sched., List II (State List), §§ 1-2, 4; *see* BAYLEY, *supra* note 25, at 55-56; JAIN, *supra* note 33, at 482-83; R.K. RAGHAVAN, POLICING A DEMOCRACY: A COMPARATIVE STUDY OF INDIA AND THE U.S. 60 (1999) (“[P]olicing in India is a highly centralized activity, [but] that centralization is at the state and not at federal level”). Nationwide, the state police forces total approximately 1.4 million individuals. COMMONWEALTH HUMAN RIGHTS INITIATIVE, POLICE ORGANISATION IN INDIA 26 (2002), *available at* http://www.humanrightsinitiative.org/publications/police/police_organisations.pdf [hereinafter CHRI, POLICE ORGANISATION IN INDIA].

³⁶ H. BHISHAM PAL, CENTRAL POLICE FORCES OF INDIA 94-111 (1997); RAGHAVAN, *supra* note 35, at 52. Other CBI divisions target corruption and economic offenses. CENTRAL BUREAU OF INVESTIGATION, ANNUAL REPORT 2005, at 5 [hereinafter CBI ANNUAL REPORT 2005], *available at* http://cbi.nic.in/AnnualReport/CBI_Annual_Report_2005.pdf.

³⁷ MINISTRY OF HOME AFFAIRS, ANNUAL REPORT 2004-05, at 112 [hereinafter MHA, ANNUAL REPORT 2004-05], *available at* <http://mha.nic.in/Annual-Reports/ar0405-Eng.pdf>. The central government also operates the Intelligence Bureau, which gathers domestic intelligence, and the Research and Analysis Wing, which principally gathers foreign intelligence. PAL, *supra* note 36, at 133-42.

³⁸ AUSTIN, *supra* note 18, at 597-604. The central government has an affirmative obligation to “protect every State against external aggression or internal disturbance.” INDIA CONST. art. 355. This provision has been interpreted to authorize deployment of central forces without state consent in situations in which the state government is “unable or unwilling” to suppress an internal disturbance. AUSTIN, *supra* note 18, at 604 (quoting Sarkaria Commission report); Sukumar Muralidharan, *Contortions in Gujarat*,

Second, while the regular domestic police services are subject to state government control, the most senior officers in all police forces nationwide are drawn from the Indian Police Service, an “all-India” civil service cadre whose members are recruited, organized, trained, and disciplined by the Union Home Ministry.³⁹ IPS officers may be appointed at the rank of assistant superintendent of police or higher and may be assigned to positions with the state or central governments.⁴⁰ As of January 2005, just under 3,200 IPS officers were assigned to the senior ranks of the state police forces.⁴¹

Third, the central government has constitutional authority to deploy the army “in aid of the civil [police] power.”⁴² This authority derives directly from powers granted under successive British colonial-era laws to deploy the army to maintain internal security.⁴³ Pursuant to this authority, the central government has enacted several laws conferring sweeping search, arrest, and preventive detention authority upon the armed forces, even authorizing them to shoot to kill suspected terrorists or insurgents, and has deployed the army to maintain order in particular moments of crisis.⁴⁴

Finally, the central government has limited authority to investigate and enforce directly some criminal matters that otherwise fall within the ambit of state authority, but may do so only under exceptional and highly constrained circumstances. The CBI may take over particular state criminal

FRONTLINE, May 25-June 7, 2002, available at <http://www.flonnet.com/fl1911/19111180.htm>.

³⁹ The Constitution authorizes the central government to create “all-India” civil services with dual responsibilities to both the central and state governments. INDIA CONST. art. 312. Under the Police Act of 1861, senior administrative officers within the state police forces are drawn from the IPS. BAYLEY, *supra* note 25, at 52 n.44; R.K. Raghavan, *The Indian Police: Problems and Prospects*, PUBLIUS, Sept. 2003, at 119, 129.

⁴⁰ Raghavan, *supra* note 39, at 131 n.14; see INDIA CONST. art. 311.

⁴¹ MHA, ANNUAL REPORT 2004-05, *supra* note 37, at 105.

⁴² INDIA CONST., 7th sched., List I (Union List), § 2A; see also *id.* art. 355.

⁴³ See BROWN, *supra* note 24, at 138; PAUL R. BRASS, *THE POLITICS OF INDIA SINCE INDEPENDENCE* 57 (2d ed. 1994); BAYLEY, *supra* note 25, at 35-57; Kuldip Mathur, *The State and the Use of Coercive Power in India*, 32 ASIAN SURV. 337, 343-46 (1982).

⁴⁴ *E.g.*, Armed Forces (Jammu and Kashmir) Special Powers Act, No. 21 of 1990; National Security Guard Act, No. 47 of 1986; Armed Forces (Punjab and Chandigarh) Special Powers Act, No. 34 of 1983; Armed Forces (Special Powers) Act, No. 28 of 1958 (as amended). These laws have come under severe criticism from human rights advocates, and recognizing the seriousness of these concerns, the government in November 2004 appointed a commission to review the use of AFSPA in the country’s Northeast. See AMNESTY INT’L, BRIEFING ON THE ARMED FORCES (SPECIAL POWERS) ACT, 1958, ASA 20/025/2005, at 6-7 (2005), [http://web.amnesty.org/library/pdf/ASA200252005ENGLISH/\\$File/ASA2002505.pdf](http://web.amnesty.org/library/pdf/ASA200252005ENGLISH/$File/ASA2002505.pdf). While that commission submitted its final report in June 2005, the contents of that report have not been made public, and the government has not yet made a final decision on whether to amend or repeal the law. *No Decision Taken Yet On AFSPA*, THE HINDU, Dec. 28, 2005, available at <http://www.thehindu.com/2005/12/28/stories/2005122807011400.htm>.

investigations, but ordinarily only at the request or with consent of a state government. As discussed below, in more extreme situations, if the central government exercises its emergency power to impose “President’s Rule” in a particular state, then the entire state government becomes subject to central control.⁴⁵

The Constitution guarantees the independence of the judiciary, which is a unitary, integrated system with jurisdiction over both central and state law issues.⁴⁶ The independence and responsibility of the judiciary to interpret and enforce fundamental rights are considered “basic features” of the Constitution that cannot be withdrawn even by constitutional amendment.⁴⁷ The judiciary consists of the Supreme Court of India, twenty-one High Courts, and an extensive system of subordinate courts and tribunals which are subject to the broad supervisory jurisdiction of the High Courts.⁴⁸ The states are divided into districts which consist of civil district courts and criminal sessions courts. Judicial magistrates are authorized to adjudicate lesser criminal offenses, subject to oversight by the sessions courts, and have supervisory responsibility over police investigations and other pretrial matters.⁴⁹

While the organization and jurisdiction of the Supreme Court and High Courts are, within constitutional constraints, largely subject to central government control, state governments share concurrent authority to regulate the jurisdiction of all courts other than the Supreme Court for areas in which they have legislative authority.⁵⁰ The Constitution confers both the Supreme Court and the High Courts with broad original jurisdiction to enforce fundamental rights through the filing of writ petitions.⁵¹

⁴⁵ INDIA CONST. art. 356. On President’s Rule, see *infra* subsection III.B.1.

⁴⁶ For background on the Indian judiciary, see INT’L COMM’N OF JURISTS, *ATTACKS ON JUSTICE: THE HARASSMENT AND PERSECUTION OF JUDGES AND LAWYERS* 177-82 (11th ed. 2002), available at <http://www.icj.org/IMG/pdf/india.pdf>; JAIN, *supra* note 33, at 190-288, 372-458.

⁴⁷ *E.g.*, Supreme Court Advocates-on-Record Ass’n v. Union of India, A.I.R. 1994 S.C. 268, 421; L. Chandra Kumar v. Union of India, (1997) 3 S.C.C. 261, 301; see also INDIA CONST. art. 50 (articulating directive principle that state “shall take steps to separate the judiciary from the executive”).

⁴⁸ Supreme Court and High Court judges are appointed by the President, in consultation with the cabinet and mandatory concurrence of the Chief Justice of India. Lower court judges are appointed by the state governor in consultation with the state’s High Court. INDIA CONST. arts. 124, 217; JAIN, *supra* note 33, at 199, 387-88, 442-43. Supreme Court and High Court judges may be removed from office upon a joint address of Parliament, but only for proved misbehavior or incapacity. Lower court judges may be transferred, promoted, or disciplined by the High Court, and may be removed by the state governor upon the instructions of the High Court. JAIN, *supra* note 33, at 387-88, 442-43.

⁴⁹ R.V. KELKAR’S CRIMINAL PROCEDURE 12 (K.N. Chandrasekharan Pillai ed., 2001) [hereinafter KELKAR’S CRIMINAL PROCEDURE].

⁵⁰ This includes the power to confer jurisdiction upon particular courts for specific laws and to establish new general or specialized courts. JAIN, *supra* note 33, at 454-56.

⁵¹ INDIA CONST. arts. 32, 226 (authorizing Supreme Court and High Courts to issue writs in the nature of

B. Fundamental Rights and Criminal Procedure

India is bound by legal obligations that protect fundamental rights under its own Constitution and statutes and under international treaties to which it is a party.⁵²

1. Indian Constitution

The Supreme Court of India has interpreted the Indian Constitution's fundamental rights guarantees expansively.⁵³ The Constitution protects "equality before the law" and "equal protection of the laws" under provisions which embody a broad guarantee against arbitrary or irrational state action more generally.⁵⁴ Indian citizens are guaranteed the rights to speech and expression, peaceable assembly, association, free movement, and residence although Parliament may legislate "reasonable restrictions" on some of these rights in the interests of the "sovereignty and integrity of India," "security of the state," or "public order."⁵⁵ As discussed below, the Constitution also authorizes suspension of judicial enforcement of these rights during lawful, formally declared periods of emergency.⁵⁶

Specifically in the criminal justice context, the Constitution prohibits *ex post facto* laws, double jeopardy, and compelled self-incrimination.⁵⁷ Individuals arrested and taken into custody must be provided the basis for arrest "as soon as may be" and produced before a magistrate within 24

habeas corpus, mandamus, prohibition, certiorari, and quo warranto).

⁵² On the procedural rules and human rights standards that apply under the Indian criminal justice system, see generally SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, HANDBOOK OF HUMAN RIGHTS AND CRIMINAL JUSTICE IN INDIA: THE SYSTEM AND PROCEDURE (2006) [hereinafter SAHRDC, CRIMINAL JUSTICE HANDBOOK].

⁵³ INDIA CONST. pt. III, arts. 12-35; see *Pathumma v. State of Kerala*, A.I.R. 1978 S.C. 771 (in interpreting fundamental rights provisions, court's approach "should be dynamic rather than static, pragmatic and not pedantic[,] and elastic rather than rigid").

⁵⁴ INDIA CONST. art. 14; see JAIN, *supra* note 33, at 855-901. Other provisions more specifically prohibit discrimination on the basis of religion, race, caste, sex, or place of birth and guarantee equality of opportunity in public employment. INDIA CONST. arts. 15-16. The Constitution also explicitly abolishes and forbids "untouchability" and deems unlawful the enforcement of any disabilities based on untouchability. *Id.* art. 17.

⁵⁵ INDIA CONST. art. 19(1)(a)-(f); see JAIN, *supra* note 33, at 1009; INDIA CONST. art. 19(2) (qualifications on freedom of speech); INDIA CONST. art. 19(3)-(4) (qualifications on freedom of assembly and association).

⁵⁶ INDIA CONST. art. 359; see *infra* subsection III.B.1.

⁵⁷ INDIA CONST. art. 20; see JAIN, *supra* note 33, at 1055-77.

hours.⁵⁸ In its landmark case of *D.K. Basu v. State of West Bengal*, the Supreme Court extended the Constitution's procedural guarantees further by requiring the police to follow detailed guidelines for arrest and interrogation.⁵⁹ The Constitution also guarantees the right to counsel of the defendant's choice, and the Supreme Court has held that legal assistance must be provided to indigent defendants at government expense, a right that attaches at the first appearance before a magistrate.⁶⁰ These guarantees do not apply to laws authorizing preventive detention, which, as discussed below, the Constitution subjects to a more limited set of protections.⁶¹

While the Constitution does not explicitly protect "due process of law," it does prohibit deprivation of life or personal liberty from any person except according to "procedure established by law," and the Supreme Court has broadly interpreted this guarantee to encompass a range of procedural and substantive rights that approximate the concept of "due process."⁶² Procedures must be "right, just and fair," and not arbitrary, fanciful or oppressive.⁶³ The Court has held, based on its broad understanding of the right to life and liberty, that the Constitution guarantees the right to privacy⁶⁴ and freedom from torture or cruel, inhuman, or degrading treatment.⁶⁵ The Court also has recognized a constitutional right to a fair criminal trial, including among other elements the presumption of innocence; independence, impartiality, and competence of the judge; adjudication at a convenient and non-prejudicial venue; knowledge by the accused of the accusations; trial of the accused and taking of evidence in his or her presence;

⁵⁸ INDIA CONST. art. 22(1)-(2); see also KELKAR'S CRIMINAL PROCEDURE, *supra* note 49, at 74 (Code of Criminal Procedure §§ 50, 55, and 75 impose higher standard than constitutionally required, since they require grounds of arrest to be communicated "forthwith," or immediately).

⁵⁹ *D.K. Basu v. State of West Bengal*, A.I.R. 1997 S.C. 610, 623. The National Human Rights Commission has similarly issued extensive guidelines on the rights to be provided at the time of arrest. NAT'L HUMAN RIGHTS COMM'N OF INDIA, GUIDELINES ON ARREST, Nov. 22, 1989, <http://nhrc.nic.in/Documents/sec-3.pdf>.

⁶⁰ INDIA CONST. art. 22(2); see *M.H. Hoskot v. State of Maharashtra*, (1978) 3 S.C.C. 544; KELKAR'S CRIMINAL PROCEDURE, *supra* note 49, at 77.

⁶¹ On preventive detention, see *infra* subsection III.B.2.

⁶² *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597; see T.R. Andhyarujina, *The Evolution of Due Process of Law by the Supreme Court*, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA (B.N. Kirpal et al. eds., 2000).

⁶³ *Kartar Singh v. State of Punjab*, (1994) 2 S.C.R. 375, 1994 Indlaw SC 525, ¶ 216.

⁶⁴ *Kharak Singh v. State of Uttar Pradesh*, A.I.R. 1963 S.C. 898.

⁶⁵ *Francis Coralie Mullin v. Union Territory of Delhi*, A.I.R. 1981 S.C. 746. Torture is not, however, expressly criminalized under Indian criminal law or prohibited under the Indian Code of Criminal Procedure, and neither Parliament nor the Supreme Court has defined what constitutes "torture." REDRESS TRUST, INDIA COUNTRY REPORT, in REPARATION FOR TORTURE: A SURVEY OF LAW AND PRACTICE IN 30 SELECTED COUNTRIES at 7 (2003), available at <http://www.redress.org/studies/India.pdf>.

cross-examination of prosecution witnesses; and presentation of evidence in defense.⁶⁶ The Constitution also requires a speedy trial, extending from the outset of an investigation through all stages of the criminal process.⁶⁷

2. Statutes and Procedural Rules

The Constitution requires pretrial detention to be as short as possible, and a number of statutory provisions implement this principle.⁶⁸ Under the Code of Criminal Procedure, detention in police custody beyond the constitutional limit of 24 hours must be authorized by a magistrate. When the accused is initially produced before the magistrate, the magistrate must release the accused on bail unless it “appears that the investigation cannot be completed” within 24 hours and the accusation is well-founded – in which case the accused may be remanded to police custody for up to 15 days, although in principle remand is disfavored.⁶⁹ Bail is meant to be the rule and continued detention the exception.⁷⁰ For minor, so-called “bailable” offenses, release on bail is available as of right, while for most serious or “non-bailable” offenses, the accused may be released on bail at the discretion of the court.⁷¹

⁶⁶ State of Punjab v. Baldev Singh, A.I.R. 1999 S.C. 2378; see KELKAR’S CRIMINAL PROCEDURE, *supra* note 49, at 320-31.

⁶⁷ Antulay v. R.S. Naik, A.I.R. 1992 S.C. 1701.

⁶⁸ The Supreme Court has held that unjust or harsh bail conditions are unconstitutional and has raised concerns about unreasonable denial of bail where it has not been available as of right. Babu Singh v. State of Uttar Pradesh, A.I.R. 1978 S.C. 527.

⁶⁹ INDIA CODE CRIM. PROC. §§ 57, 167; see KELKAR’S CRIMINAL PROCEDURE, *supra* note 49, at 75, 163. In practice, remand to police custody “is routine” except for individuals who can afford to pay for counsel to appear before the magistrate and for bail itself. Human rights advocates have also documented periods of police custody beyond what is legally permissible. See HUMAN RIGHTS WATCH, PRISON CONDITIONS IN INDIA 7-8 (1991) [hereinafter HRW, PRISON CONDITIONS IN INDIA].

⁷⁰ KELKAR’S CRIMINAL PROCEDURE, *supra* note 49, at 279-80.

⁷¹ Under the Indian Penal Code, Parliament may designate certain offenses as “bailable”; all other offenses are “non-bailable.” Most serious offenses carrying potential prison sentences of at least three years are non-bailable. *Id.* at 270-74, 279-80; INDIA CODE CRIM. PROC. §§ 436-37. If there are “reasonable grounds” for believing the accused is guilty of an offense punishable by death or life imprisonment, or if the accused’s criminal history meets certain statutory criteria, bail may not be granted unless the accused is female, sick or infirm, or under age sixteen. KELKAR’S CRIMINAL PROCEDURE, *supra* note 49, at 283-85. The factors the court must consider in deciding whether to grant bail include the severity of the charged offense and potential punishment; the alleged factual circumstances and the nature of the evidence supporting the charge; the risk of flight; the risk of witness tampering; the ability of the accused to prepare their defense and access counsel; the health, age, sex, and criminal history of the accused; and the likelihood that the defendant might pose a danger to public safety. *Id.* If denied by the lower courts, bail may be sought from the High Court. INDIA CODE CRIM. PROC. § 439; KELKAR’S CRIMINAL PROCEDURE, *supra* note 49, at 286-89.

Before ordering remand to police custody, the magistrate must record the reasons for continued detention. Upon finding “adequate grounds” to do so, the magistrate may order detention beyond the fifteen day period for up to 60 days, or in a case involving a potential prison sentence of at least 10 years or the death penalty, for up to 90 days. This extended period of detention, however, must take place in judicial custody, rather than police custody.⁷²

The police must file with the magistrate a “charge sheet” setting forth the particulars of their allegations “without unnecessary delay.”⁷³ If the charge sheet is not filed upon expiration of the 60- or 90-day extended detention period, the individual must be released on bail, regardless of the seriousness of the offense alleged.⁷⁴ However, if the charge sheet is filed before that period expires, and the magistrate decides to charge the accused, the decision to grant bail must be determined based on the contents of the charge sheet.⁷⁵

Indian law sharply limits the use of statements given to the police or while in police custody. Under the Indian Evidence Act, confessions made to police officers are inadmissible as substantive evidence against the accused, and confessions made to others while in police custody must be made in the immediate presence of a magistrate to be admissible.⁷⁶ More generally, the Code of Criminal Procedure prohibits statements made to the police in the course of an investigation by any person, if reduced to writing, to be signed by the individual or used for any purpose during proceedings concerning the offense under investigation, except to impeach that person’s subsequent testimony.⁷⁷ These rules, which date to the colonial period, are intended to

⁷² INDIA CODE CRIM. PROC. § 167(2), (4); KELKAR’S CRIMINAL PROCEDURE, *supra* note 49, at 164-65.

⁷³ INDIA CODE CRIM. PROC. § 173(2).

⁷⁴ KELKAR’S CRIMINAL PROCEDURE, *supra* note 49, at 165-66, 274-75; *see* Matabar Parida v. State of Orissa, (1975) 2 S.C.C. 220 (“If it is not possible to complete the investigation within a period of 60 days (or 90 days, as the case may be), then even in serious and ghastly types of crimes the accused will be entitled to release on bail”).

⁷⁵ The investigation may continue even after filing of the charge sheet, which may subsequently be amended. Once the accused actually has been charged by the court, the court may not drop the charges, but rather must either convict or acquit the accused. KELKAR’S CRIMINAL PROCEDURE, *supra* note 49, at 361.

⁷⁶ Indian Evidence Act, No. 1 of 1872 (as amended), §§ 25-26; *see also* INDIA CODE CRIM. PROC. § 164 (authorizing magistrates to record confessions or statements made in the course of an investigation after advising accused of right to remain silent and ensuring that any confession is made voluntarily and without any pressure or influence). Such confessions must be recorded by the magistrate in open court. KELKAR’S CRIMINAL PROCEDURE, *supra* note 49, at 156.

⁷⁷ INDIA CODE CRIM. PROC. § 162; KELKAR’S CRIMINAL PROCEDURE, *supra* note 49, at 139-40. If the prosecution wishes to use the statement for impeachment, it may do so with permission of the Court. INDIA CODE CRIM. PROC. § 162. Such statements may not be used by either party for corroboration.

reduce the incentive for police to engage in torture and other coercive interrogation practices, in recognition that torture by the Indian police has been a longstanding problem.⁷⁸ However, these limitations are not unqualified. If part of a confession or other statement given to the police leads to the discovery of admissible evidence, that portion of the statement may be admitted as corroborative evidence.⁷⁹

3. International Law

India is a party or signatory to several international instruments protecting individuals from arbitrary or improper treatment under antiterrorism and other security laws, including the International Covenant on Civil and Political Rights,⁸⁰ the International Convention on the Prevention and Punishment of the Crime of Genocide,⁸¹ and the International Convention on the Elimination of All Forms of Racial Discrimination,⁸² and the four Geneva Conventions.⁸³ As a U.N. member state, India is bound by the U.N. Charter, which pledges member states to “promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all

KELKAR’S CRIMINAL PROCEDURE, *supra* note 49, at 140.

⁷⁸ Ved Marwah, *A Citizen Friendly Force?*, SEMINAR, Nov. 1999, at 14, available at <http://www.india-seminar.com/1999/483/483%20ved%20marwah.htm> (rule against admissibility originated because “[t]orture, in order to extract confessions was so endemic in our land”). These longstanding concerns about the police were sufficiently apparent during the colonial period that when considering in the 1900s whether to permit confessions to police officers to be admissible, the Fraser Commission not only decisively rejected that proposal, but instead proposed that the rule be strengthened in some respects, noting that the use of such confessions by the police would lead to “gross abuse of power” and a strong likelihood that innocent people would be coerced into making confessions. ANDREW H.L. FRASER ET AL., REPORT OF THE INDIAN POLICE COMMISSION AND RESOLUTION OF THE GOVERNMENT OF INDIA, 1902-03, ¶ 163 (1905); see BAYLEY, *supra* note 25, at 47 (discussing Fraser Commission’s conclusion that police services were insufficiently trained and supervised and regarded by public as corrupt and oppressive).

⁷⁹ Indian Evidence Act § 27.

⁸⁰ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (ratified by India Apr. 10, 1979) [hereinafter ICCPR].

⁸¹ International Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (ratified by India Aug. 27, 1959).

⁸² International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (ratified by India Dec. 3, 1968).

⁸³ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 (ratified by India Nov. 9, 1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85 (ratified by India Nov. 9, 1950); Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 (ratified by India Nov. 9, 1950).

without distinction as to race, sex, language, or religion,” and by the Universal Declaration of Human Rights, which protects the rights to liberty, freedom of expression and opinion, peaceful assembly, an effective remedy for acts violating fundamental rights, and a “fair and public hearing by an independent and impartial tribunal.”⁸⁴ Several non-binding sources of law further clarify the principles underlying these binding international obligations.⁸⁵

The ICCPR protects the rights to life, liberty and security of the person, and freedom from arbitrary arrest or detention.⁸⁶ To ensure freedom from arbitrary detention, the ICCPR guarantees the right of any arrested or detained individual to have a court promptly decide the lawfulness of detention and to be released if detention is not lawful.⁸⁷ Individuals charged with criminal offenses must be presumed innocent until proven guilty, tried without undue delay, and not compelled to confess their guilt.⁸⁸ Criminal offenses must be defined with sufficient precision to prevent arbitrary enforcement, and no one may be criminally punished for conduct not proscribed at the time committed.⁸⁹ The ICCPR also protects freedom of opinion, expression, peaceful assembly, and association.⁹⁰

Finally, when rights are violated, the ICCPR requires the availability of effective remedies, regardless of whether the individuals who committed the violations acted in an official capacity.⁹¹ “Effective” remedies may require more than just monetary compensation, but instead might also need to involve restoration of residence, property, family life and employment; physical and psychological rehabilitation; prosecution of those responsible;

⁸⁴ U.N. Charter arts. 1(3), 55-56; Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Sess., Pt. I, Resolutions, at 71, U.N. Doc. A/810, arts. 19, 21 (Dec. 10, 1948) [hereinafter UDHR].

⁸⁵ See U.N. Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169, U.N. Doc. A/34/169 (Dec. 17, 1979); U.N. Basic Principles on the Independence of the Judiciary, Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Aug. 26-Sep. 6, 1985, U.N. Doc. A/CONF.121/22/Rev.1 (1985); U.N. Basic Principles on the Role of Lawyers, Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 27-Sep. 7, 1990, U.N. Doc. A/CONF.144/28/Rev.1, at 118; U.N. Guidelines on the Role of Prosecutors, Aug. 27-Sep. 7, 1990, U.N. Doc. A/CONF.144/28/Rev.1, at 189; U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147, Annex (Mar. 21, 2006) [hereinafter U.N. Basic Principles on the Right to a Remedy].

⁸⁶ ICCPR, *supra* note 80, arts. 6, 9.

⁸⁷ *Id.* art. 9.

⁸⁸ *Id.* art. 14(3)(c).

⁸⁹ *Id.* art. 15.

⁹⁰ *Id.* arts. 19, 21.

⁹¹ *Id.* art. 2.

official acknowledgement and apology; and guarantees of non-repetition.⁹²

States may derogate from some human rights guarantees under limited circumstances, and the threat of terrorism may, potentially, constitute a “public emergency” authorizing derogation.⁹³ However, derogation must be “strictly required by the exigencies of the situation,” not “inconsistent with other obligations under international law,” and not discriminatory on the basis of race, color, sex, language, religion or social origin.⁹⁴ Derogation also must be tailored to the particular circumstances and limited in duration. Procedurally, a state party must “immediately” notify other state parties through the U.N. Secretary General of the specific provisions from which it has derogated and the reasons for derogation.⁹⁵

India has never purported to derogate from any of the ICCPR’s provisions, and many of the ICCPR’s provisions are nonderogable under any circumstances. The ICCPR explicitly provides that the rights to life, freedom from torture or cruel, inhuman, or degrading treatment, freedom from prosecution under retroactive legislation, and freedom of thought, conscience, and religion are nonderogable.⁹⁶ In addition, the Human Rights Committee has identified other nonderogable standards. Under the Committee’s guidelines, all persons deprived of liberty must be treated with respect for their dignity; hostage-taking, abduction, and unacknowledged detention are prohibited; persons belonging to minority groups must be protected; and “no declaration of a state of emergency . . . may be invoked as justification for a State party to engage itself . . . in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute

⁹² U.N. Basic Principles on the Right to a Remedy, *supra* note 85, ¶¶ 19-23.

⁹³ See ICCPR, *supra* note 80, art. 4 (permitting derogation from some provisions, including articles 9 and 10, in the event of “public emergency which threatens the life of the nation and the existence of which is officially proclaimed”); UDHR, *supra* note 84, art. 29(2) (recognizing that laws limiting fundamental rights may be enacted “solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in the democratic society”); U.N. Office of the High Comm’r for Human Rights, *Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights While Countering Terrorism* 18-25 (2003), <http://www.unhcr.ch/html/menu6/2/digest.doc> [hereinafter OHCHR, *Digest of Jurisprudence*] (discussing substantive criteria for derogation).

⁹⁴ ICCPR, *supra* note 80, art. 4(1).

⁹⁵ *Id.* art. 4(3); OHCHR, *Digest of Jurisprudence*, *supra* note 93, at 18 (“[D]eclarations of states of emergency and any accompanying derogations taken pursuant to article 4 of the Covenant must meet certain strict requirements . . . including necessity, duration and precision”).

⁹⁶ ICCPR, *supra* note 80, art. 4(2) (“No derogation from Articles 6, 7, 8, 11, 15, 16, and 18 may be made under this provision”); U.N. Human Rights Committee, *General Comment 20 (Article 7)*, U.N. Doc. A/47/40, ¶ 3 (1992) (emphasizing that prohibition against torture and cruel, inhuman, or degrading treatment is nonderogable under any circumstances).

incitement to discrimination, hostility or violence.”⁹⁷

India has not signed the Optional Protocol to the ICCPR, which permits individuals to bring complaints of violations before the Human Rights Committee.⁹⁸ While India signed the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1997, it has not ratified CAT or taken steps to ensure that its domestic legislation complies with CAT’s requirements.⁹⁹ However, the prohibition against torture and cruel, inhuman, or degrading treatment also is found in the ICCPR and is widely regarded as a customary international law norm and a *jus cogens* norm from which no derogation is permitted.¹⁰⁰

4. International Human Rights Norms and Indian Domestic Law

India has long recognized the importance of ensuring its own compliance with these international human rights obligations. While international treaties do not automatically become part of domestic law upon ratification,¹⁰¹ the Constitution provides, as a Directive Principle of State Policy, that the government “shall endeavour to foster respect for international law and treaty obligations in the dealings of organized people with one another,” and also authorizes the central government to enact legislation implementing its international law obligations without regard to

⁹⁷ U.N. Human Rights Committee, *General Comment 29: States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶¶ 11-13 (2001).

⁹⁸ Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302 (entered into force March 23, 1976).

⁹⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, U.N. Doc. A/RES/39/708, 1465 U.N.T.S. 85; see Asia-Pacific Human Rights Network, *India: Human Rights Challenges for the New Government*, HUMAN RIGHTS FEATURES, HRF/99/04 (May 30, 2004), <http://www.hrdc.net/sahrde/hrfeatures/HRF99.htm>. For many years, India also has refused to permit the U.N. Special Rapporteur on Torture or other representatives appointed under U.N. special mechanisms to visit India to investigate allegations of torture or other human rights violations. *Id.*; see also A.G. Noorani, *India, Torture, and the UN*, ECON. & POL. WKLY., June 7, 1986, at 989.

¹⁰⁰ ICCPR, *supra* note 80, art. 7; Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, entered into force Jan. 27, 1980, art. 53, 1155 U.N.T.S. 331, available at <http://www.un.org/law/ilc/texts/treaties.htm> (*jus cogens* norm is one “accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”); PETER MALANCZUK, *AKHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 39-48 (7th rev. ed. 1997) (customary international law norms are evidenced by practices that states generally recognize as obligatory and that substantial number of states follow in uniform and consistent fashion).

¹⁰¹ *E.g.*, State of Madras v. G.G. Menon, A.I.R. 1954 S.C. 517.

the ordinary division of central and state government powers.¹⁰² The Supreme Court of India has frequently emphasized that constitutional and statutory provisions should be interpreted in light of India's international law obligations¹⁰³ and has looked for guidance when interpreting the Constitution's fundamental rights provisions to the UDHR, which was adopted while the Constitution was being drafted.¹⁰⁴ India also is bound by customary international law norms, to the extent it has not persistently objected to those norms, and is absolutely bound by norms that have attained the status of *jus cogens*.¹⁰⁵

In 1993, India established the National Human Rights Commission, an independent government commission whose mandate is to protect and promote international human rights norms.¹⁰⁶ The NHRC is empowered to receive and investigate individual complaints of human rights violations, initiate such investigations on its own, monitor and make non-binding recommendations to the government on domestic implementation of international human rights norms, and promote public awareness of human rights standards.¹⁰⁷ To conduct these activities, the NHRC has the powers of a civil court, including the ability to compel appearance of witnesses, examine witnesses under oath, compel discovery and production of documents, and order production of records from courts and government agencies.¹⁰⁸ If the NHRC concludes that violations occurred, it may recommend compensation to the victim or prosecution of those responsible.

¹⁰² INDIA CONST. arts. 51(c), 253.

¹⁰³ See, e.g., *People's Union for Civil Liberties v. Union of India*, A.I.R. 1997 S.C. 568; *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461; *Jolly George Verghese v. Bank of Cochin*, A.I.R. 1980 S.C. 470, 473; JAIN, *supra* note 33, at 1394-95; Justice A.S. Anand, *The Domestic Application of International Human Rights Norms* (1998), http://www.humanrightsinitiative.org/jc/papers/jc_2004/supplementary_papers/anand.pdf.

¹⁰⁴ DURGA DAS BASU, HUMAN RIGHTS IN CONSTITUTIONAL LAW 27 & n.48 (Bhagabati Prosad Banerjee & Ashish Kumar Massey eds., 2d ed. 2003) (citing *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597).

¹⁰⁵ MALANCZUK, *supra* note 100, at 43, 46-48, 57-58.

¹⁰⁶ Protection of Human Rights Act, 1993, No. 10 of 1994 [hereinafter PHRA]; see Vijayashri Sripati, *India's National Human Rights Commission: A Shackled Commission?*, 18 B.U. INT'L L.J. 1 (2000). The PHRA was enacted amidst a broader effort by the U.N. Commission on Human Rights and the General Assembly during the early 1990s to encourage the establishment of national human rights institutions to promote and protect human rights norms domestically. See G.A. Res. 134, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/134 (Dec. 20, 1993).

¹⁰⁷ PHRA, *supra* note 106, §§ 12-14. The NHRC issues annual reports and more specific reports regarding government abuses, and sponsors studies and other research programs.

¹⁰⁸ *Id.* §§ 13-16. The chair of the NHRC must be a former Supreme Court chief justice, one member must be a current or former Supreme Court judge, one member must be a current or former High Court chief justice, and two members must "hav[e] knowledge of, or practical experience in, matters relating to human rights." *Id.* § 3(2).

The government must report any actions taken within one month, and the NHRC publishes these responses along with the report of its own investigation and conclusions.¹⁰⁹ The NHRC only may investigate alleged violations within the previous year and may not investigate allegations against the armed forces.¹¹⁰

III. EMERGENCY AND SECURITY LAWS BEFORE 1980

The use of extraordinary laws in India to combat terrorism and other security threats long predates independence, part of the legacy that Britain bequeathed to India and other former colonies.¹¹¹ These laws may be placed into three general categories: (1) constitutional provisions and statutes authorizing the declaration of formal states of emergency and the use of special powers during those declared periods, (2) constitutional provisions and statutes authorizing preventive detention during non-emergency periods, and (3) substantive criminal laws, such as TADA, POTA, and UAPA, which define terrorism and other security-related offenses and establish special rules to adjudicate these offenses during non-emergency periods.

While periodic efforts have been made to limit the use of these laws, the overall trajectory since independence has been to maintain the pattern established by the British, which blurred the lines between these categories by maintaining the extraordinary powers initially exercised during periods of emergency during non-emergency periods. This “institutionalization” of emergency powers has become so established that one commentator, discussing preventive detention, has characterized the use of such laws as “a permanent part of India’s democratic experiment.”¹¹² As new laws have

¹⁰⁹ *Id.* §§ 17-18.

¹¹⁰ *Id.* §§ 19, 36. Rather, the NHRC must refer the complaints regarding the armed forces to the central government and make recommendations based on its response.

¹¹¹ *E.g.*, Ryan Goodman, *Time to End Abuses*, SEMINAR, Apr. 2002, at 20, available at <http://www.india-seminar.com/2002/512/512%20seminarist.htm> (“Since the early days of British colonial rule, India has lived under a series of draconian preventive detention laws”); see Andrew J. Harding & John Hatchard, *Introduction*, in PREVENTIVE DETENTION AND SECURITY LAW: A COMPARATIVE SURVEY 1, 2 (Andrew Harding & John Hatchard eds., 1993) (noting that “[p]reventive detention is not the purely Third World phenomenon it is often thought to be,” and that “most [postcolonial] regimes of preventive-detention law were introduced by British colonial governments”); Caroline Elkins, *The Wrong Lesson*, ATLANTIC MONTHLY, July-Aug 2005, at 34, 36 (“[R]epressive laws and undemocratic institutions, not peace and progress, are the primary bequest of the British to their onetime empire”).

¹¹² BAYLEY, *supra* note 25, at 99 (discussing preventive detention); see also David H. Bayley, *The Indian Experience with Preventive Detention*, 35 PACIFIC AFFAIRS 99, 114 (1962) (stating that “India’s political leaders have gradually come to the realization that for them emergency is a way of life”); Jinks, *supra* note 20.

been enacted in response to terrorism and other threats to security in recent years, they have shared a number of continuities with these earlier emergency and security laws, adopted both before and after independence, and accordingly have also shared a number of their attendant human rights concerns.

A. British Colonial Emergency and Security Laws

Laws authorizing the use of extraordinary powers by the executive during formally declared periods of emergency have existed in India from the earliest days of direct British rule.¹¹³ Following the 1857 Indian uprising and the consolidation of British control, the Indian Council Act of 1861, which was the statute establishing the overall governance framework for British India, authorized the Governor-General to legislate outside the ordinary lawmaking process in emergency situations by unilaterally issuing ordinances to ensure “the peace and good government” of India.¹¹⁴ Such ordinances frequently were used to authorize administrative detention and to establish special tribunals to adjudicate cases relating to law and order, especially during wartime.¹¹⁵ Two subsequent framework statutes, the Government of India Acts of 1919 and 1935, also granted the Governor-General emergency ordinance-making authority based on similar criteria.¹¹⁶

In addition to this general emergency ordinance-making authority, the British enacted special emergency legislation during the two world wars. During World War I, the British enacted the Defence of India Act of 1915, which adapted the wartime “emergency code” from Britain for use in India and authorized the Governor General in Council to issue rules to secure the

¹¹³ VENKAT IYER, STATES OF EMERGENCY: THE INDIAN EXPERIENCE 67 (2000) (“The British . . . made liberal provision for emergency powers, partly to deal with the various social and political tensions which were endemic in Indian society at the time, and partly to establish and consolidate their own hold over the country”).

¹¹⁴ Indian Councils Act of 1861, 24 & 25 Victoria, c. 67, § 23; see IYER, *supra* note 113, at 67-68 & n.4. Such ordinances had the same legal effect as regular laws or regulations promulgated by the Governor-General in Council, and would remain valid for six months unless (1) disapproved by the government in London or (2) superseded by ordinary legislation issued by the Governor-General in Council. IYER, *supra* note 113, at 67-68.

¹¹⁵ *Id.* at 68. While this ordinance-making power was used only seven times before 1914, it was exercised 27 times during World War I, and included the authorization of preventive detention. *Id.* at 68 & nn.6-7.

¹¹⁶ Government of India Act of 1919, 9 & 10 Geo. 5, c. 101 (authorizing issuance of ordinances “in cases of emergency . . . for the peace and good government of British India”); Government of India Act of 1935, 26 Geo. 5 & 1 Edw. 8 c. 2 (authorizing legislation by ordinance whenever “a grave emergency exists whereby the security of India is threatened whether by war or internal disturbance”).

public safety and defense of British India.¹¹⁷ The Act authorized civil and military authorities to detain individuals or impose other restraints on personal liberty if they had “reasonable grounds” to suspect a person’s conduct was “prejudicial to public safety.”¹¹⁸ A second Defence of India Act was enacted in 1939, at the outset of World War II, authorizing the government to preventively detain anyone whose conduct was likely “prejudicial to the defence of British India, the public safety, the maintenance of public order, His Majesty’s relations with foreign powers or Indian states, the maintenance of peaceful conditions in tribal areas or the efficient prosecution of the war.”¹¹⁹ Special tribunals were established to adjudicate violations of the Act’s wartime rules, which remained in effect until they lapsed in October 1946.¹²⁰

But the British never limited their use of such extraordinary powers in India to formally declared periods of emergency. During non-emergency periods, the British also relied extensively upon sweeping laws authorizing preventive detention and criminalizing substantive offenses against the state.¹²¹ As early as 1818, a regulation in Bengal granted the executive general authority to place individuals “under personal restraint” – notwithstanding the absence of “sufficient ground to institute any judicial proceeding” – whenever justified to maintain British alliances with foreign governments, preserve tranquility in the princely states, or preserve the security of the state from “foreign hostility” or “internal commotion.”¹²² Detainees had no right to learn or contest the basis for their detention, and detention orders were not subject to time limits or independent oversight.¹²³ The 1818 regulation ultimately was extended throughout India. Subject to minor amendments, it remained in effect even for several years after

¹¹⁷ On the British emergency code and wartime legislation, see A.W.B. Simpson, *Round Up The Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights*, 41 LOY. L. REV. 629, 639-42, 646 (1996); Rachel Vorspan, *Law and War: Individual Rights, Executive Authority, and Judicial Power in England During World War I*, 38 VAND. J. TRANSNAT’L L. 261 (2005).

¹¹⁸ Pursuant to the Act, approximately 800 such orders were issued in Bengal alone. SIMPSON, *supra* note 117, at 647.

¹¹⁹ IYER, *supra* note 113, at 73-74 & n.39.

¹²⁰ *Id.* at 73-74 & n.39; MOHAMMED IQBAL, LAW OF PREVENTIVE DETENTION IN ENGLAND, INDIA AND PAKISTAN 6 (1955); Jinks, *supra* note 20, at 324.

¹²¹ Indeed, given the extent of the government’s preexisting, non-emergency powers, measures taken during the formally recognized emergency of World War I merely “topped up” those existing powers. BROWN, *supra* note 24, at 202.

¹²² SIMPSON, *supra* note 117, at 637-38; PANNALAL DHAR, PREVENTIVE DETENTION UNDER INDIAN CONSTITUTION 72-73 (1986).

¹²³ DHAR, *supra* note 122, at 72-73. As a practical matter, detainees could obtain permission to make representations against their detention.

independence, before being superseded by new legislation conferring similar authority.¹²⁴ The British also enacted criminal laws punishing offenses against the state such as sedition, which was first criminalized in India in 1870.¹²⁵

The British also sought to extend the extraordinary powers initially justified on the basis of wartime emergency into non-emergency periods. Before the end of World War I, the British began to explore ways to preserve during peacetime the wartime emergency powers authorized by the Defence of India Act. A government committee recommended that several wartime powers be maintained during peacetime, and in response, the government in 1919 enacted the Anarchical and Revolutionary Crimes Act, known as the “Rowlatt Act” for the chair of the committee recommending its enactment.¹²⁶

Both the substantive provisions of the Rowlatt Act and the circumstances surrounding its enactment and ultimate lapse three years later foreshadowed issues that have arisen in recent years under TADA and POTA.¹²⁷ The Act conferred broad power upon the government to combat “anarchical and revolutionary movements,” a term the law did not define. Despite the lapse of the Defense of India Act and the end of the war, the Act preserved detention orders and other restraints on freedom of movement entered under that law’s wartime authority. The Act also conferred new authority to order preventive detention or other restrictions on freedom of movement for up to two years of any individuals who the government had reasonable grounds to believe were involved in an anarchical or revolutionary movement or, in parts of the country designated by the government as “affected areas,” were suspected of connection to certain specified criminal offenses.¹²⁸ While individuals subject to preventive detention were afforded an opportunity to appear before an investigating

¹²⁴ IQBAL, *supra* note 120, at 123 & n.1, 126; DHAR, *supra* note 122, at 72-73; GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* 107 (1966).

¹²⁵ D. Gopalakrishna Sastri, *The Law of Sedition in India*, INDIAN LAW INSTITUTE STUDY No. 6, at 9-37 (1964).

¹²⁶ Anarchical and Revolutionary Crimes Act, No. 11 of 1919; *see* BROWN, *supra* note 24, at 203; SUMIT SARKAR, *MODERN INDIA: 1885-1947*, at 177-78, 187 (1989); *Report of the Commissioners Appointed by the Punjab Sub-Committee of the Indian National Congress* (Mar. 25, 1920), in 20 *THE COLLECTED WORKS OF MAHATMA GANDHI* 1; A.P. Muddiman, *British India: Acts of the Indian Legislative Council*, 3 J. COMP. LEGISL. & INT’L L. 125, 126-28 (1919).

¹²⁷ *See, e.g.*, K.G. Kannabiran, *TADA: More Repressive than Rowlatt*, in *THE WAGES OF IMPUNITY* 91, 91-92 (2004).

¹²⁸ The scheduled offenses included sedition; waging war against the government; attempting or conspiring to wage war; collecting arms with the intention of waging war; abetting mutiny; promoting enmity between different religious, racial, or linguistic groups; and causing criminal intimidation. IYER, *supra* note 113, at 68 n.11; MUDDIMAN, *supra* note 126, at 127.

authority and learn the basis for their detention, such proceedings were not governed by the procedural and evidentiary protections governing regular criminal proceedings, such as the right to representation by counsel. In its discretion, the investigating authority was permitted to refrain from disclosing “any fact the communication of which might endanger the public safety or the safety of any individual.”¹²⁹

In addition to authorizing preventive detention and other restraints on free movement, the Rowlatt Act defined particular substantive criminal offenses and set forth special procedures to adjudicate those offenses if the government determined that (1) anarchical and revolutionary movements were being promoted in all or part of India, and (2) the specified offenses were related to those movements and sufficiently prevalent to justify special, expedited procedures. Special courts were established to try such offenses, and ordinary procedural protections did not apply – the Act authorized *in camera* trial proceedings and eliminated the right to appeal. However, the law did ensure some judicial oversight over the exercise of prosecutorial discretion, requiring the government to provide its allegations to the chief justice of the High Court, who had discretion to seek additional facts before deciding whether to constitute a special court to adjudicate the alleged violation.¹³⁰

With its extension of draconian wartime powers into an ordinary, non-emergency period, the Rowlatt Act became a focal point of the non-cooperation campaign led by Mahatma Gandhi in the early 1920s.¹³¹ In the face of this intense popular opposition, the government tempered its policies and permitted the Rowlatt Act to lapse in 1922.¹³² However, the British did not refrain from exercising emergency-like powers during peacetime. To the contrary, the government continued to exercise preventive detention authority throughout the 1920s under the preexisting 1818 regulation and to rely on what British Prime Minister Ramsay MacDonald termed “government by ordinance.”¹³³ When faced once again with large scale,

¹²⁹ MUDDIMAN, *supra* note 126, at 127-28.

¹³⁰ *Id.* at 127; IYER, *supra* note 113, at 69; Vijay Nagaraj, *India: The Politics of Anti-Terror Legislation*, Commonwealth Human Rights Initiative Seminar, Human Rights and Anti-Terrorism Legislation in the Commonwealth, at 1 (June 2003), available at http://www.humanrightsinitiative.org/new/papers/vijay_nagaraj.pdf.

¹³¹ SARKAR, *supra* note 126, at 187-95.

¹³² SIMPSON, *supra* note 117, at 647; BROWN, *supra* note 24, at 203; see D.A. Low, ‘Civil Martial Law’: *The Government of India and the Civil Disobedience Movements, 1930-34*, in CONGRESS AND THE RAJ: FACETS OF THE INDIAN STRUGGLE, 1917-47, at 165, 165 (D.A. Low ed., 1977) (in immediate wake of anti-Rowlatt campaign, government “changed its policy towards nationalist agitation” and decided “so far as possible [to] avoid repressive measures, since these seemed to do more harm than good”).

¹³³ Low, *supra* note 132, at 190 (quoting MacDonald); see A. Fenner Brockway, *Government by*

nationwide civil disobedience during the 1930s, the government resumed and intensified its use of repressive powers, issuing ordinances, for example, that authorized bans of associations designated as “unlawful” and restrictions on freedom of the press.¹³⁴ A 1930 Bengal ordinance authorized the government to “commandeer any property . . . for its use” without any right to compensation or meaningful judicial review and set up special tribunals to adjudicate political offenses. Other ordinances authorized warrantless searches, indefinite detention, bans on nationalist newspapers, confiscation of property from associations the government declared “unlawful,” and the use of special procedural rules (such as the elimination of appellate review) in particular security-related criminal prosecutions.¹³⁵

In implementing these measures, the British self-consciously intended to establish what D.A. Low has termed “civil martial law.”¹³⁶ The most far-reaching of these ordinances, the Emergency Powers Ordinance, was issued in January 1932, when the government determined to crack down on the nationalist movement more aggressively. As described by the British home secretary, the provisions in the ordinance were “a species of Martial Law administered by civil officers,” intended to avoid the more frontal imposition that would result from direct use of the military.¹³⁷ Nationalist organizations affiliated with the Congress were banned throughout India, and within months tens of thousands of nationalist activists were arrested and convicted under both ordinary criminal laws and emergency ordinances.¹³⁸ The government also ordered the preventive detention of approximately 3,500 individuals at one point or another during the course of the 1930s.¹³⁹

The establishment of elected, semiautonomous provincial governments under the Government of India Act of 1935 maintained the basic pattern established by the British. The Act explicitly granted the provincial legislatures authority to enact preventive detention laws of their own, and while the newly-elected, Congress-led governments initially made

Ordinance in India, THE NATION, Feb. 24, 1932, at 226, 226; SIMPSON, *supra* note 117, at 647 (discussing reinstatement of emergency powers under Bengal Ordinance of 1924 and Bengal Criminal Law Amendment Act of 1925).

¹³⁴ Low, *supra* note 132, at 174; Brockway, *supra* note 133, at 226; Suruchi Thapar-Bjorkert, *Gender, Nationalism, and the Colonial Jail: A Study of Women Activists in Uttar Pradesh*, 7 WOMEN'S HIST. REV. 583, 592 (1998).

¹³⁵ Brockway, *supra* note 133, at 226; Thapar-Bjorkert, *supra* note 134, at 592.

¹³⁶ Low, *supra* note 132, at 170.

¹³⁷ *Id.* at 170; SARKAR, *supra* note 126, at 318.

¹³⁸ On the first day that the Emergency Powers Ordinance was in effect, 272 associations were banned in Bengal alone. Low, *supra* note 132, at 174 & n.90; SARKAR, *supra* note 126, at 320-21.

¹³⁹ SIMPSON, *supra* note 117, at 647.

efforts to repeal the emergency powers enacted before 1935, by 1937 they increasingly began to rely upon the same kinds of measures used by the British to maintain order and exercise social control.¹⁴⁰ Between 1946 and 1950, under circumstances similar to those surrounding enactment of the Rowlatt Act, nearly all of the provincial governments responded to the lapse of the rules promulgated under the Defence of India Act of 1939 by enacting “public safety acts” authorizing preventive detention in the absence of a formally declared emergency.¹⁴¹

The 1935 legislation also strengthened the colonial executive’s emergency powers by permitting it to supersede provincial authority if it determined that the “constitutional machinery” within a province had failed.¹⁴² The centrally-appointed provincial governors, formally at their discretion but with the concurrence of the Governor-General, were authorized to legislate by ordinance upon a proclamation that the government “could not be carried on in accordance with the [Act’s] provisions.”¹⁴³ Even in the absence of a formal breakdown in “constitutional machinery,” provincial governors were authorized to legislate by ordinance when faced with threats to the “peace and tranquility of the province” by “any persons committing, or conspiring, preparing, or attempting to commit, crimes of violence” intended to overthrow the government.¹⁴⁴ The Governor-General also was permitted to direct the provincial governors’ exercise of their executive authority to “prevent[] any grave menace to the peace or tranquility of India or any part thereof.”¹⁴⁵

Taken together with the existing authority to exercise emergency powers when faced with a threat to the security of India from either war or internal disturbance, the broad sweep of the emergency powers conferred upon the Governor-General by the 1935 Act led Winston Churchill famously to describe them as “likely ‘to rouse Mussolini’s envy.’”¹⁴⁶

¹⁴⁰ SARKAR, *supra* note 126, at 352; Pradyumna K. Tripathi, *Preventive Detention: The Indian Experience*, 9 AM. J. COMP. L. 219 (1960).

¹⁴¹ IQBAL, *supra* note 120, at 6, 126; AUSTIN, *supra* note 18, at 41.

¹⁴² SARKAR, *supra* note 126, at 376.

¹⁴³ IYER, *supra* note 113, at 72-73. The Act conferred similar emergency authority upon the Governor-General to supersede the authority of the central legislature.

¹⁴⁴ *Id.* at 72-73.

¹⁴⁵ *Id.* at 73.

¹⁴⁶ *Id.* at 80 (quoting Churchill in B. SHIVA RAO, *THE FRAMING OF INDIA’S CONSTITUTION* 803 (1968)).

B. Emergency and Security Laws from 1947 to 1975

From 1947 to 1975, independent India followed the same basic pattern established by the British in its use of emergency and security laws. While India's post-independence constitution includes an extensive array of fundamental rights protections, its emergency and security provisions incorporate a number of the same basic principles found in the Government of India Act of 1935: extraordinary powers that may be exercised during declared periods of emergency, but supplemented by several layers of preventive detention and other security laws that readily afford the government multiple options to exercise similar powers even outside of formally declared periods of emergency.

1. Formal Emergency Powers

The Constitution created several sources of formal emergency power similar to those used by the British. As originally written, the Constitution authorized the President to declare a national emergency in circumstances involving a grave threat to the security of India or any part of its territory on account of (1) war, (2) external aggression, or (3) internal disturbance or imminent danger of internal disturbance.¹⁴⁷ Upon proclaiming an emergency, the central government could exercise a broad range of special powers. Perhaps most significantly, fundamental rights under article 19 of the Constitution would automatically be suspended by the declaration of emergency, and the executive was conferred with the power to suspend judicial enforcement of any other fundamental rights.¹⁴⁸

Between 1950 and 1975, the central government exercised its authority to declare a formal state of emergency twice – in 1962, when Chinese and Indian armed forces clashed along India's northern border, and in 1971, when war broke out between India and Pakistan.¹⁴⁹ Each of the two wartime proclamations of emergency was followed by parliamentary action conferring sweeping powers upon the executive. Rules promulgated under

¹⁴⁷ INDIA CONST. art. 352; Gopal Subramaniam, *Emergency Provisions Under the Indian Constitution*, in SUPREME BUT NOT INFALLIBLE, *supra* note 62, at 134, 136.

¹⁴⁸ INDIA CONST. art. 358-59; *see* Subramaniam, *supra* note 147, at 143; IYER, *supra* note 113, at 141. In addition, the declaration of emergency empowered the central government executive to assume the power to direct state governments concerning the manner in which their own executive authority should be exercised. Parliament also could assume the power to legislate concerning matters that otherwise would be within the exclusive jurisdiction of the states.

¹⁴⁹ IYER, *supra* note 113, at 141.

the Defence of India Act of 1962, for example, authorized the central and state governments to engage in preventive detention extending well beyond the length of time permitted under ordinary preventive detention laws.¹⁵⁰ While the rules established a system of administrative supervision and review, they set no maximum period of detention, and detainees were not entitled to learn the grounds for detention or to challenge the detention in any forum. The rules also authorized restrictions on freedom of movement and freedom of assembly; conferred broad search, seizure, and warrantless arrest powers upon magistrates and the police; increased penalties for a number of criminal offenses; and, to adjudicate violations, authorized the creation of special tribunals in which many ordinary criminal procedural protections were not available.¹⁵¹ The government also suspended judicial enforcement of rights that may have been violated under the emergency proclamation.¹⁵²

While the formal ground for invoking the Constitution's emergency authority in each instance was war and external aggression, in each case the government maintained the state of emergency long after armed conflict had ceased, echoing efforts by the British to extend into peacetime the sweeping emergency powers authorized on account of war. Although the conflict with China was over within days, the 1962 emergency proclamation remained in effect until 1968.¹⁵³ Similarly, the 1971 war with Pakistan ended within weeks, and relations between India and Pakistan were soon normalized, yet the 1971 emergency proclamation remained in effect, along with a concurrent state of emergency declared by Indira Gandhi in 1975 in response to threats allegedly posed by "internal disturbance,"¹⁵⁴ through 1977.

Finally, the Constitution preserved a version of the power held by the British Governor-General to legislate by ordinance and supersede state governments. When both houses of Parliament are out of session, the President, at the direction of the cabinet, may promulgate an ordinance if satisfied "that circumstances exist which render it necessary . . . to take immediate action."¹⁵⁵ Such ordinances have the force of law, but must be ratified by an act of Parliament within six weeks after the end of its recess,

¹⁵⁰ The rules authorized preventive detention of anyone for the purpose of "preventing him from acting in a manner prejudicial to the defence of India and civil defence, the public safety, the maintenance of public order, India's relations with foreign powers, the maintenance of peaceful conditions in any part of India, or the efficient conduct of military operations." IYER, *supra* note 113, at 109.

¹⁵¹ *Id.* at 109-14.

¹⁵² *Id.* at 105.

¹⁵³ While efforts to terminate the 1962 emergency were dampened by the onset of war between India and Pakistan in 1965, that conflict, too, was over within weeks. *Id.* at 125.

¹⁵⁴ *See infra* section III.C.

¹⁵⁵ INDIA CONST. art. 123(1); IYER, *supra* note 113, at 79-80.

which constitutionally may not be longer than six months.¹⁵⁶ This ordinance-making authority has been used more often as a matter of “executive convenience” than on account of any genuine emergency.¹⁵⁷ On occasion, the executive has even successively repromulgated the same ordinance to extend the period of time before formal legislation becomes necessary.¹⁵⁸

As under the 1935 Act, the central government also may supersede state government authority based on the “failure of constitutional machinery” within a state. Upon determining that the government of a state “cannot be carried on in accordance with the provisions” of the Constitution, the central government may impose “President’s Rule” within that state.¹⁵⁹ Under such circumstances, the President may assume any or all of the non-legislative functions of the state government, declare that the state’s legislative powers shall be exercised by Parliament rather than the state legislature, or take other steps that might be necessary to deal with the emergency, including suspension of other constitutional provisions.¹⁶⁰

2. Non-Emergency Preventive Detention Laws

Like the colonial legal framework, the Indian Constitution explicitly authorizes preventive detention during ordinary, non-emergency periods. Subject to limited procedural safeguards, the Constitution explicitly grants both the central and state governments power to enact laws authorizing preventive detention.¹⁶¹ Preventive detention ordinarily may not extend

¹⁵⁶ INDIA CONST. arts. 123(2), 213; *see id.* art. 85(1). State governors have comparable authority, which under most circumstances only may be exercised at the direction of the President. *See id.* art. 213(1).

¹⁵⁷ AUSTIN, *supra* note 18, at 31. The use of the ordinance-making authority in this fashion dates from the earliest days following the Constitution’s adoption. The frequency of the government’s use of the ordinance power during its first year in office led the speaker of the Lok Sabha to protest to Nehru that an impression had been given that “government is [being] carried on by ordinances,” rather than the regular legislative process, with the intention of presenting Parliament with a *fait accompli* to which it was expected to commit. While Nehru claimed to recognize that ordinances only should be issued on “special and urgent occasions,” he nevertheless objected that the legislative process was too slow and “important legislation [was being] held up.” *Id.*

¹⁵⁸ IYER, *supra* note 113, at 80; D.C. Wadhwa v. State of Bihar, A.I.R. 1987 S.C. 579. Many post-independence emergency and security laws, including TADA and POTA, have initially, and controversially, been promulgated as ordinances before being replaced by acts of Parliament. *See, e.g.*, Rajeev Dhavan, Op-Ed, *Terrorism by Ordinance*, THE HINDU, Oct. 1, 2004, available at <http://www.hindu.com/2004/10/01/stories/2004100104781000.htm>.

¹⁵⁹ INDIA CONST. art. 356.

¹⁶⁰ AUSTIN, *supra* note 18, at 604-12.

¹⁶¹ *See Jinks, supra* note 20, at 324-26.

beyond three months without approval of an “Advisory Board,” an administrative tribunal consisting of current or former High Court judges or individuals “qualified to be appointed” as High Court judges. The detainee must be told the basis for detention “as soon as can be” and have an opportunity to challenge the detention order.¹⁶² However, these procedural protections are qualified. Parliament may specify circumstances justifying extended detention without Advisory Board review, and the detaining authority may withhold any information if it deems disclosure against the “public interest.”¹⁶³ Preventive detention laws also are explicitly excused from complying with other constitutional protections, such as the right to counsel, to be produced before a magistrate within 24 hours of being taken into custody, or to be informed promptly of the grounds for arrest.¹⁶⁴

Within weeks after the Constitution went into force, Parliament enacted the Preventive Detention Act of 1950, which authorized detention for up to 12 months by both the central and state governments if necessary to prevent an individual from acting in a manner prejudicial to the defense or security of India, India’s relations with foreign powers, state security or maintenance of public order, or maintenance of essential supplies and services.¹⁶⁵ The act also implemented the limited procedural protections required by the Constitution.¹⁶⁶

The PDA was originally set to expire after one year. Indeed, the Home Minister explicitly stated that the bill was meant as a temporary expedient, intended only to address exigent circumstances in the aftermath of independence and partition, and that any decision to make it permanent demanded closer study.¹⁶⁷ However, as with the use of formal emergency authority, this “temporary expedient” was routinely reenacted each year for almost 20 years. While it finally lapsed in 1969, preventive detention authority returned less than two years later under the Maintenance of Internal Security Act, which largely restored the provisions of the PDA.¹⁶⁸

¹⁶² INDIA CONST. art. 22(4)-(6).

¹⁶³ *Id.* art. 22(7).

¹⁶⁴ *Id.* art. 22(3).

¹⁶⁵ BAYLEY, *supra* note 112, at 99-100.

¹⁶⁶ For example, the Act required the government to provide the detainee with the grounds for detention within five days and required Advisory Board review of all detention orders. *Id.* at 102.

¹⁶⁷ The Home Minister even confessed to having lost sleep for two nights before introducing the bill. A.G. Noorani, *Preventive Detention in India*, *ECON. & POL. WKLY.*, Nov. 16, 1991, at 2608 (quoting Vallabhbai Patel); *see also* Jinks, *supra* note 20, at 341-42 (quoting statements by PDA supporters that preventive detention was a “necessary evil”).

¹⁶⁸ Maintenance of Internal Security Act, No. 26 of 1971 [hereinafter MISA]; *see* IYER, *supra* note 113, at 135-36.

3. Non-Emergency Criminal Laws

Finally, following the model established by the British with laws such as the Rowlatt Act, independent India has continued to define and punish substantive offenses involving crimes against the state and, in some cases, to establish special rules to adjudicate those offenses. The Constitution explicitly authorizes Parliament to impose “reasonable restrictions” on freedom of speech, expression, peaceable assembly, and association in the “interests of the sovereignty and integrity of India.”¹⁶⁹ Pursuant to this authority, Parliament enacted the Unlawful Activities (Prevention) Act of 1967, which remains in effect today and affords the central government broad power to ban as “unlawful” any association involved with any action, “whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise,” that is intended to express or support any claim to secession or that “disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India.”¹⁷⁰

When the central government declares an organization unlawful it must provide the grounds for the declaration but does not have to disclose any fact if it deems disclosure against the public interest.¹⁷¹ The central government’s notification ordinarily becomes effective only upon confirmation by a special judicial tribunal.¹⁷² The central government must refer its notification to the tribunal within 30 days, and after giving the organization notice and an opportunity to respond, the tribunal must either confirm or cancel the notification within six months of the notification’s issuance.¹⁷³ If confirmed, the declaration remains in force for two years from the date the notification became effective.¹⁷⁴

Once an organization has been banned as “unlawful,” UAPA provides the central government with broad powers to restrict its activities. The central government may, by written order, prohibit individuals from paying or delivering funds if they are being used for the purposes of an

¹⁶⁹ These qualifications were adopted by Parliament in 1963 amidst anxiety over several movements for regional autonomy and secession. AUSTIN, *supra* note 18, at 52; R. Subrahmanyam, *The Unlawful Activities (Prevention) Act, 1967: A Legislative Case Study*, 2 J. CONST. PARL. STUDS. (India) 111, 111 (1968).

¹⁷⁰ Unlawful Activities (Prevention) Act, No. 37 of 1967 [hereinafter UAPA], § 2(1)(o).

¹⁷¹ *Id.* § 3.

¹⁷² The tribunal consists of a single High Court judge and has all the powers of a civil court. *Id.* §§ 3, 5.

¹⁷³ *Id.* §§ 4-5.

¹⁷⁴ *Id.* § 6(1). The government may order the declaration to take effect immediately pending confirmation by the tribunal. The central government may also, either on its own motion or on the application of any person aggrieved, cancel the notification at any time. *Id.* § 6(2).

unlawful association.¹⁷⁵ The statute also criminalizes several forms of individual involvement with banned associations and their activities.¹⁷⁶

C. *The Emergency and Its Aftermath*

From June 1975 until March 1977, India witnessed one of the darkest moments in the post-independence period, a period now referred to simply as “the Emergency.”¹⁷⁷ The excesses of the Emergency have cast a long shadow on the use of extraordinary laws against terrorism and other security threats in the years since then. India’s democratic institutions themselves were suspended and rights were violated on a massive scale, as Prime Minister Indira Gandhi, facing intense opposition that had been simmering for years, recast those political threats to her leadership as threats against the sovereignty of India itself, and on that basis assumed sweeping authoritarian powers.

The events immediately precipitating the Emergency were mass protests against Gandhi’s leadership in advance of state elections and, in June 1975, the invalidation of her election to Parliament by the Allahabad High Court on grounds of electoral misconduct.¹⁷⁸ Almost immediately, Gandhi declared a state of emergency on the ostensible ground of an urgent threat to India’s security from internal disturbance. Opponents in the opposition parties and Gandhi’s own Congress Party were detained under MISA, and Parliament soon acted to ensure that Gandhi would not have to comply with the court order invalidating her election. Within two months, President’s Rule was declared in the two states not ruled by the Congress Party, placing all state governments within her effective control.¹⁷⁹ Freedom of expression was sharply curtailed, if not eliminated altogether – the government

¹⁷⁵ *Id.* § 7. Any person aggrieved by such an order may apply within 15 days to a judge to show that the funds in question are not being used or are not intended for the purpose of the unlawful association. *Id.* § 7(4). The statute contains analogous provisions regarding property being used by an association designated as unlawful. *Id.* § 8.

¹⁷⁶ Anyone who is a member of, participates in meetings of, or contributes to an association declared unlawful may be imprisoned for up to two years. *Id.* § 10. Any individual who takes part in, commits, advocates, or abets any unlawful activity is punishable with up to seven years’ imprisonment. *Id.* § 13(1). Anyone who in any manner assists the unlawful activities of any association declared unlawful faces up to five years’ imprisonment, a fine, or both. *Id.* § 13(2).

¹⁷⁷ On the Emergency, see generally AUSTIN, *supra* note 18, at 295-390; BRASS, *supra* note 43, at 40-43; KULDIP NAYAR, *THE JUDGEMENT: INSIDE STORY OF THE EMERGENCY IN INDIA (1977)*; EMMA TARLO, *UNSETTLING MEMORIES: NARRATIVES OF THE EMERGENCY IN DELHI (2003)*; Jethmalani, *supra* note 18; IYER, *supra* note 113, at 151-205.

¹⁷⁸ BRASS, *supra* note 43, at 40-41; AUSTIN, *supra* note 18, at 295-319.

¹⁷⁹ BRASS, *supra* note 43, at 41.

disbanded the four main independent news agencies within the country and replaced them with one government-run agency, subjected all newspapers and other publications to prepublication censorship, and confiscated disfavored foreign periodicals and other publications.¹⁸⁰

MISA and other preventive detention laws were amended during the Emergency to permit much longer periods of detention, to make it easier for the government to exercise detention authority without Advisory Board scrutiny, and to eliminate other procedural protections that otherwise applied.¹⁸¹ Ultimately, over 111,000 people were detained under MISA and other laws during the Emergency.¹⁸² On such a large scale, these laws were not simply part of a coercive strategy against opposition political movements, although certainly that was a main function. Rather, the use of these laws extended much further, as John Dayal and Ajoy Bose noted soon after the Emergency had ended, to “[become] a way of everyday administration. There was neither criteria nor a basis for the detentions under MISA during the Emergency.”¹⁸³

Gandhi’s consolidation of power evolved into a broader institutional struggle between the executive and the judiciary. Gandhi systematically moved to sideline the role of the judiciary in resisting her authority and to enact a series of constitutional amendments intended to institutionalize the enhanced executive power she had assumed. With opponents in jail, press freedoms curtailed, and the judiciary unable to resist the Prime Minister in any meaningful way, these efforts largely succeeded.¹⁸⁴

Mass discontent had been percolating, however, especially in response to excesses in mass sterilization, slum clearance, and other programs introduced by the Prime Minister’s son, Sanjay Gandhi. Somewhat inexplicably, since she had no obligation to do so, Gandhi relaxed some of the Emergency’s political restrictions in December 1976 and called parliamentary elections for March 1977, undoubtedly expecting to win. In a major surprise, she did not. The Janata Party won a majority of seats in the Lok Sabha, and all of the opposition parties combined claimed more than two-thirds of the seats, a massive repudiation of the Emergency.¹⁸⁵

In the wake of the Emergency, the Janata-led government amended

¹⁸⁰ Indeed, discussion at public or private meetings of the declaration of emergency itself was prohibited. Jethmalani, *supra* note 18, at 249.

¹⁸¹ IYER, *supra* note 113, at 167-70.

¹⁸² AUSTIN, *supra* note 18, at 309.

¹⁸³ JOHN DAYAL & AJAY BOSE, THE SHAH COMMISSION BEGINS 37-39 (1978).

¹⁸⁴ BRASS, *supra* note 43, at 42; AUSTIN, *supra* note 18, at 314-90.

¹⁸⁵ BRASS, *supra* note 43, at 43; AUSTIN, *supra* note 18, at 393-95.

the Constitution to rein in the government's authority to exercise extraordinary powers, repealing some of the constitutional changes made during the Emergency and adding additional safeguards. First, the post-Emergency amendments constrain the Constitution's emergency provisions, eliminating the authority to declare a nationwide emergency based on "internal disturbance" and substituting the narrower ground of "armed rebellion."¹⁸⁶

Second, the post-Emergency amendments restrict the government's authority to derogate from certain fundamental rights even during formally declared periods of emergency. The amendments eliminate the authority to suspend the constitutional rights to life and personal liberty and its protections against *ex post facto* laws, self-incrimination, and double jeopardy. While the rights to freedom of speech, expression, peaceable assembly, and association previously were suspended automatically during any declared period of emergency, the amendments limit this automatic suspension to emergencies predicated upon war or external aggression, not those based on armed rebellion. However, the government retains its authority to suspend judicial enforcement of any fundamental rights, other than the nonderogable rights arising under Articles 20 and 21 of the Constitution, regardless of the basis for the emergency. The amendments also require any legislation that the government seeks to insulate from judicial scrutiny during an emergency to expressly recite that it has been enacted pursuant to a particular proclamation of emergency that was in effect at the time.¹⁸⁷

Third, the post-Emergency amendments limit the authority to engage in preventive detention. The amendments reduced the maximum period of detention from three months to two months and made Advisory Board appointments subject to the recommendations of the Chief Justices of the High Courts. The amendments also required all Advisory Board members to be sitting or retired High Court judges (rather than simply individuals "qualified to be appointed" to the High Courts), and eliminated the ability of Parliament to permit the government to dispense with Advisory Board review of detention orders in particular cases.¹⁸⁸

¹⁸⁶ The amendments also mandate a written decision by the cabinet before the Prime Minister may request an emergency proclamation, and require tighter parliamentary oversight of the decision to declare a state of emergency. To remain in effect, emergency proclamations must be confirmed by each house of Parliament within one month of being issued and reconfirmed by similar parliamentary majorities every six months. IYER, *supra* note 113, at 201.

¹⁸⁷ *Id.* at 202.

¹⁸⁸ *Id.*

Despite the appearance of significant reform, the aftermath of the Emergency did not fundamentally break from the pattern set by the British and intensified by Indira Gandhi. In practice, authority to impose preventive detention was not significantly constrained, since the new limits on preventive detention in the post-Emergency amendments never went into force. The amendments conferred discretion upon the government to set their effective date, and neither the Janata government nor any subsequent government has ever set an effective date for these provisions to enter into force.¹⁸⁹

Moreover, while the Janata-led government made an early commitment during the 1977 election campaign to repeal MISA “absolutely and unequivocally,” in light of the discredited use of that law during the Emergency, repeal did not come easily.¹⁹⁰ Upon taking office, the Janata government instead “acted slow and equivocally” on the issue of preventive detention, deciding that it needed some authority to impose preventive detention to combat economic offences, “anti-social elements,” and threats to national security.¹⁹¹ In fact, in its first proposal to repeal MISA, the Janata government simultaneously proposed to amend the Code of Criminal Procedure to add a set of provisions permanently conferring similar preventive detention authority.¹⁹² In the face of tremendous political outcry, this proposal was withdrawn, and during the summer of 1978, well over a year after taking office, the government did finally repeal MISA.

However, despite the repeal of MISA, preventive detention authority soon returned. By the fall of 1979, the Janata-led government had issued an ordinance authorizing detention to prevent actions endangering essential supplies, and upon the return to power of the Congress Party following elections in early 1980, this ordinance was replaced by an act of Parliament.¹⁹³ Later that year, the Congress government issued a sweeping preventive detention ordinance to replace MISA, which ultimately was

¹⁸⁹ *Id.* According to the former Law Minister under the Janata government, the government had been working on legislation that would implement the new amendment while at the same time preserving the validity of certain existing detention orders that would otherwise have been invalidated, but was unable to enact such legislation before the government fell. AUSTIN, *supra* note 18, at 430 n.64; *see also* Noorani, *supra* note 167, at 2608 (noting that despite its opposition to MISA, the Janata Party was “enthusiastic about making preventive detention part of the ordinary law”).

¹⁹⁰ AUSTIN, *supra* note 18, at 433.

¹⁹¹ *Id.* at 432-33.

¹⁹² Unlike most Indian preventive detention and security laws, which typically sunset and must be renewed by Parliament after a defined period of time, the proposed amendments to the Code of Criminal Procedure would have been permanent. *Id.* at 433.

¹⁹³ *Id.* at 434-35 (discussing Prevention of Black Marketing and Maintenance of Essential Commodities Ordinance).

replaced by an act of Parliament, the National Security Act of 1980.¹⁹⁴ The NSA, which remains in effect today, restored many of the provisions found in the PDA and the pre-Emergency version of MISA and “presaged years of new repressive legislation,”¹⁹⁵ including TADA and POTA. The stated purpose of the NSA is to combat “‘anti-social and anti-national elements including secessionist, communal and pro-caste elements’ and elements affecting ‘the services essential to the community.’”¹⁹⁶ The NSA authorizes preventive detention for up to 12 months, and both the permissible grounds to order preventive detention and the procedural requirements under the NSA are essentially the same as under the PDA and MISA.

IV. CONTEMPORARY ANTITERRORISM LAWS

In the early 1980s, India began to face a crisis of politicized violence that prompted the government to enact sweeping criminal antiterrorism laws. Since then, these laws have been enacted and repealed in a cyclical pattern that replicates the pattern established by the British and maintained after independence for emergency and preventive detention laws. The major antiterrorism laws that India has enacted since 1980 – the Terrorist and Disruptive Activities (Prevention) Act, the Prevention of Terrorism Act, and the Unlawful Activities (Prevention) Amendment Act – all have raised human rights concerns under the Indian Constitution and international human rights treaties such as the ICCPR. To be sure, public debate over these laws has been vigorous and ongoing, and in part as a result, each subsequent law has incrementally improved upon its immediate predecessor. Nevertheless, the human rights concerns raised by these laws have been significant, and a number persist to this day.

A. *The Terrorist and Disruptive Activities (Prevention) Act*

Criminal laws explicitly designed to combat “terrorism” were enacted during the 1980s in response to an extended period of violence in Punjab.¹⁹⁷ Political grievances between Sikhs in Punjab and the central

¹⁹⁴ State governments also were active in the years following the Emergency in legislating new preventive detention authority of their own. See Jinks, *supra* note 20, at 323 n.38 (discussing state laws).

¹⁹⁵ AUSTIN, *supra* note 18, at 508.

¹⁹⁶ *Id.* at 509 (quoting bill’s Statement of Objects and Reasons).

¹⁹⁷ Sikhs comprise approximately 60 percent of Punjab’s population. On the history of Punjab in the 1980s and 1990s, see BRASS, *supra* note 43, at 193-201; Singh, *supra* note 8; MANOJ JOSHI, COMBATING

government had accumulated for years without meaningful resolution.¹⁹⁸ During the Emergency, leaders of the Akali Dal, a leading Sikh political party, were among Indira Gandhi's sharpest critics, and after the 1977 elections the party joined the Janata-led government that assumed power.¹⁹⁹ After Gandhi and the Congress Party returned to power in 1980, extensive negotiations for several years between the central government and the Akali Dal failed to resolve their differences. In the meantime, both civil disobedience and violence in Punjab escalated sharply, including attacks by militant Sikhs against Hindu and moderate Sikh politicians and civilians and communal violence between Hindus and Sikhs.²⁰⁰ After negotiations with the Akali Dal broke down, the government banned several Sikh organizations in 1982. Members of some of the banned militant groups soon sought refuge in Amritsar in the complex of Sikhism's holiest site, the Harmandir Sahib, which quickly became the main base of operations for the heavily-armed militants.²⁰¹

In June 1984, the central government imposed a curfew and deployed the military throughout Punjab as part of "Operation Bluestar," an operation involving a massive offensive by the army and central paramilitary forces against militants in the Harmandir Sahib complex. The overwhelming use of force caused tremendous death and destruction. Unofficial estimates place the numbers of civilians killed in the thousands, including priests, pilgrims, and temple employees and their family members. The offensive also caused extensive damage to the temple complex itself. Many thousands more were detained throughout the state in the aftermath of the offensive. Journalists and advocates have extensively documented evidence of human rights violations by the security forces, including many arbitrary killings of Sikh civilians.²⁰² In October 1984, Indira Gandhi was assassinated by two

TERRORISM IN PUNJAB: INDIAN DEMOCRACY IN CRISIS (1993); HRW, PUNJAB IN CRISIS, *supra* note 3, at 11-26.

¹⁹⁸ HRW, PUNJAB IN CRISIS, *supra* note 3, at 15-16. These political grievances were recited in the Akali Dal's Anandpur Sahib resolutions of 1978, which called, among other things, for sweeping political autonomy for Punjab; transfer of the city of Chandigarh to Punjab from central government administration; enactment of a Sikh personal law; and establishment of military quotas for Sikhs. *Id.*

¹⁹⁹ See Ram Narayan Kumar, *Constitutional Perspective*, SEMINAR, Oct. 1992, at 20, 23 (stating that Akali Dal "was the only party in India to effectively protest against" the Emergency and that approximately 45,000 Sikhs were detained during that period).

²⁰⁰ HRW, PUNJAB IN CRISIS, *supra* note 3, at 15-16.

²⁰¹ *Id.* at 16. The Harmandir Sahib is also referred to as the "Golden Temple."

²⁰² *E.g., id.* at 18-19; Jaskaran Kaur, TWENTY YEARS OF IMPUNITY: THE NOVEMBER 1984 POGROMS OF SIKHS IN INDIA - A REPORT BY ENSAAF 37-41 (2004), available at <http://www.ensaaf.org/pdf/reports/complete-1984report-v2.pdf>. K.P.S. Gill, who was director-general of the Punjab police later in the decade and credits strong antiterrorism and counterinsurgency operations for the ultimate resolution of the Punjab situation, has criticized Operation Bluestar and its aftermath as

Sikh bodyguards, and in the aftermath of her death, thousands of Sikhs were killed and tens of thousands displaced in targeted violence.²⁰³ In the aftermath of Operation Bluestar and the massive post-assassination violence, many Sikhs were outraged and alienated, including many who had not previously supported the militants. Militant demands intensified, and as efforts to reach a political resolution failed, both militant violence and draconian government responses escalated dramatically throughout the rest of the decade and into the early 1990s.²⁰⁴

Even before Operation Bluestar, the government relied significantly upon its emergency and preventive detention powers in responding to the Punjab situation. The government extensively used the NSA throughout the early 1980s, and in October 1983, the government dismissed the Punjab state government and imposed President's Rule.²⁰⁵ The government also amended the NSA in early 1984 to permit it to be used more aggressively in Punjab, extending the maximum period of detention from one year to two years, extending the deadline for referral to an Advisory Board from three months to four-and-a-half months, and permitting the government to dispense with Advisory Board review under certain circumstances.²⁰⁶ The

excessive and self-defeating. K.P.S. Gill, *Endgame in Punjab: 1988-93*, in TERROR AND CONTAINMENT: PERSPECTIVES OF INDIA'S INTERNAL SECURITY 23, 30-31 (K.P.S. Gill & Ajay Sahni eds., 2001); see Singh, *supra* note 12, at 16 (characterizing Bluestar as "the act of a desperate government," and arguing that security operations in its aftermath caused further deep injury through the countryside and villages of Punjab).

²⁰³ Investigations by human rights advocates and government commissions have concluded that this violence was instigated by and carried out with the assistance of senior Congress Party officials and that the police failed to protect Sikhs from harm, particularly in Delhi. *E.g.*, People's Union for Democratic Rights & People's Union for Civil Liberties, *Who Are the Guilty?* (1984), available at <http://www.pucl.org/Topics/Religion-communalism/2003/who-are-guilty.htm>; KAUR, *supra* note 202; Annie Zaidi & Aman Sethi, *Indelible Memories*, FRONTLINE, Aug. 27-Sep. 9, 2005, available at <http://www.flonnet.com/fl2218/stories/20050909004302600.htm>. Recently, in the wake of the final report of the Nanavati Commission, Prime Minister Manmohan Singh apologized on behalf of the government for the post-assassination violence. Senior Congress officials accused of complicity in the violence have resigned, and the government is considering whether to reopen investigations of some of them. Manmohan Singh, Prime Minister of India, Speech (Aug. 10, 2005), transcript available at <http://pib.nic.in/release/release.asp?relid=11148>; Sudhi Ranjan Sen, *1984 Sikh Riots: Home Asks CBI to Reopen Cases*, INDIAN EXPRESS, Oct. 26, 2005, available at http://www.indianexpress.com/res/web/pla/full_story.php?content_id=80784; HUMAN RIGHTS WATCH, WORLD REPORT: EVENTS OF 2005, at 265 (2006) [hereinafter HRW, WORLD REPORT 2005].

²⁰⁴ In the view of some human rights advocates at the time, the situation in Punjab was sufficiently severe, at least until mid-1992, so as to constitute an armed conflict to which international humanitarian law applied. *E.g.*, HRW, PUNJAB IN CRISIS, *supra* note 3, at 14-15.

²⁰⁵ *Id.* at 17.

²⁰⁶ IYER, *supra* note 113, at 215. Subsequent amendments to the NSA provided the government even greater latitude in Punjab, permitting it to delay referral of detention orders to Advisory Boards for up to six months if the basis for detention was to prevent interference with the government's counterterrorism efforts. The government also was afforded a longer time period before it was required to inform the

central government again imposed President's Rule in Punjab in 1987, and amended the Constitution to expand the grounds for declaring a national state of emergency to include "internal disturbance" in Punjab. Punjab remained under President's Rule until 1992.²⁰⁷

In addition to using these emergency powers, the government also enacted new non-emergency laws that defined acts of terrorism as substantive criminal offenses.²⁰⁸ In early 1984, Parliament enacted the Terrorist Affected Areas (Special Courts) Act, which established special courts to adjudicate certain "scheduled offenses" related to terrorism in areas designated by the central government, for specified time periods, as "terrorist affected."²⁰⁹ The statute required the special courts to hold proceedings *in camera* unless the prosecutor requested otherwise, and authorized the courts to take measures to keep witness identities secret upon a request by either the prosecutor or the witnesses themselves.²¹⁰ The TAAA also instituted a stringent bail standard under which an individual accused of a scheduled offense could not be released if the prosecutor opposed release, absent reasonable grounds to believe the accused was not guilty, and extended the time during which an individual may be detained pending investigation from 90 days to one year.²¹¹

Most of these provisions were incorporated into the more sweeping Terrorist and Disruptive Activities (Prevention) Act of 1985, which was

detainee of the basis for detention. *Id.* at 215-17. The government also authorized the military and police to exercise special powers, including the use of deadly force against individuals suspected of posing a serious threat to public order. *See* Armed Forces (Punjab and Chandigarh) Special Powers Act, No. 34 of 1983; Punjab Disturbed Areas Act, No. 32 of 1983.

²⁰⁷ Singh, *supra* note 8, at 411; Sorabjee, *supra* note 8, at 37-38.

²⁰⁸ *See* HRW, PUNJAB IN CRISIS, *supra* note 3, at 153-58; RAM NARAYAN KUMAR ET AL., COMMITTEE FOR COORDINATION ON DISAPPEARANCES IN PUNJAB, REDUCED TO ASHES: THE INSURGENCY AND HUMAN RIGHTS IN PUNJAB 83-87 (2003) [hereinafter REDUCED TO ASHES], available at <http://www.ensaaf.org/docs/reducedtoashes.php>.

²⁰⁹ Terrorist Affected Areas (Special Courts) Act, No. 61 of 1984 [hereinafter TAAA]. To guide the central government's designation of "terrorist affected areas," TAAA broadly defined a "terrorist" as a person who "indulges in wanton killing of persons or violence or in the disruption of services or means of communications essential to the community or in damaging property" with intent to "put[] the public or any section of the public in fear," "affect[] adversely the harmony between different religious, racial, language or regional groups or cases or communities," "coerce[] or overawe[] the Government established by law," or "endanger[] the sovereignty and integrity of India." *Id.* § 2(1)(h). As one critic noted at the time, the definition is "wide enough even to cover legitimate trade union activity." A.G. Noorani, *The Terrorist Act*, ECON. & POL. WKLY., June 22-29, 1985, at 945.

²¹⁰ TAAA § 12. Such measures could include, for example, conducting proceedings in secret, undisclosed locations, non-disclosure of witness identities in the court's judgments, or ordering the parties not to disclose the identities of witnesses. *Id.*

²¹¹ *Id.* § 15(5); *see* HRW, PUNJAB IN CRISIS, *supra* note 3, at 157-58.

enacted in the wake of Indira Gandhi's assassination.²¹² Unlike the TAAA, which deemed certain existing substantive offenses terrorist-related only if they were committed in specific geographic areas designated for limited periods of time as "terrorist affected," TADA explicitly defined a series of new, substantive terrorism-related offenses of general applicability, which could be prosecuted by state governments throughout the country without any central government designation that the area in which the offense took place was "terrorist affected." At one level, this may have been desirable, for as Jaswant Singh noted during the 1980s, the singling out of Punjab for emergency treatment may have contributed to the "psychological isolation of [that] beleaguered state."²¹³ At the same time, enactment of a powerful, nationwide antiterrorism law without sufficient safeguards to constrain its misuse and ensure national uniformity in its application led to human rights abuses and disparate patterns of enforcement throughout the country.

TADA's principal provisions made it a crime to (1) commit a "terrorist act," (2) conspire, attempt to commit, advocate, abet, advise or incite, or knowingly facilitate the commission of a terrorist act or "any act preparatory to a terrorist act," (3) "harbor or conceal, or attempt to harbor or conceal any person knowing that such person is a terrorist," or (4) hold property that has been "derived or obtained from commission of any terrorist act" or that "has been acquired through the terrorist funds."²¹⁴ The statute also made it a crime to commit any "disruptive activity," defined as any act, speech, or conduct that, "through any other media or in any other manner whatsoever," either (1) "questions, disrupts, or is intended to disrupt, whether directly or indirectly, the sovereignty and territorial integrity of India," or (2) "is intended to bring about or supports any claim, whether directly or indirectly, for the cession of any part of India or the secession of any part of India from the Union."²¹⁵

The procedural rules under TADA departed from the ordinary rules of evidence and criminal procedure in several respects. While ordinary law

²¹² Terrorist and Disruptive Activities (Prevention) Act, No. 31 of 1985 [hereinafter TADA].

²¹³ As Singh continued, "You cannot vociferously demand the ending of all separatist tendencies in that state, and yet, simultaneously, specifically legislate for an emergency in . . . Punjab only." Singh, *supra* note 12, at 19.

²¹⁴ TADA § 3. TADA defined "terrorist act" as one of several specifically enumerated acts of violence if committed "with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people." *Id.* § 3(1).

²¹⁵ *Id.* § 4. TADA also criminalized conspiracy or attempt to commit disruptive activities, abetting, advocating, advising, or knowingly facilitating the commission of any disruptive activities, and harboring, concealing, or attempting to harbor or conceal any "disruptionist." *Id.* § 4(1), (4).

precludes admissibility of any confessions made to police officers, TADA provided instead that confessions to police officers could be admitted as substantive evidence as long as the officer's rank was superintendent or higher; the confession was recorded in writing, audio, or video; and the confession was voluntary.²¹⁶ The stringent bail and pretrial detention provisions and the special procedural rules for the special courts under the TAAA also were included under TADA.²¹⁷

Human rights advocates sharply criticized the antiterrorism practices of the central and state governments in Punjab and elsewhere throughout the late 1980s and early 1990s. In Punjab, much of this criticism focused on the practices of the police, paramilitary, and armed forces, drawing attention to the many thousands of civilian deaths and extensive evidence that the security forces engaged in arbitrary arrests and detentions, extortion, torture, extrajudicial killings, and thousands of disappearances.²¹⁸ As in other parts of India, extrajudicial killings in Punjab frequently took the form of "false encounters," a longstanding, well-documented practice by which the police simply execute someone extrajudicially and then falsely claim that the killing took place in response to an attack.²¹⁹

However, laws such as TADA also have been a focal point of these criticisms, since they purported to provide both the legal and symbolic

²¹⁶ *Id.* § 15; see *supra* subsection II.B.2. Before recording the confession, the police officer needed to explain to the person making the confession that he is not required to confess, and that if he does, the confession could be used as evidence against him. TADA § 15.

²¹⁷ *Id.* §§ 9-19.

²¹⁸ See HRW, PUNJAB IN CRISIS, *supra* note 3, at 35-148; REDUCED TO ASHES, *supra* note 208, at 170-80; see also Singh, *supra* note 8, at 414 (noting statistics suggesting as many as 31 percent of all casualties in Punjab were civilians). Without refuting any specific allegations, some individuals have questioned whether these allegations of human rights violations are true. *E.g.*, Gill, *supra* note 202, at 59-60. However, in recent years, substantial evidence has emerged suggesting that the army and police in Punjab engaged in thousands of illegal mass cremations throughout this period. In 1996, the Supreme Court of India ordered the NHRC to investigate over 2,000 cases of illegal cremations within one district in Punjab alone. The Court's order came two years after a leading human rights advocate, Jaswant Singh Khalra, was abducted and disappeared, apparently in retaliation for his investigation into these cremations. While the NHRC's investigation has moved slowly, human rights advocates have extensively documented evidence of the illegal cremations and other human rights violations. See REDUCED TO ASHES, *supra* note 208; NHRC Urged to Probe 'Disappearances' in Punjab, THE HINDU, June 13, 2003, available at <http://www.hindu.com/2003/06/13/stories/2003061303191200.htm>; Rajinder Puri, Facing The Truth, OUTLOOK, Mar. 22, 2006, available at <http://www.outlookindia.com/fullprint.asp?choice=1&fodname=20060322&fname=rajinderpuri&sid=1>. In November 2005, over ten years after Khalra's disappearance, several senior Punjab police officials were convicted for his abduction and murder. See Asit Jolly, 'Police Guilty' in Punjab Killing, BBC News, Nov. 18, 2005, http://news.bbc.co.uk/2/hi/south_asia/4450174.stm.

²¹⁹ Usha Ramanathan, *Human Rights in India: A Mapping*, IELRC Working Paper 2001-3, at 14-15 (2001), <http://www.ielrc.org/content/w0103.pdf>; see Ved Marwah, *The Sub-Culture*, SEMINAR, Oct. 1977, at 14, 15 (noting fake encounters are "a legacy from [the] British days"); see *infra* section V.B.

authority for many of these rights violations. Critics frequently noted the facial inconsistency of many of TADA's provisions with human rights norms under international law and the Constitution.²²⁰ Considerable evidence suggests that in its application, TADA's sweeping powers were predominantly used not to prosecute and punish actual terrorists, but rather as a tool that enabled pervasive use of preventive detention and a variety of abuses by the police, including extortion and torture.²²¹ In Punjab, advocates extensively documented evidence that thousands of individuals, virtually all of them Sikh, had been arbitrarily arrested under TADA and detained for prolonged periods without being told the charges against them. The availability of TADA's provisions as a means of coercion also helped facilitate many of the other well-documented human rights violations by the police.²²² Frequently, the Punjab police would eschew use of the ordinary criminal laws when TADA's more powerful provisions also were available.²²³

But human rights violations associated with TADA were not limited to Punjab. To the contrary, police often committed similar abuses even in states that lacked the acknowledged problem of political violence found in Punjab. For example, of the 67,507 individuals detained under TADA as of August 1994, 19,263 of them were in Gujarat – even more than in Punjab, and in a state without any significant terrorism problem.²²⁴ As in Punjab, advocates presented considerable evidence that in other states TADA was similarly used to facilitate extortion, illegal arrests and detentions, torture, and other human rights violations. While the precise contours of this pattern varied from state to state, depending on the local social and political context, TADA's provisions consistently were used in an arbitrary and discriminatory manner to target political opponents, religious minorities, or Dalits and other lower caste groups, or to prosecute ordinary criminal offenses with no connection to terrorism.²²⁵

²²⁰ *E.g.*, HRW, PUNJAB IN CRISIS, *supra* note 3, at 148-58; REDUCED TO ASHES, *supra* note 208, at 87-99.

²²¹ *E.g.*, REDUCED TO ASHES, *supra* note 208, at 181-82. The threat of charges under TADA was often used to threaten the same individuals more than once. *Id.* at 182.

²²² *See, e.g.*, HRW, PUNJAB IN CRISIS, *supra* note 3, at 148-58.

²²³ In fact, the use of TADA as a substitute for ordinary criminal law become so widespread that the Punjab government eventually directed local officials explicitly not to use TADA when regular criminal law provisions might apply. SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, ALTERNATE REPORT AND COMMENTARY TO THE U.N. HUMAN RIGHTS COMMITTEE ON INDIA'S 3RD PERIODIC REPORT UNDER ARTICLE 40 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1997), http://www.hrdc.net/sahrdc/resources/alternate_report.htm [hereinafter SAHRDC, ALTERNATE REPORT].

²²⁴ *Id.*

²²⁵ *See, e.g., id.* (discussing discriminatory use of TADA in Rajasthan against Muslims and Sikhs, in Bihar

Statistics documenting detention and conviction rates under TADA provided further evidence suggesting the law's misuse. While precise numbers have varied, the overall picture is clear and consistent: large numbers of individuals were detained under TADA, but only a miniscule fraction of them were ultimately convicted of anything. Statistics reported by the government in October 1993 showed that only 0.81 percent of the 52,268 individual detained under TADA since its enactment had been convicted. In Punjab, the conviction rate was even lower: only 0.37 percent of the 14,557 individuals detained under TADA in Punjab had been convicted. In August 1994 the Minister of State for Home Affairs reported that of the 67,059 individuals reported to have been detained under TADA since its enactment, only 8,000 individuals had been tried, of whom 725 individuals were convicted. Other government statistics suggested that by mid-1994, 76,036 individuals had been detained under TADA, of whom only one percent had been convicted.²²⁶ For individuals arrested under ordinary criminal laws, by contrast, the conviction rate in 1991 was 47.8 percent.²²⁷

Together with qualitative evidence concerning TADA's application, these data suggest that TADA functioned more as a tool to enable preventive detention and police abuse than as a meaningful and effective criminal law. Indeed, in 1987 the Punjab director-general of police implicitly conceded that the police frequently used TADA primarily as a preventive detention law, describing a common practice by which the police would first detain at least some individuals for the maximum two years available under the NSA's preventive detention authority before then charging and detaining the same individuals under TADA, in order to "keep them in custody for another year or two."²²⁸ Even when the laws were not used sequentially, TADA's

against the landless poor, and in Andhra Pradesh against tribals and lower caste individuals alleged to be Naxalites); Mathur, *supra* note 43, at 343 (discussing use of TADA to target journalists for speech activities); K. Balagopal, *Drought and TADA in Adilabad*, ECON. & POL. WKLY., Nov. 25, 1989, at 2587, 2591 (discussing use of TADA in Andhra Pradesh against tribals); Janaki Nair, *Terrorists Act Used against Civil Rights Activist*, ECON. & POL. WKLY., June 7, 1986, at 1000 (discussing use of TADA in Karnataka against civil rights activist Nagari Babiah); P.A. Sebastian, *Terrorist Act Against Demoratic Rights Activist*, ECON. & POL. WKLY., Nov. 30, 1985, at 2148 (discussing use of TADA in Andhra Pradesh against civil liberties activist K. Balagopal).

²²⁶ Suhas Chakma, *Do Ends Justify Means?*, SEMINAR, Apr. 2002, at 27, 30, available at <http://www.india-seminar.com/2002/512/512%20suhas%20chakma.htm>; SAHRDC, ALTERNATE REPORT, *supra* note 223. According to one estimate, of these approximately 76,000 individuals, 25 percent were released without ever being charged. Of the cases that proceeded to trial, trials were completed in only 35 percent of the cases, with 95 percent of those trials resulting in acquittals. Ujjwal Kumar Singh, *Democratic Dilemmas: Can Democracy Do Without Extraordinary Laws?*, ECON. & POL. WKLY., Feb. 1, 2003.

²²⁷ MINISTRY OF HOME AFFAIRS, NATIONAL CRIME RECORDS BUREAU, CRIME IN INDIA 2004, at 192 (2005), <http://ncrb.nic.in/crime2004/home.htm> [hereinafter CRIME IN INDIA 2004].

²²⁸ HRW, PUNJAB IN CRISIS, *supra* note 3, at 149 (quoting statement by Julio Ribeiro).

onerous pretrial detention and bail provisions made it almost impossible for defendants to obtain release if the prosecution opposed bail.²²⁹

The Supreme Court of India ultimately upheld the constitutionality of TADA in almost all respects, although it did seek to rein in its potential misuse by requiring relatively modest safeguards.²³⁰ However, political opposition to the law and the manner in which it was applied continued, and by the early 1990s, the overall level of violence had declined sharply in Punjab, the state which originally had been the impetus for TADA's enactment.²³¹ TADA contained a sunset provision requiring Parliament to reconsider and renew the legislation every two years, and by the mid-1990s political pressure had mounted on Parliament not to renew the Act when it expired. In February 1995, the chairperson of the NHRC wrote a letter to all members of Parliament urging them not to renew TADA.²³² Even the Supreme Court of India, in upholding TADA's constitutionality, noted with concern the "sheer misuse and abuse of the Act by the police."²³³ When

²²⁹ See SAHRDC, ALTERNATE REPORT, *supra* note 223 (under TADA, "[i]t was common for people to be held on the strength of [a First Information Report] for a year. If a charge sheet is filed, then it is almost impossible for the accused to be released on bail. Thus the accused, though in most cases acquitted, is preemptively punished by incarceration, normally for a period of 2-3 years").

²³⁰ *Kartar Singh v. State of Punjab*, (1994) 2 S.C.R. 375, 1994 Indlaw SC 525; see REDUCED TO ASHES, *supra* note 208, at 87-100. The Court did invalidate a provision in TADA that made witness identifications based on photographs admissible as a violation of the right to a fair trial, and because it deemed the provision criminalizing "abetting" of a terrorist act to be overly vague, the Court held that the government must prove that the accused had actual knowledge or reason to believe that the persons allegedly abetted were engaged in terrorist or disruptive acts. *Kartar Singh*, (1994) 2 S.C.R. 375, 1994 Indlaw SC 525, ¶ 146; *id.* ¶¶ 389-90 (Ramaswamy, J.). The Court also imposed several procedural safeguards before sustaining the provisions in TADA permitting confessions to certain police officers. *Id.* ¶ 165.

²³¹ Observers differ sharply on why the violence in Punjab declined. While some credit strong antiterrorism and counterinsurgency policies as the most important factor in curbing militant groups, see, for example, Gill, *supra* note 202; Singh, *supra* note 8, at 413-15, others have emphasized social forces within Punjabi society that prevented the militancy from seriously taking hold among the people and which ultimately were able to prevail, see, for example, Singh, *supra* note 8, at 415-16; JOSHI, *supra* note 197, at 18-19. As one scholar noted in 1993, "[t]he victory against terrorism [was] only one part of the solution to the overall Punjab problem." JOSHI, *supra* note 197, at 26; see also Praful Bidwai, *The Perils of POTO*, FRONTLINE, Nov. 24-Dec. 7, 2001, available at <http://www.flonnet.com/fl1824/18241100.htm> (arguing that terrorism in Punjab was ultimately controlled not by antiterrorism laws and policies, but "through a political solution which exposed the . . . terrorist [in Punjab] as a bunch of extortionists and rapists").

²³² Letter from Justice Ranganath Misra (Feb. 20, 1995), in NAT'L HUMAN RIGHTS COMM'N OF INDIA, ANNUAL REPORT 1994-95, available at http://www.nhrc.nic.in/ar94_95.htm [hereinafter NHRC ANNUAL REPORT 1994-95] (criticizing TADA as "draconian in effect and character" and "incompatible with our cultural traditions, legal history and treaty obligations," and urging Parliament not to renew it); see also NHRC ANNUAL REPORT 1994-95, *supra*, ¶¶ 4.1-4.6.

²³³ *Kartar Singh v. State of Punjab*, (1994) 2 S.C.R. 375, 1994 Indlaw SC 525, ¶ 352. Recognizing the potential for abuse of the procedural safeguards it had imposed, and the past cases of mistreatment of prisoners, particularly during interrogation, the Court also recommended that the central government

TADA came up for renewal, the Congress-led government ultimately lacked support to renew the law and it was permitted to lapse in May 1995.²³⁴

Despite TADA's lapse, the law cast a long shadow for years to come. Cases initiated while TADA was in force were not automatically dismissed upon its lapse, and the central and state governments still have authority – to this day – to institute new cases based on allegations arising from the period when TADA was in effect. As of 1996, over 14,000 TADA cases were still pending, and by 1999, almost 5,000 trials under TADA remained to be completed and over 1,300 cases were still being investigated.²³⁵ While many of the accused in these cases were released on bail, many remained in detention for years. According to government statistics, at the time of TADA's lapse approximately 6,000 individuals were in detention under TADA, and as of 1997, the number of TADA detainees still was approximately 1,500. Today, the number of TADA detainees appears to be fewer, but some cases instituted under the law are still pending, with defendants continuing to await trial before TADA's special courts. Evidence suggests that in some instances wholly new proceedings under TADA have been instituted through fraudulent backdating of factual allegations.²³⁶

B. The Prevention of Terrorism Act of 2002 and the Aftermath of Its Repeal

Just as successive governments in the late 1970s had difficulty letting go of the extraordinary powers conferred by MISA, both the Congress-led government in 1995 and the Bharatiya Janata Party-led government elected

institute review committees at the central and state levels to evaluate the application of TADA on recording confessions. *Id.* ¶ 265.

²³⁴ Rajeev Dhavan, Op-Ed, *Sugarcoating POTA*, THE HINDU, Oct. 31, 2003, available at <http://www.hindu.com/2003/10/31/stories/2003103100841000.htm>. In reviewing India's third periodic report under the ICCPR two years later, the Human Rights Committee noted that it "welcome[d]" the lapse of TADA. U.N. Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: India*, ¶ 9, U.N. Doc. CCPR/C/79/Add.81 (Aug. 4, 1997), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.79.Add.81.En](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.79.Add.81.En).

²³⁵ Rajeev Dhavan, Op-Ed, *POTO: An Assault on Democracy*, THE HINDU, Nov. 16, 2001, available at <http://www.hindu.com/thehindu/2001/11/16/stories/05162523.htm>; Dhavan, *supra* note 234.

²³⁶ NAT'L HUMAN RIGHTS COMM'N OF INDIA, ANNUAL REPORT 1995-96, ¶¶ 4.2, available at http://www.nhrc.nic.in/ar95_96.htm; Usha Ramanathan, *Crime and Punishment*, SEMINAR, Jan. 2006, at 106, available at <http://www.india-seminar.com/2006/557/557%20usha%20ramanathan.htm>; Press Release, Human Rights Watch, India Human Rights Press Backgrounder (Nov. 20, 2001), <http://www.hrw.org/backgrounder/asia/india-bck1121.htm>.

in 1999 had difficulty relinquishing the authority conferred by TADA. In 1995, almost immediately after permitting TADA to lapse, the Congress-led government introduced the Criminal Law Amendment Bill, which would have reenacted many of the same provisions found in TADA. The Human Rights Committee noted concerns over the proposal when reviewing India's periodic report under the ICCPR in 1997.²³⁷ No action ultimately was taken on the bill.

In 1999, the Law Commission of India undertook a study at the request of the new BJP-led government to determine whether new antiterrorism legislation was necessary. The Commission responded by proposing a new Prevention of Terrorism Bill based largely on the Criminal Law Amendment Bill of 1995.²³⁸ Throughout 2000 and 2001, the government sought to enact a new antiterrorism law based on this proposal, explicitly invoking antiterrorism laws in the United States and the United Kingdom to justify its proposal.²³⁹ These efforts were met with vigorous resistance not only from Indian human rights advocates, but also from the NHRC, opposition parties including the Congress Party, and even some of the BJP's coalition partners.²⁴⁰ Opponents cited the abuses that occurred under TADA, fearing that the new proposal's virtually identical provisions would result in similar abuses and would be similarly ineffective in combating terrorism.²⁴¹

As in other countries, however, the terrorist attacks on September 11, 2001, affected the political dynamics in India. Within days, the Prime Minister asserted that India needed to review its "hobbled laws" and "dilatatory procedures."²⁴² Within weeks, the government ushered its

²³⁷ U.N. Human Rights Committee, *supra* note 234, ¶ 24.

²³⁸ LAW COMM'N OF INDIA, 173RD REPORT ON PREVENTION OF TERRORISM BILL, 2000, ch. 2 (2000) [hereinafter LAW COMM'N 173RD REPORT], <http://www.lawcommissionofindia.nic.in/tada.htm>; see AMNESTY INT'L, BRIEFING ON THE PREVENTION OF TERRORISM ORDINANCE, ASA 20/049/2001, at 1 (2001) [hereinafter AMNESTY INT'L, BRIEFING ON POTO], available at [http://web.amnesty.org/library/pdf/ASA200492001ENGLISH/\\$File/ASA2004901.pdf](http://web.amnesty.org/library/pdf/ASA200492001ENGLISH/$File/ASA2004901.pdf).

²³⁹ SAHRDC, PREVENTION OF TERRORISM ORDINANCE, *supra* note 19, at 14. Ironically, the BJP and some of its allies previously had been strongly critical of the Congress-led government's use of TADA, which differed very little from the BJP's own proposed law.

²⁴⁰ Nat'l Human Rights Comm'n of India, *Opinion in Regard: The Prevention of Terrorism Bill, 2000*, http://www.nhrc.nic.in/annexDoc00_01.htm#no2 [hereinafter NHRC, *Opinion Regarding Prevention of Terrorism Bill*]; Era Sezhiyan, *Perverting the Constitution*, FRONTLINE, Dec. 8-21, 2001, available at <http://www.flonnet.com/fl1825/18251010.htm> ("Some of the National Democratic Alliance constituents themselves have expressed reservations about some of the provisions of POTO").

²⁴¹ Jayanth K. Krishnan, *India's Patriot Act: POTA and the Impact on Civil Liberties in the World's Largest Democracy*, 22 LAW & INEQ. 265, 269 (2004).

²⁴² Prime Minister Atal Behari Vajpayee, Address to Nation on Terrorist Attacks on the United States, Sep. 14, 2001, 2001,

preexisting proposal into law as an ordinance, the Prevention of Terrorism Ordinance, temporarily deferring full parliamentary consideration of the proposal.²⁴³ In the midst of the debate over the proposed bill, the government's proposal gained further momentum from two significant terrorist attacks – an attack on the legislative assembly complex in the state of Jammu & Kashmir in October 2001 and an assault on the Indian Parliament building in Delhi in December 2001. The debate over the proposed legislation was highly charged. Soon after POTO was promulgated, the Home Minister asserted that POTO's opponents "would be wittingly or unwittingly pleasing the terrorists by blocking it in Parliament."²⁴⁴ Despite vigorous opposition, Parliament ultimately affirmed the government's ordinance, enacting the Prevention of Terrorism Act into law in March 2002, during an extraordinary joint session of both houses of Parliament.²⁴⁵

POTA quickly became highly controversial for many of the same reasons that made TADA controversial years earlier, and as a result, the law became a significant political issue during the election campaign in May 2004. When the Congress-led coalition won that election, it proceeded to fulfill its pledge to repeal POTA, given its "gross[] misuse[]," and to ensure instead that "existing laws are enforced strictly."²⁴⁶ While human rights advocates have commended the new government for repealing POTA and thereby eliminating several of the statute's more troubling features, several

http://www.indianembassy.org/special/cabinet/Primeminister/pm_september_14_2001.htm.

²⁴³ Prevention of Terrorism Ordinance, No. 9 of 2001 (Oct. 24, 2001). A second ordinance in December 2001 renewed POTO, with slight modifications, after Parliament adjourned without enacting legislation. Prevention of Terrorism (Second) Ordinance, No. 12 of 2001 (Dec. 30, 2001).

²⁴⁴ Onkar Singh, *Those Opposed to POTO Helping Terrorists: Advani*, REDIFF, Nov. 7, 2001, <http://www.rediff.com/news/2001/nov/07poto1.htm>.

²⁴⁵ Prevention of Terrorism Act, No. 15 of 2002 [hereinafter POTA]. Since POTA had sufficient support in the lower house but not the upper house of Parliament, the BJP-led government relied upon a rarely-used technical procedure permitting the two houses to meet in joint session, permitting the bill to become law by a simple majority vote of the entire Parliament. Krishnan, *supra* note 241, at 272; see V. Venkatesan, *The POTA Passage*, FRONTLINE, Apr. 13-26, 2002, available at <http://www.flonnet.com/fl1908/19081020.htm>. POTA was deemed to have come into force on October 24, 2001, the date that POTO was first promulgated by the President, and was to remain in force for three years from the date of enactment. POTA § 1(6).

For discussions of POTO and POTA, see Krishnan, *supra* note 241; AMNESTY INT'L, BRIEFING ON POTO, *supra* note 238; SAHRDC, PREVENTION OF TERRORISM ORDINANCE, *supra* note 19; Asia Pacific Human Rights Network, Prevention of Terrorism Act, 2002, Submission to Advisory Council of Jurists of Asia Pacific Forum (2004), http://www.asiapacificforum.net/jurists/references/terrorism/aphrn_india.pdf; Manas Mohapatra, Comment, *Learning Lessons From India: The Recent History of Antiterrorist Legislation on the Subcontinent*, 95 J. CRIM. L. & CRIMINOLOGY 315 (2004).

²⁴⁶ GOVERNMENT OF INDIA, NATIONAL COMMON MINIMUM PROGRAMME 21 (May 2004), <http://pmindia.nic.in/cmp.pdf>; see Prevention of Terrorism (Repeal) Ordinance, No. 1 of 2004 (promulgated Sep. 21, 2004); Prevention of Terrorism (Repeal) Act, No. 26 of 2004 (enacted Dec. 21, 2004) [hereinafter POTA Repeal Act].

important concerns remain even in the aftermath of POTA's formal repeal.²⁴⁷

First, POTA continues to apply to many individuals notwithstanding its formal repeal. Like both the Rowlatt Act, which preserved orders issued under the lapsed Defence of India Act of 1915, and TADA, which continued to be applied throughout the country long after its formal repeal, the repeal of POTA was not made fully retroactive.²⁴⁸ In contrast to the experience under TADA, however, the government more aggressively sought to cabin the extent to which POTA would continue to apply long after repeal by (1) prohibiting any court from taking jurisdiction of new POTA cases any later than one year following repeal, and (2) requiring *each* case to be reviewed by a central POTA "review committee" before permitting any pending POTA investigation or prosecution to proceed. The review committees also were required to complete their review within one year after repeal.²⁴⁹

Second, when the new government repealed POTA, it simultaneously reenacted and thereby preserved several of its provisions as amendments to the Unlawful Activities (Prevention) Act of 1967.²⁵⁰ These provisions continue to raise some of the same human rights issues that arose under POTA. Moreover, several states already have laws conferring authority similar to that available under POTA, and some state governments have suggested that they will enact new laws to provide additional antiterrorism authority.²⁵¹ While laws on the same subject by the central government, such as UAPA and its 2004 amendments, have supremacy

²⁴⁷ On the repeal of POTA and amendments to UAPA, see SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, THREE STEPS FORWARD, TWO STEPS BACK: THE UNLAWFUL ACTIVITIES (PREVENTION) ACT, 2004 (2005) [hereinafter SAHRDC, THREE STEPS FORWARD]; A.G. Noorani, *Repeal of POTA and UPA's Bill*, ECON. & POL. WKLY., Jan. 1, 2005.

²⁴⁸ POTA Repeal Act § 2(2).

²⁴⁹ *Id.* § 2(2)-(3); Rudra Biswas, *POTA Net for Evaders*, THE TELEGRAPH (Kolkata), Nov. 4, 2004, available at http://www.telegraphindia.com/1041104/asp/jamshedpur/story_3963012.asp (discussing Jharkhand state government's decision to proceed with charges under POTA). Within the bounds of these constraints, states have varied significantly in the degree to which they have continued to apply POTA and have cooperated with this review process.

²⁵⁰ Unlawful Activities (Prevention) Amendment Ordinance, No. 2 of 2004 (promulgated Sep. 21, 2004); Unlawful Activities (Prevention) Amendment Act, No. 29 of 2004 (enacted Dec. 21, 2004) [hereinafter UAPA Amendment Act]; see *supra* subsection III.B.3.

²⁵¹ See *Party Nod to Terror Law in BJP States*, THE TELEGRAPH (Kolkata), Sep. 13, 2004, available at http://www.telegraphindia.com/1040913/asp/nation/story_3751095.asp (quoting BJP president to say, "The moment the Centre repeals Pota, the states will enact their own (anti-terror) laws"); see also S. Nagesh Kumar, *Terror and worse*, FRONTLINE, Apr. 14-27, 2001, available at <http://www.flonnet.com/fl1808/18080400.htm> (noting enactment of Andhra Pradesh Control of Organized Crime Act and noting critics' description of law as a "re-packaged version of the now-lapsed [TADA]"); Sudhir Kumar Mishra, *CM to Keep POTA Spirit Alive*, THE TELEGRAPH (Kolkata), Sep. 20, 2004, available at http://www.telegraphindia.com/1040920/asp/jharkhand/story_3778162.asp (discussing Jharkhand state government's consideration of new state law to replace POTA).

under the Indian Constitution,²⁵² the existence of these state laws nevertheless means that the same human rights concerns arising under POTA might well arise in those particular states.

Third, the issue of special, national antiterrorism legislation has remained a controversial issue. Opposition parties continue to criticize the government for repealing POTA and periodically propose that it be reenacted, often most sharply in the immediate aftermath of significant terrorist incidents.²⁵³ Indeed, not long before POTA was repealed, a government commission considering broader reforms to the criminal justice system proposed that many of POTA's provisions be extended to *all* criminal cases.²⁵⁴ Just as MISA's provisions were reenacted in the form of the NSA, and TADA's provisions were reenacted in the form of POTA, it is not out of the question that proposals will eventually emerge to reenact POTA's repealed provisions in some future antiterrorism or criminal law.

The discussion that follows therefore considers the human rights issues arising under both POTA and the amendments to UAPA, since the provisions in POTA that have been incorporated into UAPA continue to apply prospectively to all Indian citizens. In addition, the provisions in POTA that have been repealed continue to apply directly to many

²⁵² Alope Tikku, *Terror Law Blow to BJP*, THE TELEGRAPH (Kolkata), Sep. 23, 2004, available at http://www.telegraphindia.com/1040923/asp/nation/story_3793189.asp (quoting statement by Union Home Minister that “[i]f there is a law created by the Centre and the state for the same purpose, the law enacted by the Centre will have precedence” under the Constitution); see also V.R. Krishna Iyer, *Rowlatt Act, TADA & POTA II*, THE HINDU, Aug. 4, 1998, at 12; Vijayashri Sripathi, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)*, 14 AM. U. INT’L L. REV. 413, 487 (1998); V. Venkatasana, *The POTO Debate*, FRONTLINE, Nov. 24-Dec. 7, 2001, available at <http://www.flonnet.com/fl1824/18240320.htm>.

²⁵³ See, e.g., *BJP for Re-Introduction of POTA*, THE HINDU, Sep. 19, 2005, available at <http://www.hindu.com/thehindu/holnus/001200509190302.htm>; *Be Clear on Policy Against Terror, BJP Tells Centre*, THE HINDU, Oct. 31, 2005, available at <http://www.hindu.com/2005/10/31/stories/2005103105741200.htm> (in aftermath of Delhi bomb blasts, quoting statement by BJP official that repeal of POTA “had sent an encouraging signal to terrorists”); *‘Soft Attitude’ to Terrorists Assailed*, THE HINDU, Dec. 2, 2005, available at <http://www.hindu.com/2005/12/02/stories/2005120207921200.htm> (quoting claims by opposition that repeal of POTA had “triggered” terrorist attacks in Delhi and Jammu & Kashmir and Naxalite attacks in Bihar); *UPA Gov’t Should Re-Enact POTA: Swamy*, TIMES OF INDIA, Jan. 9, 2006, available at <http://timesofindia.indiatimes.com/articleshow/1364411.cms> (quoting Janata Party president in wake of terrorist attack in Bangalore); Jaya Menon, *Jaya: Bring Back POTA to Fight Terror*, INDIAN EXPRESS, July 16, 2006, available at <http://www.indianexpress.com/sunday/story/8619.html> (quoting AIADMK leader J. Jayalalitha in wake of Mumbai train blasts); *Re-Enact POTA to Tackle Terror: Advani*, HINDUSTAN TIMES, July 16, 2006, available at <http://www.hindu.com/2006/07/17/stories/2006071708431200.htm> (quoting BJP leader in wake of Mumbai train blasts); *Gujarat CM Demands Pota, again*, THE STATESMAN (Kolkata), July 17, 2006, available at <http://www.thestatesman.net/page.arcview.php?clid=2&id=150792&usrss=1> (quoting Gujarat Chief Minister Narendra Modi in aftermath of Mumbai train blasts).

²⁵⁴ See *infra* section VI.B.

individuals, under POTA's savings clause, and have support from a number of political leaders who advocate their reenactment.

1. Definitions of "Terrorist Acts" and "Terrorist Organizations"

While governments and the United Nations have extensively legislated against "terrorism" and "terrorist acts," defining these terms precisely has been a major challenge. Most governments, including the United States, have found workable and consistent definitions of "terrorism" elusive, and with POTA the Indian government has continued to struggle with the same issues.²⁵⁵ The result is a set of open-ended definitions that fail to give sufficient notice of what conduct is being criminalized and are susceptible to arbitrary and discriminatory application.

POTA's substantive provisions expand upon the similar provisions in TADA and may be placed into three broad categories. First, POTA directly criminalizes (1) commission of a "terrorist act," (2) conspiring, attempting to commit, advocating, abetting, advising or inciting, or knowingly facilitating the commission of a terrorist act or "any act preparatory to a terrorist act," (3) "voluntarily harbor[ing] or conceal[ing], or attempt[ing] to harbor or conceal any person knowing that such person is a terrorist," (4) "possession of any proceeds of terrorism," and (5) knowingly holding any property that has been "derived or obtained from commission of any terrorist act" or that "has been acquired through the terrorist funds"²⁵⁶ Like TADA, the statute defines "terrorist act" to include (a) any one of several enumerated acts of violence if committed "with intent to strike terror in the people or any section of the people" or with intent to "threaten the unity, integrity, security and sovereignty of India"²⁵⁷ or (b) commission of any act "resulting in loss of human life or grievous injury to any person," or causing "significant damage to any property," if the defendant is a member of, or voluntarily aids or promotes the objects, of an association declared unlawful under UAPA and in possession of unlicensed firearms, ammunition, explosives, or other instruments or substances "capable of

²⁵⁵ By one count, federal law in the United States includes at least twenty-two different definitions of "terrorism." Nicholas J. Perry, *The Numerous Federal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 254-69 (2004).

²⁵⁶ POTA § 3(6)

²⁵⁷ *Id.* § 3(1). Notably, POTA dropped the language in TADA encompassing acts committed with "intent to . . . adversely affect the harmony amongst different sections of the people." Noorani, *supra* note 247.

causing mass destruction.”²⁵⁸

Many of these core offenses in POTA duplicate provisions found in TADA and, as such, raise the same concerns. While human rights advocates praised the government for excluding TADA’s vague provisions criminalizing “disruptive activities,” POTA’s definition of “terrorist act” remains vague and overly broad. The definition broadly encompasses many ordinary criminal law offenses with little relationship to terrorist activity, creating tremendous potential for arbitrary or selective application. Several provisions fail to specify the mental state required for conviction, raising the same concerns of adequate notice identified by the Supreme Court in its review of similar provisions under TADA.²⁵⁹ As such, POTA’s definition may run afoul of the principle of legality, a nonderogable obligation under the ICCPR that requires the law to define criminal offenses before they are committed and with “sufficient precision” to prevent arbitrary enforcement.²⁶⁰ As discussed below, the open-ended nature of these provisions has enabled violations of the rights to equality and to freedom of association and expression by facilitating selective enforcement on the basis of religion, caste, tribal status, and political opinion, and prosecution for activities solely involving speech and association.²⁶¹

Second, POTA goes beyond TADA’s original provisions to target several forms of association with terrorism.²⁶² The law authorizes the government to ban any “terrorist organisation”²⁶³ and criminalizes a host of actions associated with these banned entities, including:

- “belong[ing] or profess[ing] to belong to a terrorist organization,” unless the defendant can prove (a) “that the organization was not declared as a terrorist organization at the time when he became or began to profess to be a member” and (b) “that he has not taken

²⁵⁸ POTA § 3(1)(b).

²⁵⁹ In reviewing TADA, the Supreme Court required the government to prove that the accused had actual knowledge or reason to believe that the persons allegedly abetted were engaged in terrorist or disruptive acts. *See supra* note 230.

²⁶⁰ ICCPR, *supra* note 80, arts. 4, 15; OHCHR, *Digest of Jurisprudence*, *supra* note 93, at 63-65.

²⁶¹ ICCPR, *supra* note 80, arts. 19, 21; OHCHR, *Digest of Jurisprudence*, *supra* note 93, at 70-74; *see infra* Part V.

²⁶² While TADA did not originally include any provisions addressing “terrorist gangs” and “terrorist organizations,” Parliament amended TADA in 1993 to criminalize membership in a “terrorists gang or a terrorist organisation, which is involved in terrorist acts” – although in doing so it did not define either term. Act No. 43 of 1993, § 4 (amending TADA § 3).

²⁶³ POTA § 18.

part in the activities of the organization at any time” since its having been banned by the government,²⁶⁴

- “invit[ing] support” for a terrorist organization, not limited to the provision of money or other property,²⁶⁵
- arranging or managing, or assisting in arranging or managing, a meeting that the defendant knows is (a) to support or further a terrorist organization’s activities or (b) to be addressed by a person who belongs to a terrorist organization,²⁶⁶
- raising, receiving, or providing money or other property when either intending or having “reasonable cause to suspect” it will be used “for the purposes of terrorism.”²⁶⁷

The statute does not define “terrorist organisation” in substantive terms, providing instead that (1) the central government may designate and ban a “terrorist organisation” if it believes that entity is “involved in terrorism,” and (2) an organization shall be deemed to be “involved in terrorism” if it commits or participates in acts of terrorism, prepares for terrorism, promotes or encourages terrorism, or is otherwise involved in terrorism.²⁶⁸ While the definition of “terrorist act” provides some interpretive guidance, the statute defines no additional substantive criteria to guide the government’s determinations, and does not provide for judicial review of those decisions. The statute confuses matters further by defining a separate criminal offense, for membership in a “terrorist gang or a terrorist organisation, which is involved in terrorist acts,” which relies upon a completely different definition of “terrorist organisation” – namely, any “organisation which is concerned or involved with terrorism,” apparently without regard to whether the organization has been officially banned by the government.²⁶⁹

To the extent that these provisions fail to specify the requisite intent to establish criminality or define *any* criteria for designating an association to be a “terrorist organisation” – much less to define those criteria with clarity –

²⁶⁴ *Id.* § 20.

²⁶⁵ *Id.* § 21(1).

²⁶⁶ *Id.* § 21(2). A “meeting” is defined to include any gathering of three or more persons “whether or not the public is admitted.” *Id.* § 21 (explanatory note).

²⁶⁷ *Id.* § 22(1)-(3).

²⁶⁸ *Id.* § 18.

²⁶⁹ *Id.* § 3(5).

they, too, fail to satisfy the principle of legality. As written, these provisions criminalize mere “membership,” “belonging,” or “professing” to belong to an association deemed to be involved in terrorism without either defining those terms substantively or requiring the accused to have knowledge of the organization’s activities. The provisions directly target protected speech and associational activities, and their application has in fact infringed upon these rights under the Constitution and the ICCPR.²⁷⁰

Third, POTA defines a handful of other offenses deemed terrorism-related. The statute criminalizes violent threats, wrongful restraints or confinements, or “any other unlawful act with the said intent” against any person who is a witness or “in whom such witness may be interested,” although by failing to define what the “said intent” in this provision actually means, this vague provision also is susceptible to arbitrary application.²⁷¹ In addition, POTA criminalizes unauthorized possession of certain categories of arms and ammunition in a “notified area” – defined as any area that the state government so designates, without any substantive criteria to guide that determination – and unauthorized possession of a broad range of other specifically identified weapons and hazardous substances in any area, whether “notified” or not.²⁷² Finally, POTA enhances the penalties for several other criminal law offenses if committed “with intent to aid any terrorist.”²⁷³

The UAPA amendments retain most of POTA’s substantive terrorism-related offenses without significant modification. POTA’s provisions permitting the government to designate “terrorist organisations” have been retained with only two changes. First, the amendments supplemented POTA’s existing provisions by authorizing the central government to designate as a “terrorist organisation” any entity that has been designated as such by the U.N. Security Council.²⁷⁴ Second, the amendments explicitly require an individual liable for an offense related to membership in a designated “terrorist organisation” to intend to support the organization’s

²⁷⁰ OHCHR, *Digest of Jurisprudence*, *supra* note 93, at 70-74; ICCPR, *supra* note 80, art. 21.

²⁷¹ POTA § 3(7).

²⁷² *Id.* § 4.

²⁷³ *Id.* § 5 (enhancing penalties under Explosives Act of 1884, Explosive Substances Act of 1908, Inflammable Substances Act of 1952, and Arms Act of 1959).

²⁷⁴ UAPA § 35(1)(b). Similarly, the UAPA amendments expand the definition of “terrorist act” to encompass actions in any country, not just India. UAPA § 15. Each of these amendments is intended to ensure India’s compliance with U.N. Security Council Resolution 1373, which was adopted after September 11. Neither amendment is particularly controversial, but both illustrate the degree to which India has taken seriously its obligations under the resolution. *See* SAHRDC, *THREE STEPS FORWARD*, *supra* note 247, at 5; *infra* section VII.B.

activities.²⁷⁵ However, the law continues to provide limited substantive criteria to guide the government's designations and no opportunity for judicial review – which is particularly anomalous given that under the existing provisions of UAPA, designations of “unlawful associations” are guided by statutory definitions and are subject to full review by a tribunal which has the powers of a civil court.²⁷⁶

2. Pretrial Investigation and Detention Procedures

Like TADA, POTA relaxes many of the ordinary procedural rules that otherwise would apply during pretrial investigations and, at the same time, establishes substantive and procedural requirements for bail that are much more stringent than the standards under ordinary law.²⁷⁷ After the police initially produce an accused individual before a magistrate, the magistrate may then remand the individual to police custody for up to 30 days, rather than fifteen days, and thereafter may order judicial custody for up to 90 days. The POTA special court may order additional detention in judicial custody for up to 180 days if the prosecutor informs the court that the additional time is necessary to complete the investigation.²⁷⁸ The availability of this extended period of detention in judicial custody thereby extends the period within which the police must file a charge sheet to as long as 180 days, rather than the 90 days provided for under ordinary law. While POTA requires the police to inform individuals of their right to counsel upon arrest and to permit the accused to meet with counsel during the course of the interrogation, the law provides explicitly that the accused is not entitled to have counsel present “throughout the period of interrogation.”²⁷⁹ This failure to ensure access to counsel throughout the period of detention is inconsistent

²⁷⁵ UAPA § 38(1).

²⁷⁶ Compare UAPA §§ 2(1)(o)-(p), 3-5 (defining “unlawful activity” and “unlawful association” and providing for judicial review of designations of unlawful associations) with UAPA §§ 35-40 (incorporating “terrorist organisation” provisions from POTA).

²⁷⁷ POTA also added provisions not present in TADA that authorize senior police officers to submit applications for the interception of admissible wire, electronic, or oral communications evidence through a relatively detailed administrative authorization and review scheme. POTA §§ 36-48. While the amendments to UAPA continue to authorize interception and admission of such evidence, the amendments eliminate altogether the oversight and review mechanisms found in POTA. SAHRDC, THREE STEPS FORWARD, *supra* note 247, at 10.

²⁷⁸ POTA § 49(2)(a)-(b).

²⁷⁹ *Id.* § 52(4). The statute also requires the police to prepare a “custody memo” and to promptly notify a family member about the arrest of the accused. *Id.* § 52(1). However, both of these procedural safeguards already are required by the Supreme Court’s decision in *D.K. Basu v. State of West Bengal*, A.I.R. 1997 S.C. 610, 623.

with the ICCPR.²⁸⁰

As under TADA, the substantive bail standard under POTA presents a nearly insurmountable burden. If the prosecutor opposes bail, then for one year the court only may release the accused if there are reasonable grounds to believe that the accused is not guilty of the alleged offense and not likely to commit any offense while on bail.²⁸¹ But since the charge sheet itself need not be filed for up to 180 days after the accused has been detained, the two provisions together effectively permit the prosecutor, rather than the court, to determine whether an individual will remain in detention. If the prosecutor opposes bail before the charge sheet is filed, the accused will have trouble showing grounds supporting their innocence since they will know neither the allegations against them nor the basis for the prosecutor's opposition. Even after the accused receives notice of the prosecution's allegations when the charge sheet is filed, the standard for bail under POTA remains exceedingly high, in effect requiring the defendant to show that the prosecution lacks any substantial basis for its charges.

These provisions are among the most severe in POTA and the most clearly inconsistent with the ICCPR.²⁸² According to the Supreme Court, POTA affords the prosecution greater latitude in pretrial investigation and detention because POTA offenses "are more complex" than ordinary criminal offenses and therefore demand greater time to fully investigate.²⁸³ However, the possibility that continued detention might be necessary in a complex investigation does not justify a blanket rule making bail a virtual impossibility, since the normal, case-by-case bail standard fully accounts for

²⁸⁰ According to the Human Rights Committee, antiterrorism regimes that fail to ensure access to counsel during pretrial and administrative detention raise concerns under articles 9 and 14 of the ICCPR. OHCHR, *Digest of Jurisprudence*, *supra* note 93, at 66-68 (discussing conclusions by U.N. Human Rights Committee); *see also* U.N. Basic Principles on the Role of Lawyers, *supra* note 85, ¶¶ 1, 5-8, 22 (all individuals must have access to counsel to assist them in all stages of criminal proceedings, and governments must respect the confidentiality of communications between lawyers and clients).

²⁸¹ POTA § 49(6)-(7). The Supreme Court upheld these provisions. *People's Union for Civil Liberties v. Union of India*, A.I.R. 2004 S.C. 456, 478-79; *State of Tamil Nadu v. R.R. Gopal*, 2003 Indlaw SC 800 (Sep. 26, 2003). Non-Indian citizens who have entered the country without authorization are subject to even more severe restrictions, since POTA flatly prohibits them from being granted bail "except in very exceptional circumstances and for reasons to be recorded in writing." POTA § 49(9). Human rights advocates have expressed concerns about this differential treatment of non-citizens. AMNESTY INT'L, BRIEFING ON POTO, *supra* note 238, at 12; SAHRDC, PREVENTION OF TERRORISM ORDINANCE, *supra* note 19.

²⁸² *See* OHCHR, *Digest of Jurisprudence*, *supra* note 93, at 39-52 (discussing "core principles" under international law governing pretrial and administrative detention, including "the necessity of judicial control, the right of accused persons to know the charges at issue, and limits on the length of pre-trial detention").

²⁸³ *People's Union for Civil Liberties v. Union of India*, A.I.R. 2004 S.C. at 479.

that possibility when circumstances warrant.²⁸⁴ By contrast, POTA's bail provisions permit prosecutors – at their discretion, and without making any evidentiary showing – to reverse the general rule under the ICCPR that accused individuals awaiting trial should not remain in custody pending trial unless necessary to ensure the accused's appearance.²⁸⁵

Taken together with the provisions providing the government with up to six months to file a charge sheet, POTA's bail provisions fail to ensure that individuals are given prompt notice of the charges against them or that they be tried within a reasonable period of time or released from custody. The bail standard deprives the accused of meaningful judicial review of their custody, and undermines the presumption of innocence guaranteed by the ICCPR, since it requires the accused to provide reasonable grounds to establish their innocence – before any trial has taken place, and in many cases before a charge sheet even has been filed – in order to obtain bail.²⁸⁶

The UAPA amendments temper these human rights concerns by eliminating POTA's stringent bail standard and extended time limits for pretrial investigations.²⁸⁷ While the restoration of the normal bail standard constitutes a step forward, the period of time before an individual must be charged under ordinary law – 90 days – remains quite lengthy. Still, the repeal of POTA's bail and detention provisions eliminates a key incentive for the government to charge individuals under POTA for offenses that more appropriately should be charged under ordinary criminal laws and restores to the court, rather than the prosecutor, ultimate responsibility to determine whether an accused individual should remain in custody.

3. Admissibility of Confessions to Police Officers

Like TADA, POTA makes confessions to police officers admissible as substantive evidence, reversing the normal rule that confessions to police officers are flatly inadmissible.²⁸⁸ This provision is of tremendous

²⁸⁴ See *supra* subsection II.B.2.

²⁸⁵ ICCPR, *supra* note 80, art. 9(3) (“It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject guarantees to appear for trial”).

²⁸⁶ *Id.* art. 14 (“Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”).

²⁸⁷ Thus, rather than the 180 day period that was available under POTA, the maximum period of time that an accused person may remain in custody before a charge sheet is filed is 90 days, and even before that charging deadline, the accused may apply for bail under the normal standard that applies in any ordinary criminal case. See *supra* subsection II.B.2.

²⁸⁸ POTA § 32; see *supra* subsection II.B.2.

importance, especially since the Supreme Court has made clear that a voluntary and truthful confession – which, in ordinary criminal cases, must be given before a magistrate – can be sufficient to sustain conviction without any further corroboration.²⁸⁹ For confessions to police officers to be admissible under POTA, several statutory criteria must be satisfied, most of which codify the procedural requirements imposed by the Supreme Court in upholding the analogous provisions in TADA. The officer must not be lower in rank than superintendent of police and must advise the accused in writing that they are not compelled to make any confession and that any statement may be used against them. If the individual chooses to remain silent, the officer may not compel or induce any confession. The confession also must be recorded, either in writing or by audio or video, in an “atmosphere free from threat or inducement” and in the same language in which the individual has given the statement. The individual must be produced, and the recorded confession presented, before a magistrate within 48 hours, at which time the magistrate must record any additional statement the individual wishes to make and obtain their signature or thumbprint.²⁹⁰ Finally, if there is any complaint of torture, the individual must be given a medical examination and, thereafter, sent to judicial custody.²⁹¹

As with TADA, the Supreme Court upheld POTA’s provisions authorizing confessions to police officers against constitutional challenge.²⁹² While POTA is silent on whether confessions obtained under these provisions may be used to prosecute non-POTA offenses, whether charged together with the POTA violation or in a separate prosecution, the Supreme Court resolved a similar ambiguity under TADA in favor of permitting such confessions to be admitted in non-TADA offenses.²⁹³ As commentators

²⁸⁹ Sarayu Natarajan & Ananth Lakshman, *Admissibility of Confessions Taken Under POTA for Conviction of Offences Under the IPC*, 3 ASIARIGHTS J. at 9 (2004), http://rspas.anu.edu.au/asiarightsjournal/Natarajan_and_Lakshman.pdf (“A confession can stand alone, and may be the sole basis of conviction”); Solil Paul, *The Supreme Court on Confessions*, 16 FAULTLINES 29, 57-58 & n.94 (2005) (citing cases).

²⁹⁰ POTA § 32; see *People’s Union for Civil Liberties v. Union of India*, A.I.R. 2004 S.C. 456, 478 (requiring production of the accused before magistrate “give[s] that person an opportunity to rethink over his confession” and, given magistrate’s responsibility to record accused’s statement and investigate any allegations of torture, may “deter the police officers from obtaining a confession from an accused by subjecting him to torture”).

²⁹¹ POTA § 32. While POTA, unlike TADA, does not explicitly require the confession to be voluntary, the Supreme Court has clarified that a non-voluntary confession would be a “nullity.” *People’s Union for Civil Liberties*, A.I.R. 2004 S.C. at 478.

²⁹² *People’s Union for Civil Liberties*, A.I.R. 2004 S.C. 456.

²⁹³ See *State v. Nalini*, (1999) 5 S.C.C. 253 (properly recorded confessional statement under TADA is admissible for non-TADA offenses tried together with TADA offenses, even if accused is acquitted of offenses alleged under TADA); Paul, *supra* note 289, at 59-60.

have noted, permitting such confessions to be admitted in ordinary criminal cases creates a risk that the police might circumvent the ordinary law prohibition on the admissibility of confessions to the police by initially investigating an individual for an alleged violation of POTA, obtaining a confession under its provisions, and then using that confession to obtain a conviction for a non-POTA offense for which such confessions ordinarily cannot be used.²⁹⁴

The UAPA amendments eliminate POTA's rules authorizing confessions to police officers, which, along with the rules governing bail and pretrial investigations, were among the provisions in POTA that most troubled advocates as facilitating violations of the rights to be free from torture, cruel, inhuman, or degrading treatment or punishment, and compelled self-incrimination.²⁹⁵ While neither the Constitution nor international law per se requires the preclusion of *voluntary* confessions to the police, advocates have raised concerns that given the extensive, longstanding, and widely acknowledged problems in India with police torture and other violations of fundamental rights, relaxing the traditional rule increases the likelihood of torture, coerced confessions, and other abuses in violation of international human rights norms.²⁹⁶ Indeed, the government seems to recognize that the important underlying issue is not the admissibility of confessions as such, but rather the need to ensure that the police respect human rights – in addition to repealing the police confessions provision of POTA, the government also has undertaken a serious effort to fundamentally reform the police in India, as discussed further below.²⁹⁷

4. Special Courts and Procedural Rules

Like TADA, POTA authorizes the central and state governments to

Similar concerns have arisen in the United States about the use of evidence gathered under the relaxed procedures available in national security-related investigations to prosecute ordinary crimes. See Michelle Mittelstadt, *Patriot Act's Reach Goes Beyond Terror*, DALLAS MORNING NEWS, Sep. 8, 2003, at 1A (noting use of Patriot Act “in pursuit of thieves, computer hackers, drug dealers and money launderers”); see also Protecting the Rights of Individuals Act, S. 1552, 108th Cong. (2003) (bipartisan bill introduced to limit the use of Patriot Act powers to terrorism investigations).

²⁹⁴ Natarajan & Lakshman, *supra* note 289, at 9-12.

²⁹⁵ ICCPR, *supra* note 80, arts. 7, 14(3)(g); see U.N. Code of Conduct for Law Enforcement Officials, *supra* note 85, ¶¶ 2-3 (law enforcement officials must “respect and protect human dignity and maintain and uphold the human rights of all persons,” and only may use force when strictly necessary and to the extent to required for the performance of their duty).

²⁹⁶ See, e.g., AMNESTY INT'L, BRIEFING ON POTO, *supra* note 238, at 10-11.

²⁹⁷ See *infra* section VI.A.

establish “special courts” to adjudicate offenses punishable under the statute. These courts, which essentially function as fast-track sessions courts with a special set of procedural rules, may be established by either the central or state governments to adjudicate a single case, a category or group of cases, or cases arising from particular geographic areas, and are presided over by sitting sessions judges appointed by the central government or, if applicable, the state governments with concurrence of the Chief Justice of that state’s High Court.²⁹⁸ When trying an offense arising under POTA, a special court may also try any “connected” offenses, and the central government, rather than the court itself, has “final” authority to determine the court’s jurisdiction.²⁹⁹

The modified procedural rules governing cases before the special courts are essentially the same that applied before TADA’s “designated courts.” POTA affords the special courts discretion to conduct proceedings wherever they deem “expedient or desirable,” including potentially prejudicial or intimidating locations such as the prison facility where the accused is detained.³⁰⁰ Upon an application by the prosecutor or a witness, or on its own motion, the court may conduct its proceedings *in camera* or take other steps to keep the witnesses’ identities secret so long as it records its reasons in writing.³⁰¹ The court also may try the accused in absentia and record the evidence of witnesses, subject to the right of the accused to recall witnesses for cross-examination.³⁰² While the Supreme Court has sustained these witness identity procedures in both TADA and POTA against constitutional attack, it also has expressed concern that accused persons may be “put to disadvantage to effective cross-examining and exposing the previous conduct and character of the witnesses.”³⁰³

The use of special courts, and the procedural rules that apply in their proceedings, infringes upon judicial independence and violates the right to a

²⁹⁸ POTA § 23(4). In the event that both the central and state government establish special courts to adjudicate the same case or class of cases, jurisdiction shall be before the court established by the central government. POTA § 23(1).

²⁹⁹ *Id.* §§ 23(3), 26(1).

³⁰⁰ *Id.* § 24.

³⁰¹ *Id.* § 30(1).

³⁰² *Id.* §§ 29(5), 30. Special courts also may conduct “summary trials” for offenses punishable by a fine or prison term of three years or less, although upon a conviction in summary trial the court may not impose a prison sentence longer than one year. POTA § 29(2). Under ordinary law, summary trials only are permitted for offenses carrying a potential sentence of two years’ imprisonment, and upon conviction the court may not impose a sentence longer than three months’ imprisonment. KELKAR’S CRIMINAL PROCEDURE, *supra* note 49, at 538-42.

³⁰³ Kartar Singh v. State of Punjab, (1994) 2 S.C.R. 375, 1994 Indlaw SC 525, ¶ 289.

fair trial guaranteed by both the Constitution and the ICCPR.³⁰⁴ Structurally, the very use of special courts in this context might be inherently prejudicial to anyone charged, at least absent mechanisms to minimize the potential prejudice. Permitting the executive to constitute and appoint judges to the special courts and to determine their jurisdiction creates the risk of political influence over particular cases and violates the principles of judicial independence and separation of powers guaranteed by both the Constitution and international law.³⁰⁵ This encroachment upon judicial independence is particularly pernicious in antiterrorism cases, which are more likely to be politically charged than others. As one Indian lawyer has argued based on his experiences representing individuals accused under POTA, “[a] Judge of the Special Court firmly believes that he is a one-man army against terrorism. . . . [T]he Special Judge convinces himself so much that he is on an anti-terrorist mission that he refuses to see anything else.”³⁰⁶ While an equally prejudicial sense of being on an antiterrorism mission certainly could develop with a generalist judge presiding over a single terrorism-related case, the manner in which the POTA special courts are constituted exacerbates the risk.

The rules available in the special courts are in tension with the rights

³⁰⁴ ICCPR, *supra* note 80, art. 14; see OHCHR, *Digest of Jurisprudence*, *supra* note 93, at 54-61 (discussing human rights issues arising from “the nature of tribunals with competence to try offences related to terrorism or state security”); Krishnan, *supra* note 241, at 281-82, 286-87. In the United States, analogous issues have arisen in slightly different contexts concerning the use of special tribunals or special procedural rules when adjudicating terrorism and national security-based cases. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (invalidating presidential military order establishing special “military commissions” to adjudicate terrorism-related offenses outside of framework established by Geneva Conventions); Robert A. Levy, *Not on Our Soil: Upholding the Constitution*, NAT’L REV. ONLINE, Jan. 25, 2002, <http://www.nationalreview.com/comment/comment-levy012502.shtml> (essay by Cato Institute fellow noting constitutional concerns implicit in the broad scope of Bush military order); see also Charles Lane, *In Terror War, 2nd Track for Suspects*, WASH. POST, Dec. 1, 2002, at A1 (noting criticisms of “parallel legal system” established for terrorism suspects).

³⁰⁵ INDIA CONST. art. 50; ICCPR, *supra* note 80, art. 14(1) (in criminal cases, “everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law”). Under the U.N. Basic Principles on the Independence of the Judiciary, individuals are guaranteed “the right to be tried by ordinary courts or tribunals using established legal procedures,” rather than special tribunals “that do not use the duly established procedures of the legal process,” and the judiciary has exclusive authority to determine its own lawful jurisdiction. U.N. Basic Principles on the Independence of the Judiciary, *supra* note 85, ¶¶ 3, 5. The Basic Principles also provide that assignment of cases to particular judges is not appropriately an executive function, but rather is “an internal matter of judicial administration.” *Id.* ¶ 14; see AMNESTY INT’L, BRIEFING ON POTO, *supra* note 238, at 6-8; SAHRDC, PREVENTION OF TERRORISM ORDINANCE, *supra* note 19, at 69-72.

³⁰⁶ TERROR OF POTA, *supra* note 12, at 63 (statement by K. Chandru); see also *id.* at 113 (statement by Nitya Ramakrishnan) (discussing “crusading spirit that institutions adopt” and “halo of patriotic warriors” with which “officers are clothed” when prosecuting antiterrorism cases, which causes “a slow but sure closing of the Indian mind on issues of investigative accountability”); *infra* notes 423-424 and accompanying text (discussing prejudicial climate associated with Parliament attack prosecution under POTA).

to be tried in a public hearing before an impartial tribunal, to be present during one's trial, and to examine the state's witnesses against the accused.³⁰⁷ Moreover, the procedures for the protection of witnesses are not evenhanded. While the prosecution or its witnesses may seek protection of their identities from the court, the defendant does not have the right to seek protection of its witnesses – even though defense witnesses themselves might be just as likely to fear intimidation or coercion by the police as prosecution witnesses might be to fear intimidation by the defendant.³⁰⁸

The UAPA amendments temper the potential infringement of these provisions upon judicial independence by eliminating the special courts altogether, providing instead that alleged violations of the terrorism-related offenses in UAPA shall be tried in the same courts as any other criminal offenses, without any special executive control over jurisdiction or judicial administration. The amendments also eliminate the ability of the courts to try defendants *in absentia*. However, the amendments retain for the regular courts the discretion to hold *in camera* proceedings, potentially in prejudicial settings, or take other steps to protect the identity of prosecution witnesses, but not defense witnesses. To this extent, the UAPA amendments raise the same concerns as POTA itself about potential violations of the right to fair trial.³⁰⁹

5. Adverse Inferences and Presumptions of Guilt

POTA also permits the court to draw adverse inferences against the accused, and in some circumstances affords state governments broad, unilateral power to create presumptions of involvement with terrorist activities. The statute authorizes the police to request an order from a magistrate to obtain bodily samples from anyone accused under POTA, but without explicitly requiring the police to establish that they have obtained informed consent from the accused. Rather, for the sample to be admissible, the police need only testify that the individual provided it voluntarily, and if the individual refuses to provide it, POTA requires the special court to draw an adverse inference.³¹⁰ POTA also requires the court to draw an adverse inference in prosecutions for commission of “terrorist acts” if (1) arms,

³⁰⁷ ICCPR, *supra* note 80, art. 14(1), (3)(d); see SAHRDC, PREVENTION OF TERRORISM ORDINANCE, *supra* note 19, at 69-79.

³⁰⁸ See SAHRDC, PREVENTION OF TERRORISM ORDINANCE, *supra* note 19, at 77.

³⁰⁹ See SAHRDC, THREE STEPS FORWARD, *supra* note 247, at 3, 7-8.

³¹⁰ POTA § 27.

explosives, or other specified substances are recovered from the accused, and there is reason to believe similar items were used in the offense, or (2) the accused's fingerprints are found at the site of the offense or on anything used in connection with the offense.³¹¹ In prosecutions for conspiring or attempting to commit a terrorist act, or for advocating, abetting, advising, inciting, or knowingly facilitating the commission of a terrorist act, the court must draw an adverse inference if the prosecution proves that the accused provided financial assistance to a person with knowledge that they are accused or reasonably suspected of an offense under POTA.³¹²

Two of POTA's criminal provisions permit state governments to presume involvement in terrorist activity in the absence of any individualized basis. First, if a state government designates a particular region as a "notified area," then any offense in that area involving unauthorized possession of arms or ammunition in violation of the Arms Act of 1959 will, irrefutably, constitute a violation of POTA as well. While this provision does not technically reverse the burden of proof, it confers sweeping power upon state governments to arbitrarily charge alleged violators of the Arms Act as "terrorists" instead, without any criteria to guide the state government's decision either to designate notified areas or to prosecute offenses under POTA rather than the Arms Act.³¹³ Indeed, the government of Tamil Nadu went so far as to designate the entire state a notified area, and since the statute does not require the government's designation to be supported with any reasons, it offered none. While the Supreme Court reversed this determination on the ground that the state government had failed actually to exercise any discretion by "applying its mind" to the decision, the court did not disturb the state's underlying authority to designate notified areas at whim.³¹⁴

Second, POTA's provision criminalizing an individual's knowing, active membership in an entity designated as a "terrorist organisation" similarly presumes mere membership in such an organization is sufficient to constitute a terrorist offense unless the individual proves that (1) the organization was not banned at the time he became a member and (2) he has not taken part in the organization's activities since it had been banned.³¹⁵

³¹¹ *Id.* § 53(1).

³¹² *Id.* § 53(2).

³¹³ SAHRDC, PREVENTION OF TERRORISM ORDINANCE, *supra* note 19, at 49-50; AMNESTY INT'L, BRIEFING ON POTO, *supra* note 238, at 7.

³¹⁴ K.T. Sangameswaran, *Tamil Nadu Order on POTA Quashed*, THE HINDU, July 22, 2005, available at <http://www.hindu.com/2005/07/22/stories/2005072202621500.htm>.

³¹⁵ POTA § 20.

The UAPA amendments retain this burden-shifting aspect of the offense for membership in a designated “terrorist organization,” but repeal the rest of these provisions, which undermine the presumption of innocence protected by the Constitution and the ICCPR.³¹⁶ Accused individuals might refuse to give a bodily sample for any number of innocent reasons. Moreover, given widespread concerns in India about the police, arms and other items might be found in the possession of accused individuals, or their fingerprints discovered at the scene of a crime, for reasons that are either (1) completely innocent, or (2) completely nefarious, but not their doing.³¹⁷

6. Judicial and Administrative Oversight

Actions taken under POTA are subject to limited judicial and administrative scrutiny. Final judgments, sentences, and orders of the special courts may be appealed to the High Courts on issues of both fact and law,³¹⁸ and while most interlocutory orders are not appealable, orders granting or denying bail may be appealed to the High Courts.³¹⁹ However, most other decisions under POTA are not subject to judicial review. Instead, POTA authorizes the central and state governments to establish administrative “review committees,” which consist of three members appointed by the central or state governments themselves and whose chair must be a current or former High Court judge.³²⁰

As originally enacted, POTA formally defined only two

³¹⁶ UAPA § 38.

³¹⁷ For example, Jayanth Krishnan posits a scenario whose basic elements are entirely plausible:

Imagine, for example, a situation in which a person is suspected of owning a firearm that the government thinks was used in a terrorist crime. Suppose the firearm has traces of blood on it, but that it was planted in the person’s home by the real terrorist. Now assume because the accused – like many Indians – believes that the police engage in doctoring evidence, he refuses to give a blood sample. The court will be permitted to look askance at the accused not only for “possessing” the firearm, but also for not submitting to the blood test.

Krishnan, *supra* note 241, at 283. –

³¹⁸ POTA § 34(1). The law also permits appeal to the High Courts of forfeiture orders issued by the special courts of any property deemed to constitute “proceeds of terrorism.” *Id.* § 10(1).

³¹⁹ *Id.* § 34(3)-(4).

³²⁰ *Id.* § 60. These review committees trace their origin to the directions of the Supreme Court of India when adjudicating the constitutionality of TADA. Without specifying in particular detail the precise form that these entities should take, the court directed both the central and state governments to establish review committees to oversee, evaluate, and make recommendations concerning the implementation and application of TADA, in order to ensure that its provisions were not being misused. *Kartar Singh v. State of Punjab*, (1994) 2 S.C.R. 375, 1994 Indlaw SC 525, ¶ 265.

responsibilities for the review committees – review of the central government’s designations of entities as “terrorist organizations” and review of orders authorizing interception of electronic communication.³²¹ Neither function is directly related to individual prosecutions, and POTA did not specify other functions for the committees to perform. However, after concerns emerged about misuse of POTA, the central government constituted a review committee in 2003 to assess how the law was being applied in particular states and make findings and recommendations for improvement.³²²

In the aftermath of that evaluation, the government attempted to strengthen oversight of POTA’s implementation in late 2003 by amending the law to permit any “aggrieved party” to seek review by a central or state review committee of whether a *prima facie* case exists for a particular prosecution.³²³ If the review committee was to determine that no *prima facie* case exists, then the proceedings would be deemed withdrawn. These decisions were binding.³²⁴ The amendment provided no further criteria for the exercise of this review authority, no procedural rules, and no time limits for decisions.

Prominent Indian lawyers, including Rajeev Dhawan and Fali Nariman, dismissed this iteration of the administrative review mechanism as a “gimmick,” arguing that the review committees had not been conferred with enough power to exercise meaningful oversight over the states and that the fundamental problem was permitting the states to arrest and charge individuals under POTA at all.³²⁵ Perhaps confirming these criticisms, very few POTA accused – by one count, only 39 out of 514, or 7 percent – actually filed complaints with the review committees before the law’s

³²¹ POTA §§ 19, 40. While the decisions of the government-appointed review committees are binding in each instance, the law explicitly deprives the courts of judicial review of such matters. *Id.* § 54.

³²² See *Review Committee to Check Misuse of POTA*, THE HINDU, Mar. 14, 2003, available at <http://www.hindu.com/2003/03/14/stories/2003031404640100.htm>. The decision to initiate this review process came in the aftermath of widespread public attention to an extensive study of misuse of the law in Jharkhand and the use of the law by several state government bodies to target political opponents. See *infra* section V.A.

³²³ POTA § 60(4); see V. Venkatesan, *Reform Without Rationale*, FRONTLINE, Nov. 21, 2003, available at <http://www.flonnet.com/fl2023/stories/20031121005902200.htm>.

³²⁴ Decisions by the central review committee overrode contrary decisions by state review committees. POTA § 60(4)-(7); see J. Venkatesan, *POTA Ordinance Empowers Review Committee*, THE HINDU, Oct. 29, 2003, available at <http://www.hindu.com/2003/10/29/stories/2003102908090100.htm>.

³²⁵ Dhawan, *supra* note 234 (arguing that amendment “empower[s] powerless committees to prescribe ineffective remedies against powerful evasive [state] Governments without examining the problems of POTA itself”); Venkatesan, *supra* note 324 (quoting Nariman to argue that “[u]nless the power of arrest is taken away from the States, you can’t prevent misuse of POTA”).

repeal.³²⁶ Moreover, states have consistently resisted efforts to constrain their discretion.³²⁷ In the months immediately after POTA's enactment, some states lagged even in merely coordinating with and reporting to the central government on how the law was being implemented.³²⁸ After the central government strengthened the power of the central POTA review committee, several states resisted central authority even more vigorously.³²⁹

While the repeal of POTA does not apply retroactively, as noted above the repeal statute strengthened the review committee mechanism to mandate central review of all investigations and prosecutions pending at the time of POTA's repeal. Under this scheme, a central government review committee was required to review *each* pending prosecution under POTA – regardless of whether the accused had affirmatively sought review – to independently determine whether a prima facie case for prosecution exists and, if not, to automatically deem the case withdrawn and any investigation closed.³³⁰ The review committees themselves have afforded defendants great latitude in their proceedings, permitting representation by counsel (appointed counsel, if necessary) and submission of whatever information they deem appropriate, without regard to formal rules of evidence, to refute the government's claim that a prima case exists for prosecution.

Conceptually, the use of this administrative review mechanism is a promising innovation insofar as it attempts to interpose an independent check

³²⁶ Krishnan, *supra* note 241, at 289-90.

³²⁷ Ujjwal Kumar Singh, *POTA and Federalism*, ECON & POL. WKLY., May 1, 2004.

³²⁸ See, e.g., Salman Ravi, *Delhi Ticks Off Govt for Terror Law Lag*, THE TELEGRAPH, Sep. 19, 2002, available at http://www.telegraphindia.com/1020919/asp/jharkhand/story_1212227.asp (noting central government concerns over failure of Jharkhand government to submit timely reports on POTA's implementation).

³²⁹ See Saji Cherian, *POTA: Miscued Priorities*, 2 S. ASIA INTELLIGENCE REV., Oct. 27, 2003, available at http://www.satp.org/satporgtp/sair/Archives/2_15.htm (noting that "working of the Central Review Committee had turned into a virtual tug of war between the Center and the States," with states failing even to provide the central review committee with basic information about POTA's enforcement); Editorial, *Vaiko's Saga*, THE HINDU, May 10, 2004, available at <http://www.hindu.com/2004/05/10/stories/2004051001051000.htm>; United News of India, *TN Govt Refuses to Withdraw Case Against Vaiko*, DECCAN HERALD, Apr. 13, 2004, available at <http://www.deccanherald.com/deccanherald/apr132004/n3.asp>; *Jaya Govt Questions Anti-Terror Review*, THE TELEGRAPH (Kolkata), Jan. 8, 2004, available at http://www.telegraphindia.com/1040108/asp/nation/story_2763550.asp.

³³⁰ According to statistics reported by the states to the central government, as of May 2005 investigations were pending in 216 POTA cases involving 2,492 accused persons, of whom 566 individuals had been arrested and 341 had been released on bail. Rajya Sabha Debate, May 11, 2005, at http://rajyasabha.nic.in/rsdebate/deb_ndx/204/11052005/11to12.htm (statement of Home Minister Shivraj V. Patil). As noted above, the repeal statute required the review committee to complete this review of pending cases within one year and permitted the central government to constitute more than one review committee to complete this review process. POTA Repeal Act § 3.

on the highly politicized prosecutorial discretion exercised by state governments. Such a mechanism permits the central government to avoid the extreme option of imposing President's Rule, which has proven highly susceptible to misuse for many years and frequently would be disproportionately intrusive, since it displaces state governance altogether, rather than merely exercising control over a particular prosecution.³³¹ However, states have continued to vigorously resist and challenge the legality of this review mechanism, and the ultimate validity and effectiveness of the central review committees remains unclear. While the review committees themselves have moved aggressively and seriously to consider whether pending prosecutions under POTA should go forward, in some instances the central government has hesitated to implement recommendations by the committees as a result of the legal and political uncertainty caused by the states' resistance.³³²

Moreover, these sorts of review mechanisms may place an onerous burden upon defendants and their lawyers to persuade the government to withdraw cases that never should have been instituted in the first place. Many detainees are not aware of their right to seek review of the charges against them, especially given their limited access to counsel. And because counsel themselves have limited resources to litigate on behalf of their clients, administrative review might not be vigorously pursued even if the detainee does have meaningful access to counsel.³³³ Indeed, the Rowlatt Act provided even greater judicial oversight of prosecutorial decisions, since the government was required – *before* a special court even was constituted, rather than *after* the accused was arrested and charged – to forward its allegations to the Chief Justice of the High Court, who could request further information before determining whether appointment of a special court was justified.³³⁴ While it may be desirable, in the interests of justice and

³³¹ See *supra* subsection III.B.1.

³³² See Manan Kumar, *Godhra Poser for Centre*, THE TELEGRAPH (Kolkata), June 22, 2005, available at http://www.telegraphindia.com/1050622/asp/nation/story_4899876.asp (noting Home Ministry's decision to "tread cautiously and [desire] to know the legal and political fallout" that might arise from implementing POTA review committee's recommendation to withdraw POTA case in Gujarat).

³³³ Krishnan, *supra* note 241, at 289; see Gautam Navlakha, *POTA: Freedom to Terrorise*, ECON. & POL. WKLY., July 19, 2002 ("In POTA trials family and friends of the accused spend enormous amount of time and resources (to the point where some become insolvent) in inhospitable and forbidding circumstances to organise legal defence").

³³⁴ See *supra* section III.A. Nariman has suggested that laws like POTA should be reformed to include similar pre-arrest oversight:

[Nariman] was of the view that . . . before any arrest was to be made, the name of the person with details of the offence committed should be forwarded either to the Union Home Ministry or to the Central Review Committee. Only if the Home Ministry or the committee was satisfied that there was *prima facie* material for

nationwide uniformity, to create mechanisms short of President's Rule for the central government to monitor and oversee specific prosecutorial decisions, it may be appropriate to consider more efficient and effective means of doing so before (or very soon after) individuals are subject to the coercive power of arrest, detention, and prosecution.

7. Official Immunity

Unlike TADA, POTA authorizes prosecution of police officers for actions taken pursuant to POTA "corruptly or maliciously, knowing that there are no reasonable grounds for proceeding," in which case the officer may be punished with two years' imprisonment or a fine.³³⁵ POTA also authorizes the special courts to order compensation, to be paid in the court's discretion either by the government or the offending police officers in their individual capacity, to any individual who the court concludes has been corruptly or maliciously subjected to prosecution or detention under the act. These provisions were initially proposed by the Law Commission to help deter police misconduct and malicious prosecution.³³⁶ As advocates noted at the time, the provisions were never particularly consequential, since malicious prosecution already may be prosecuted under the Indian Penal Code.³³⁷ Perhaps realizing these provisions added little, the government dropped them in its amendments to UAPA.

At the same time, however, POTA confers broad immunity upon government officials for actions taken under the statute "in good faith" or "purported to be done in pursuance of the Act," a provision almost identical to a similar provision contained in TADA and other security laws and one now maintained in the amendments to UAPA.³³⁸ This provision effectively

invoking POTA could the State concerned go ahead with the arrest.

J. Venkatesan, *POTA Ordinance Empowers Review Committee*, THE HINDU, Oct. 29, 2003, available at <http://www.hindu.com/2003/10/29/stories/2003102908090100.htm>.

³³⁵ POTA § 58(1).

³³⁶ *Id.* § 58(2); LAW COMM'N 173RD REPORT, *supra* note 238, ch. 5 (providing for remedies for victims of corrupt or malicious prosecution is "bound to act as a check upon the propensity of the police/investigating officer to misuse their powers"); *see also* D.K. Basu v. State of West Bengal, 1997 A.I.R. S.C. 610, 624-25 (discussing right to compensation for "established unconstitutional deprivation[s] of personal liberty or life").

³³⁷ *E.g.*, Human Rights Documentation Centre, *Super Tada: Undeclared Emergency Through the Backdoor*, HUMAN RIGHTS FEATURES, Dec. 24, 1999, <http://www.hrdc.net/sahrhc/hrfeatures/HRF12.htm>.

³³⁸ POTA § 57; TADA § 26; UAPA § 49(a). In addition, the immunity provisions in POTA and now UAPA bar claims against any serving or retired members of the armed forces or paramilitary forces good faith actions in the course of *any* operation directed towards combating terrorism. POTA § 56; UAPA §

precludes the ability to hold officials accountable for any rights violations in the investigation or prosecution of terrorism-related offenses and thereby violates the right under the ICCPR to effective and meaningful remedies.³³⁹ Individuals whose rights have been violated typically will find it difficult to prove lack of good faith on the part of the government officials responsible for those violations, particularly given the time and effort necessary to bring private claims to court or persuade government officials to prosecute their colleagues criminally. In any event, fundamental rights are not only violated by actions taken in bad faith, and to deny individuals whose rights have been violated avenues to remedy those violations fails to comply with the requirements of international law.³⁴⁰

V. HUMAN RIGHTS CONCERNS IN THE ADMINISTRATION OF POTA

The human rights concerns arising from POTA go beyond the problems apparent on the face of the statutory text itself. Rather, the application and enforcement of those statutory provisions have facilitated a host of rights violations. Administration of POTA has varied widely across the country, resulting in arbitrary and selective enforcement against members of Dalit, other lower caste, tribal, and religious minority communities, violations of protected speech and associational activities, prosecution of ordinary crimes as terrorism-related offenses, and police misconduct and abuse, including torture. To a considerable degree, POTA, like TADA before it, has functioned more as a preventive detention law than as a law intended to obtain convictions for criminal violations – but without heeding even the limited constitutional protections required for preventive detention laws, much less the exacting standards of international law. And at times, human rights defenders who have challenged these violations or defended individuals targeted under POTA have faced retaliatory threats and intimidation.

49(b).

³³⁹ ICCPR, *supra* note 80, art. 2(3).

³⁴⁰ See SAHRDC, PREVENTION OF TERRORISM ORDINANCE, *supra* note 19, at 92-94 (“Denial of any punishment unless an especially high evidentiary bar is met surely creates a culture of impunity and sends the wrong signal to the enforcement agencies”); see also SAHRDC, THREE STEPS FORWARD, *supra* note 247, at 9; AMNESTY INT’L, BRIEFING ON POTO, *supra* note 238, at 12-13.

A. *Arbitrary, Selective, and Non-Uniform Enforcement by State Governments*

While TADA and POTA have been central government statutes that apply nationwide, the states have played the leading role in the application and use of their provisions given their leading role under the Constitution in matters involving public order and policing.³⁴¹ As with TADA, the states have accordingly exercised broad discretion to implement POTA and similar laws as they have seen fit. While the Supreme Court has held that a state government must obtain the central government's permission before *withdrawing* criminal charges filed under a central government law, state governments do not need such permission before instituting criminal proceedings in the first place.³⁴² The resulting pattern of implementation has been disuniform. In many states, including some with significant levels of political violence, POTA was never implemented at all, owing to the opposition of those particular state governments to the legislation.³⁴³ At the same time, the states in which POTA has been used most aggressively have not necessarily been those facing the most grievous threats within India of politicized, anti-national violence.³⁴⁴ At least one state government ceased

³⁴¹ See *supra* section II.A.

³⁴² See R. Venkataraman, *Centre Say in Terror Charge Withdrawal*, THE TELGRAPH (Kolkata), Dec. 19, 2003, available at http://www.telegraphindia.com/1031219/asp/nation/story_2695608.asp (noting Supreme Court decision that states must obtain central government permission before withdrawing charges under POTA); see also *SC Spikes Mulayam Move to Withdraw POTA Charges Against Raja Bhaiya*, DECCAN HERALD, Dec. 19, 2003, available at <http://www.deccanherald.com/deccanherald/dec19/n16.asp>. Under the amendments to UAPA, this rule appears to be amended. As amended, UAPA provides that no court may take cognizance of offenses concerning terrorist activities or terrorist organizations "without the previous sanction of the Central Government or, as the case may be, the State Government, and where such offence is committed against the Government of a foreign country without the previous sanction of the Central Government." UAPA § 45(ii) (emphasis added). While arguably ambiguous, this language appears to preserve state autonomy to prosecute terrorism-related offenses *unless* the terrorist activities are against a foreign government.

³⁴³ As of October 2003, 15 of India's 28 states – Arunachal Pradesh, Assam, Chhattisgarh, Haryana, Karnataka, Kerala, Madhya Pradesh, Manipur, Meghalaya, Mizoram, Nagaland, Orissa, Tripura, Uttaranchal and West Bengal – and six of its Union Territories reported no arrests under POTA to a Central Review Committee reviewing the law's implementation. An additional three states did not provide any arrest statistics to the review committee, leaving ten states – Andhra Pradesh, Delhi, Gujarat, Himachal Pradesh, Jammu & Kashmir, Jharkhand, Maharashtra, Sikkim, Tamil Nadu, and Uttar Pradesh – to account for the 301 cases initiated, 1600 individuals, and 514 detained under the law as of that date. J. Venkatesan, *No POTA Application in 15 States, 6 UTs*, THE HINDU, Oct. 2, 2003, available at <http://www.hindu.com/thehindu/2003/10/02/stories/2003100204331100.htm>; Cherian, *supra* note 329.

³⁴⁴ For example, the state with the highest number of POTA arrests before the law was repealed was Jharkhand, a northern state created from the southern part of Bihar in 2000 that has not traditionally been understood to face a significant or sustained problem with terrorism or insurgent violence. See George Iype & Ehtasham Khan, *Caught in the POTA Trap*, REDIFF, Mar. 11, 2004, <http://in.rediff.com/news/2004/mar/11spec1.htm> (noting that as of January 2004, Jharkhand had between

enforcing POTA when elections brought new political parties to power.³⁴⁵

The states, therefore, bear considerable responsibility for many of the human rights concerns that have arisen from POTA's implementation. It was therefore particularly useful for the project participants to visit several Indian states and to learn from Indian colleagues in some detail about the different ways in which POTA has been applied throughout the country. Perhaps not surprisingly, given POTA's open-ended definition of its terrorism-related offenses and the broad constitutional latitude that state governments have in policing and criminal justice matters, these discussions revealed significant diversity in the specific issues that have arisen in different states. The diversity of examples in the four locations to which the project participants visited – Andhra Pradesh, Tamil Nadu, Gujarat, and Delhi – reflects a broader lack of national uniformity in the application of laws such as POTA and TADA.

1. Discrimination against Dalit, Other “Lower Caste,” and Tribal Communities

In at least two states, Jharkhand and Andhra Pradesh, POTA has been widely used against individuals from Dalit, other lower caste, and tribal communities who ostensibly have been suspected of involvement with suspected insurgents, but who in fact appear to have been innocent of any terrorist involvement or, in many cases, even of any criminal wrongdoing at all.³⁴⁶ Like many Indian states, both states suffer from severe inequality between semi-feudal “upper caste” interests and Dalit, other lower caste, and tribal communities. As a result, activists in both states have advocated intensely, but peacefully, for land reform and greater equality more generally. At the same time, so-called “Naxalite” groups who also advocate land reform have engaged in violent insurgencies against upper caste interests, who themselves have resorted to using private militias and violence against Dalit, other lower caste, and tribal communities in response.³⁴⁷

234 and 300 POTA cases pending, with as many as 3,200 people having been detained under the law).

³⁴⁵ In June 2003, the government of Jammu & Kashmir announced that it would no longer invoke POTA within the state, joining several other states, such as Manipur, Tripura, and Assam, with more significant problems with terrorism than many of those that have used POTA. *See* Cherian, *supra* note 329.

³⁴⁶ POTA similarly has been used against lower caste and tribal communities in other states, such as Uttar Pradesh. *See* TERROR OF POTA, *supra* note 12, at 275-312.

³⁴⁷ HUMAN RIGHTS WATCH, HUMAN RIGHTS IN INDIA: POLICE KILLINGS IN ANDHRA PRADESH 5-13 (1992) [hereinafter HRW, POLICE KILLINGS]; *see also* HUMAN RIGHTS WATCH, BROKEN PEOPLE: CASTE VIOLENCE AGAINST INDIA'S UNTOUCHABLES 42-73 (1999) [hereinafter HRW, BROKEN PEOPLE].

Amidst this intense conflict, government responses often have been discriminatory and disproportionate. Police and other security forces have frequently violated the human rights of people from Dalit, other lower caste, and tribal communities in the name of their efforts to combat the Naxalites, raiding villages and engaging in extortion, looting, and arrests of individuals falsely accused of harboring Naxalites.³⁴⁸ The police also have frequently staged “false encounter” killings, shooting unnamed prisoners and sometimes photographing the corpses alongside planted weapons. At the same time, police and other officials not only have failed to prosecute the private militias of upper caste landlords, leaving them to engage in unlawful violence with impunity, but also at times have directly colluded with them – for example, by disrupting peasant organizing, training private militias, and accompanying militias during their raids on Dalit, other lower caste, and tribal villages.³⁴⁹

In this context, POTA has served as a potent additional tool for the police to deploy in this social conflict. The use of POTA in Jharkhand was the object of sustained examination in early 2003 by a factfinding team of human rights advocates from across the country and the Indian news media. The team found that approximately 3,200 individuals had been accused under POTA within the state as of February 2003 – far more than in any other state in the country, including states with much higher incidences of terrorism such as Jammu and Kashmir.³⁵⁰ Approximately 202 individuals had been arrested, including approximately ten minors; most of those arrested were farmers, students, or day laborers.³⁵¹ As a result of these reports, formal concerns about the use of POTA in Jharkhand were raised by the NHRC and in Parliament, and upon further review by senior state officials in the wake of the outcry, 83 of the pending cases were withdrawn for lack of sufficient evidence.³⁵²

³⁴⁸ HRW, POLICE KILLINGS, *supra* note 347, at 13-42; *see also* HRW, BROKEN PEOPLE, *supra* note 347, at 75-81.

³⁴⁹ HRW, POLICE KILLINGS, *supra* note 347, at 13-14, 24-31; *see also* HRW, BROKEN PEOPLE, *supra* note 347, 43-44, 73-75.

³⁵⁰ TERROR OF POTA, *supra* note 12, at 196 (statement by Netai Ravani); Sukumar Muralidharan, *Untold Stories*, FRONTLINE, Mar. 27-Apr. 9, 2004, available at <http://www.flonnet.com/fl2107/stories/20040409001704400.htm>; *see also* Cherian, *supra* note 329 (noting high use of POTA in Jharkhand despite “relatively low levels of Left Wing extremist violence” in that state).

³⁵¹ Sanjay K. Jha, *Jharkhand: Anti-Naxal Strategy and Use of POTA*, INST. OF PEACE & CONFLICT STUDS., ART. NO. 1021, (Apr. 26, 2003), http://www.ipcs.org/nmt_militaryIndex2.jsp?action=showView&kValue=976&military=1016&status=article&mod=b.

³⁵² *See Freedom for 83 Terror Law Accused*, THE TELEGRAPH (Kolkata), Apr. 2, 2003, available at http://www.telegraphindia.com/1030402/asp/jamshedpur/story_1831252.asp; Ranjan Dagupta, *Munda to Lift 80 Terror Cases*, THE TELEGRAPH (Kolkata), Apr. 1, 2003, available at

In Andhra Pradesh, POTA was not invoked at all in the first year after its enactment, but after that, approximately 50 cases were initiated, allegedly involving between 300 and 400 individuals as of March 2004.³⁵³ Many of the individuals charged appear not to have been involved in any criminal activity at all, but rather have been targeted simply for their caste or tribal status alone. In other cases, the allegations against these Dalit, other lower caste, and tribal individuals under POTA appear to bear little relationship to terrorist or insurgent violence. Indeed, in Andhra Pradesh, the sheer number of individuals killed in police “encounters” – approximately 1,200 individuals between 1996 and 2004 – casts doubt on the notion that the police have resorted to legal mechanisms, rather than counterinsurgency operations and encounter killings, to any significant degree at all when targeting suspected Naxalites.³⁵⁴ While Naxalite insurgents have engaged in violence against civilians and security forces, there are few indications that POTA has played a significant role in apprehending individuals who legitimately have been suspected of involvement in Naxalite violence, much less in actually curbing that violence.

2. Discrimination against Religious Minorities

A similar pattern can be seen in the discriminatory use of POTA by particular state governments against religious minorities, particularly Muslims. This pattern, which also was found in the application of TADA, has taken on increased significance given rising communalism in India throughout the past several decades, especially since the 1990s and in states, such as Gujarat, where Hindu nationalist organizations have been ascendant. The more extreme and militant among these organizations have sought to reconstitute post-independence Indian politics and society on the basis of a narrowly defined “Hindutva” identity and, in certain circumstances, have used violence against religious minorities in a highly organized and systematic manner.³⁵⁵ Perhaps unsurprisingly, in some states these

http://www.telegraphindia.com/1030401/asp/ranchi/story_1827413.asp. Similarly, in Uttar Pradesh the state government withdrew POTA cases against 28 poor Dalits and tribals after human rights organizations and national TV news coverage drew attention to their cases. Several of the defendants appear to have been accused of being “Naxalites” simply because they had previously been bonded laborers who successfully had asserted their rights and obtained release from the bondage. TERROR OF POTA, *supra* note 12, at 301-03 (statement by Ramesh).

³⁵³ TERROR OF POTA, *supra* note 12, at 66 (statement by K. Balagopal).

³⁵⁴ *Id.* at 67-70 (statement by K. Balagopal); HRW, BROKEN PEOPLE, *supra* note 347, at 73-74.

³⁵⁵ CHRISTOPHE JAFFRELOT, THE HINDU NATIONALIST MOVEMENT AND INDIAN POLITICS, 1925 TO 1990S, at 25-33 (1999) (discussing “Hindutva”); Smita Narula, *Overlooked Danger: The Security and*

communal influences in society at large have become institutionally embedded within the police and other government institutions, especially as the police have become increasingly subject to political interference. One result of this “institutionalized communalism” has been a well-documented pattern in which the police have either failed to protect religious minorities from communal violence or, in some cases, become directly complicit in that violence.³⁵⁶

In this context, POTA has been wielded as a communalist instrument in several states. Project participants learned about this dynamic most vividly in Gujarat, a state that has witnessed some of India’s most extensive episodes of communal violence in recent years. In 2002, a train carrying a large number of Hindutva activists returning from the city of Ayodhya caught fire at the train station in the city of Godhra. At least 59 people were killed, including 15 children. Gujarat had not previously been considered a major center of terrorist activity, and despite several detailed investigations, to this day it remains unclear whether the Godhra fire was an intentional act or an accident.³⁵⁷ However, almost immediately, before any significant investigation had taken place, leading Hindu nationalists, including the

Rights Implications of Hindu Nationalism in India, 16 HARV. HUM RTS. J. 41, at 46-52 (2003) (discussing communal violence).

³⁵⁶ See Colin Gonsalves, *Institutionalized Communalism in the Police Force: The Breakdown in the Criminal Justice System*, ARTICLE 2, June 2002, at 7, available at <http://www.article2.org/pdf/v01n03.pdf>; Vibhuti Narain Rai, *Handling Communal Riots*, SEMINAR, Nov. 1999, at 40, available at <http://www.india-seminar.com/1999/483/483%20rai.htm>; Teesta Setalvad, *When Guardians Betray: The Role of the Police in Gujarat*, in GUJARAT: THE MAKING OF A TRAGEDY 177-210 (Siddharth Varadarajan ed., 2002); HUMAN RIGHTS WATCH, WE HAVE NO ORDERS TO SAVE YOU: STATE PARTICIPATION AND COMPLICITY IN COMMUNAL VIOLENCE 21-27, 47-51 (2002) [hereinafter HRW, WE HAVE NO ORDERS TO SAVE YOU]; Vrinda Grover, *The Elusive Quest for Justice: Delhi, 1984 to Gujarat, 2002*, in GUJARAT: THE MAKING OF A TRAGEDY, *supra*, at 356-88.

³⁵⁷ Speculation that the fire was set intentionally was fueled by reports indicating that fights had broken out on the train, and had quickly spilled over onto the platform, between some of the Hindutva activists and several Muslim vendors and passengers. Siddharth Varadarajan, *Chronicle of a Tragedy Foretold*, in GUJARAT: THE MAKING OF A TRAGEDY, *supra* note 356, at 3-41. However, at least two government investigations have concluded that the Godhra train fire was likely an accident, rather than a premeditated attack from outside. See *Engineering Experts Question Police Theory on Godhra Fire*, THE HINDU, Jan. 18, 2005, available at <http://www.hindu.com/2005/01/18/stories/2005011806461100.htm>; Vinay Kumar, *Godhra Fire Accidental, Says Banerjee Panel*, THE HINDU, Jan. 18, 2005, available at <http://www.hindu.com/2005/01/18/stories/2005011808360100.htm>; *Sabarmati Exp Fire an Accident: Justice Banerjee*, TIMES OF INDIA, Mar. 3, 2006, available at <http://timesofindia.indiatimes.com/articleshow/1437607.cms>. The POTA review committee reviewing pending cases in Gujarat also concluded that there was no prima facie evidence suggesting any terrorist conspiracy and recommended that all POTA charges be dropped in favor of ordinary criminal charges. Nagender Sharma, *‘No Conspiracy’ in Godhra Attack*, BBC NEWS, May 24, 2005, available at http://news.bbc.co.uk/2/hi/south_asia/4577031.stm. On the other hand, the Gujarat Police has continued to maintain that the fire was caused by a premeditated conspiracy and a terrorist attack from outside the train. See Manas Dasgupta, *Godhra Carnage a Conspiracy: Gujarat Police*, THE HINDU, Jan. 18, 2005, available at <http://www.hindu.com/2005/01/18/stories/2005011806401100.htm>.

state's chief minister, incited Hindutva groups within the community, spreading the theory that the fire had been an act of terrorism. In the violence that followed throughout the entire state, thousands of Muslims were killed and tens of thousands of others displaced. Human rights advocates, the media, and the NHRC have extensively documented the organized and systematic nature of the violence, the complicity of police and other officials, the failure to protect Muslims, and the unwillingness or inability to hold perpetrators of that violence accountable.³⁵⁸

Hundreds of Muslims have been formally arrested or illegally detained for extensive periods in connection with cases pending under POTA. In the immediate aftermath of the violence, the state government filed POTO charges against as many as 62 Muslims, including at least seven boys below the age of sixteen, who it accused of involvement with the Godhra fire, and illegally detained as many as 400 others without charge.³⁵⁹ While the POTO charges were quickly withdrawn in the face of sharp public criticism, ordinary criminal charges remained in place against these individuals, and approximately one year later the government retroactively filed charges under POTA against 121 individuals suspected of involvement in the Godhra incident.³⁶⁰ Subsequently, the Gujarat police initiated as many as nine additional POTA cases alleging wide-ranging conspiracies by Muslims against Hindus in explicit retaliation for the post-Godhra violence.³⁶¹ These conspiracy prosecutions typically have been vague and open-ended, permitting the police to add charges against additional persons over time and thereby to subject them to POTA's severe provisions for pretrial investigation and detention.³⁶² Despite the disproportionately high

³⁵⁸ See GUJARAT: THE MAKING OF A TRAGEDY, *supra* note 356; V.R. Krishna Iyer et al., *Concerned Citizens Tribunal - Gujarat 2002, Crime Against Humanity: An Inquiry into the Carnage in Gujarat* (Oct. 2002), available at <http://www.sabrang.com/tribunal>; Raghavan, *supra* note 39, at 125-28. By official counts approximately 98,000 individuals, the overwhelming majority of them Muslim, were living in over one hundred relief camps throughout Gujarat in the aftermath of the violence. HRW, WE HAVE NO ORDERS TO SAVE YOU, *supra* note 356, at 6.

³⁵⁹ Joydeep Ray, *Gujarat's 'Minor' Abuse: 7 Boys Booked*, INDIAN EXPRESS, Mar. 26, 2002, available at <http://www.indianexpress.com/res/web/pl/e/ie20020326/top1.html>; TERROR OF POTA, *supra* note 12, at 149 (statement by Mukul Sinha).

³⁶⁰ Manas Dasgupta, *POTA Applied Against All 121 Godhra Accused*, THE HINDU, Feb. 20, 2003, available at <http://www.hindu.com/thehindu/2003/02/20/stories/2003022006221100.htm>.

³⁶¹ Four of these ten alleged conspiracies, including the Godhra case, arose from cases in which individuals actually were killed or suffered minor injuries. The rest alleged conspiracies that did not allege the commission of any overt criminal acts. In some cases, the characterization of the alleged conspiracy as involving "terrorism," rather than an ordinary crime, is questionable. TERROR OF POTA, *supra* note 12, at 155 (statement by Mukul Sinha).

³⁶² For example, the so-called "ISI conspiracy" alleges a conspiracy to set off a series of bomb blasts and other attacks on Hindutva leaders by young Muslim men trained by the Pakistani Inter Services Intelligence agency. The relevant period covered by the first information report filed in this case ran from

number of Muslim victims in the post-Godhra violence, no Hindus responsible for the post-Godhra violence have been charged under POTA at all – even though POTA’s broad and malleable definition of terrorism could have been applied to much of that anti-Muslim violence – and few have been charged under ordinary criminal laws.³⁶³

Gujarat presents some of the most extreme examples of human rights concerns arising from POTA. Evidence suggests that in initiating cases under POTA, the Gujarat police often have not simply applied POTA selectively against Muslims, but also have used the law to intimidate Muslim citizens from coming forward with evidence of police complicity in the organized post-Godhra violence. It has been reported that the police have unlawfully detained hundreds of young Muslims and threatened them with false charges under POTA if they did come forward. Indeed, after one key witness to a post-Godhra massacre came forward, not only did the state fail to bring charges against the perpetrators of that massacre, but they charged the witness himself under POTA. In this context, as one community leader put it, POTA became “a sword hanging over every Muslim in Gujarat.”³⁶⁴

By March 2004, over 280 individuals had been charged under POTA in Gujarat, all but one of whom were Muslim. These charges resulted in the detention of at least 189 individuals, the vast majority of whom were denied bail. Muslims accused under POTA in Gujarat have tended to be young men, below the age of thirty, without any prior criminal history either individually or among their family members. Most are from relatively modest income backgrounds and are employed, for example, as electricians, radio/ TV

April 2002 to April 2003, and it is believed that “[s]cores of suspects have been detained illegally or formally under POTA in connection with this conspiracy.” AMNESTY INT’L, ABUSE OF THE LAW IN GUJARAT: MUSLIMS DETAINED ILLEGALLY IN AHMEDABAD, ASA 20/029/2003, at 3-4 (2003) [hereinafter AMNESTY INT’L, ABUSE OF THE LAW IN GUJARAT], available at [http://web.amnesty.org/library/pdf/ASA200292003ENGLISH/\\$File/ASA2002903.pdf](http://web.amnesty.org/library/pdf/ASA200292003ENGLISH/$File/ASA2002903.pdf), see also TERROR OF POTA, *supra* note 12, at 147-48 (detailing each POTA conspiracy alleged). The practice of filing open-ended POTA cases, to which more individuals may be added over an extended period of time, has not been limited to Gujarat. See TERROR OF POTA, *supra* note 12, at 66 (statement by K. Balagopal) (discussing use of POTA in Andhra Pradesh).

³⁶³ Owing to the unwillingness or inability of Gujarat officials effectively to prosecute Hindus involved with the violence, and to protect complaining witnesses from intimidation, the Supreme Court of India took the extraordinary step of transferring one of those prosecutions to the state of Maharashtra. J. Venkatesan, *Supreme Court Orders Re-Trial in Best Bakery Case*, THE HINDU, Apr. 13, 2004, available at <http://www.hindu.com/2004/04/13/stories/2004041306340100.htm>. In recent months, as a result of a 2004 Supreme Court order, the Gujarat police stated that it would reopen investigations into approximately 1,600 post-Godhra cases and investigate 41 police officers who failed to investigate those cases properly. *Gujarat Riot Cases To Be Reopened*, BBC NEWS, Feb. 8, 2006, available at http://news.bbc.co.uk/2/hi/south_asia/4693412.stm.

³⁶⁴ Basant Rawat, *Terror Law Repeal Flayed*, THE TELEGRAPH (Kolkata), June 1, 2004, available at http://www.telegraphindia.com/1040601/asp/nation/story_3316915.asp.

repairpersons, drivers, and religious teachers. Several had been active community members and had performed extensive service to victims of the Gujarat earthquake in 2001, without regard to the victims' religious backgrounds.³⁶⁵ As a result of being formally or illegally arrested for allegations involving terrorism, many have had difficulty obtaining work upon release, as even their own communities have hesitated to associate with them for fear of guilt by association. Family members of individuals detained under POTA also have suffered. Wives of men detained under POTA have experienced not only the emotional trauma of not knowing when their spouses might be released, but also the stigma of being associated with men accused of involvement with terrorism, the practical demands associated with sudden single parenthood, and the need to assume responsibility for their husbands' businesses or find other sources of family income.³⁶⁶

The communalized use of POTA has not been limited to Gujarat.³⁶⁷ POTA also has been used in Andhra Pradesh to target Muslims accused of terrorism in Gujarat and other parts of the country. While the Andhra Pradesh police, based on their own investigations, have questioned the extent to which local residents have been involved in terrorism, at least 30 people from Andhra Pradesh have been arrested and transferred to Gujarat in connection with some of the POTA conspiracies alleged in that state.³⁶⁸ Individuals taken into custody in Andhra Pradesh have generally feared transfer to Gujarat, given the perception that the degree of communalism in Gujarat causes courts and officials to turn a blind eye to allegations of mistreatment of detainees charged under POTA.

3. Violations of Political Speech and Associational Rights

POTA has also been used to target political speech and associational activities protected by the Indian Constitution and international law. Indeed,

³⁶⁵ TERROR OF POTA, *supra* note 12, at 189-90 (statement by Zakia Jowher).

³⁶⁶ *Id.* at 172, 184-85 (statements by family members of individuals accused under POTA). Family business of individuals detained under POTA have suffered not only from the lack of business skills of those family members suddenly forced to take over the business, but also from the hesitance of many patrons to return to the store, for fear that they might taint their own reputations and encounter trouble with the police as a result, and even in some cases on account of organized boycotts by Hindutva groups. In one instance, the wife of an individual accused under POTA lost their home, as the landlord evicted her after the police ransacked her apartment at the time of her husband's arrest.

³⁶⁷ *Id.* at 66-72 (statement by K. Balagopal). As noted earlier, similar concerns have been raised in the United States and Britain about the selective enforcement of antiterrorism laws against particular communities. *See supra* note 5.

³⁶⁸ TERROR OF POTA, *supra* note 12, at 70 (statement by K. Balagopal).

in some instances, the bases for prosecution have involved no conduct other than the disfavored speech and associational activities themselves – even though the then-Attorney General of India, Soli Sorabjee, issued a written opinion in January 2003 (with which the Supreme Court of India ultimately agreed) concluding that “[m]ere expression of opinion or expression of moral support *per se* does not tantamount to a breach of Section 21 of POTA.”³⁶⁹ Several of these cases have garnered considerable attention, since they have involved high-profile journalists and leaders of opposition political parties:

- In 2002, the government of Tamil Nadu detained several leaders of the Tamil Nationalist Movement, an officially-recognized opposition political party, in connection with their participation at a public meeting near Madurai. As widely reported in the media, several speakers at the meeting, including members of Parliament and senior members of various political parties, including the TNM and the Marumalarchi Dravida Munnetra Kazhagam, expressed support for a cease fire and proposed peace talks between the government of Sri Lanka and the Liberation Tigers of Tamil Eelam, which is banned in India as a terrorist organization. None of the participants advocated support for terrorism by the LTTE or anyone else, and when the Chief Minister of Tamil Nadu, J. Jayalalithaa, was publicly asked about the meeting soon thereafter, she stated that nothing improper had occurred. Nevertheless, four months after the meeting, the speakers and others were detained under POTA on grounds that they had expressed support for the LTTE.³⁷⁰
- In Tamil Nadu, Vaiko, a member of Parliament and leader of the MDMK – which was part of the BJP-led coalition in the central government but in the opposition in Tamil Nadu – was charged under POTA for remarks he made concerning the LTTE at a public gathering of

³⁶⁹ Suresh Nambath, ‘*Mere Expression of Moral Support Does Not Attract POTA*,’ THE HINDU, Oct. 8, 2003, available at <http://www.hindu.com/thehindu/2003/10/08/stories/2003100803931200.htm> (quoting Soli Sorabjee); *Supreme Court Upholds POTA, Vaiko May Get Some Relief*, THE HINDU, Dec. 17, 2003, available at <http://www.hindu.com/2003/12/17/stories/2003121704620100.htm>.

³⁷⁰ TERROR OF POTA, *supra* note 12, at 41-45 (statement by individual accused under POTA); *id.* at 49-50 (statement by K. Chandru).

his party's members in 2002. In his speech, Vaiko described his participation in recent debates in Parliament concerning the LTTE and Sri Lanka, in which he expressed support for the banned organization. Ironically, although he enjoyed immunity for his statements before Parliament, Vaiko's repetition of those remarks at the constituent gathering prompted the charges under POTA.³⁷¹

- In 2003, Jayalalithaa publicly called for the Prime Minister to dismiss one of the cabinet ministers from the MDMK, M. Kannappan, for public remarks about the LTTE. Jayalalithaa asserted that these remarks violated POTA and threatened to prosecute Kannappan if he were not dismissed from the cabinet – raising the unprecedented prospect of state prosecution of a central government minister for alleged violations of a central statute concerning national security.³⁷² Jayalalithaa made this demand in the face of the written opinion by Attorney General Sorabjee, which specifically concluded that similar public statements by Kannappan the previous year were not actionable.³⁷³
- In January 2003, the Chief Minister of Uttar Pradesh, Mayawati – whose political party had opposed POTO and POTA – initiated POTA charges against a dissident member of the state legislative assembly, Raghuraj Pratap Singh (also known as “Raja Bhaiya”), and his 80-year-old father. The charges were based on a supposed plot to kill Mayawati, evidenced by the discovery of a rifle and a pair of two-way radios, but the prosecution was widely understood to be an act of political retaliation against Raja Bhaiya's withdrawal of support for the coalition government that Mayawati had led. When Mayawati's government fell in August 2003, the

³⁷¹ *Id.* at 41–46 (statement by individual accused under POTA), 47–48, 56 (statement by K. Chandru); T.S. Subramanian, *A Crackdown in Tamil Nadu*, FRONTLINE, Aug. 2, 2002, available at <http://www.flonnet.com/fl1915/19150200.htm>.

³⁷² *DMK Looks to Vajpayee*, The Telegraph, Oct. 1, 2003, available at http://www.telegraphindia.com/1031002/asp/nation/story_2422111.asp; *It's Political Vendetta, Says Vaiko*, THE HINDU, Sep. 24, 2003, available at <http://www.hindu.com/thehindu/2003/09/24/stories/2003092407900400.htm>.

³⁷³ Nambath, *supra* note 369.

new state government sought to withdraw these POTA charges as one of its first actions, but the Supreme Court ruled that the state government could not withdraw charges under a central law without consent of the central government, and transferred the case to a special court in Madhya Pradesh.³⁷⁴

- R.R. Gopal, the editor of *Nakkheeran*, a weekly magazine with a history of conflict with the ruling party in Tamil Nadu, was charged under POTA in 2003. Gopal later was granted bail by the Madras High Court, which noted that the police had given three contradictory descriptions of the firearm he allegedly possessed and concluded that the weapon might not have been in Gopal's possession at all.³⁷⁵
- In 2002, Nagendra Sharma, a reporter for *Hindustan*, a Hindi-language daily newspaper, was arrested under POTA in Jharkhand because of his regular coverage of the activities of certain banned organizations.³⁷⁶

POTA also has been used to target less prominent individuals holding disfavored political and ideological viewpoints:

- In February 2003, Valeti Aravind Kumar, a member of the Revolutionary Writers Association who wrote under the pen name "Rivera," was arrested by Andhra Pradesh police under POTA and kept in solitary confinement while the police raided his parents' house. The police did

³⁷⁴ Singh, *supra* note 327; Ujjal Kumar Singh, *POTA and the Case of Raja Bhaiya*, ECON. & POL. WKLY., Jan. 7, 2006; Rasheeda Bhagat, *The POTA Soap Opera in UP*, THE HINDU BUSINESS LINE, Jan. 30, 2003, available at <http://www.blonnet.com/2003/01/30/stories/2003013000550800.htm>. Ultimately, "Raja Bhaiya" was acquitted on all charges. Saji Thomas, *Raja Bhaiya Acquitted of Pota Charges*, TIMES OF INDIA, June 3, 2006, available at <http://timesofindia.indiatimes.com/articleshow/1611156.cms>.

³⁷⁵ In the mid-1990s, 146 cases were brought against *Nakkheeran* and its writers, and issues were seized and burned. Gopal was alleged to have conspired in the 1998 murder of a police informant by identifying his status as such to members of a banned organization, and for possession of an unauthorized weapon in a notified area. TERROR OF POTA, *supra* note 12, at 52-53 (statement by K. Chandru); T.S. Subramanian, *POTA Against an Editor*, FRONTLINE, Apr. 26-May 9, 2003, available at <http://www.flonnet.com/fl2009/stories/20030509003203500.htm>; *Bail for Nakkheeran Gopal*, FRONTLINE, Sep. 27-Oct. 10, 2003, available at <http://www.flonnet.com/fl2020/stories/20031010005912700.htm>.

³⁷⁶ TERROR OF POTA, *supra* note 12, at 206 (excerpt from Preliminary Report of All India Fact Finding Team on POTA Cases in Jharkhand).

not inform them of his arrest or the reasons for the raid, and Kumar was forced to sign a confession stating he was a member of and had recruited people into the Naxalite insurgency. The police cited cassettes, compact discs, and banned revolutionary material found in his personal library as the basis for the charges under POTA.³⁷⁷

- In Delhi, police detained and charged under POTA a 56-year old man who previously had been associated with Students Islamic Movement of India, an organization banned as a terrorist organization, on the ground that he had pasted political posters along a city street. The man was arrested at his home, not at the scene; while the police claimed they received information about the man after reaching the scene, a prosecution witness later admitted to having picked up the same posters during a raid of SIMI itself.³⁷⁸
- In Jharkhand, a police official openly acknowledged that the police identified suspected Naxalites based on whether they possessed certain political publications.³⁷⁹

4. Malicious Prosecution and Prosecution of Ordinary Crimes

As with TADA, the police have been able to stretch POTA's broad definitions of terrorism-related offenses to prosecute ordinary criminal cases with little, if any, connection to terrorism and, more simply, to engage in intimidation and extortion. Similar concerns have arisen since 2001 in the United States, where many of the prosecutions initially touted by the government as victories in the war on terrorism have, upon closer inspection,

³⁷⁷ *Id.* at 74 (statements by M.A. Vanaja and M.A. Shakeel). Rivera spent eight months in jail, where he was assaulted by police and prevented from attending a court hearing after threatening to inform the court of the police's actions. He was finally released on bail in September 2003 after his family's second petition, as the court determined that contrary to the prosecution's assertions, no charge sheet had ever been filed in the case. *Id.* at 77.

³⁷⁸ *Id.* at 118 (statement by R.M. Tufail).

³⁷⁹ Akshaya Mukul, *12-Year-Old Held Under Pota in Jharkhand*, TIMES OF INDIA, Feb. 20, 2003, available at <http://timesofindia.indiatimes.com/articleshow/msid-38001159,page-1.cms> (quoting police statement that "[a]nyone caught with a copy of the Communist Manifesto or Mao's Red Book becomes a suspicious character. We then watch him and often find clinching evidence").

involved garden-variety offenses with no apparent connection to terrorism.³⁸⁰ The use of POTA in this fashion has intersected with the discriminatory use of the law against disfavored social groups – for example, as noted above, in Gujarat, the police have threatened Muslims with charges under POTA in some instances simply to intimidate them from coming forward with information concerning police complicity with the post-Godhra violence. In other instances, POTA provides a powerful weapon for the police to wield when enlisted to intervene on behalf of particular parties in private disputes or to engage in extortion or other forms of corruption.³⁸¹ For example:

- In Gujarat, one of the POTA cases involves allegations of a conspiracy by Muslim men to kill a Hindu doctor. Beyond alleging that the conspiracy was hatched in retaliation for the post-Godhra violence, which appears verbatim as boilerplate language in *each* POTA conspiracy charge sheet in Gujarat, nothing supports the characterization of this alleged conspiracy as terrorism-related.³⁸²
- In Tamil Nadu, 26 individuals, including at least two minors and several young women, were detained under POTA soon after the murder of an individual who had come forward as a witness to a police encounter killing. The murder occurred under suspicious circumstances that may have involved the police themselves, and while the 26 individuals purportedly were detained for connections to Naxalite groups and holding an illegal meeting, the arrests more likely took place to draw attention away from the alleged police misconduct. The individuals ultimately were charged for illegal possession of arms in a notified area, but evidence suggests that the weapons (pipe guns and crude

³⁸⁰ See, e.g., Dan Eggen & Julie Tate, *U.S. Campaign Produces Few Convictions on Terrorism Charges*, WASH. POST, Jun. 12, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/11/AR2005061100381.html>; U.S. GEN. ACCOUNTING OFFICE, *BETTER MANAGEMENT OVERSIGHT AND INTERNAL CONTROLS NEEDED TO ENSURE ACCURACY OF TERRORISM-RELATED STATISTICS* (2003), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-03-266>.

³⁸¹ See Subramanian, *supra* note 23 (noting, outside antiterrorism context, that the “power to arrest has become a major source of corruption” for the police, and that approximately 60 percent of all arrests “have been found to be unnecessary and unjustifiable”).

³⁸² TERROR OF POTA, *supra* note 12, at 155 (statement by Mukul Sinha).

revolvers) may have been planted by the police.³⁸³

- In Jharkhand, a case was initiated under POTA against a 30-year-old tribal man after a complaint was filed against him in connection with a private land dispute. While this case, like others in Jharkhand, was premised on the accused's alleged support for Naxalite groups, neither the accused nor his family had knowledge of these groups.³⁸⁴
- Also in Jharkhand, POTA charges were brought against a 17-year-old young woman, Ropni Kharia, who was the only woman in her village to pass matriculation. The charges were brought in apparent retaliation for her resistance to patriarchal norms in her village and her work educating and encouraging other women to do the same; complaints were reportedly brought to the police about her supposed involvement with a banned organization by men in the community who were "worried about her knowledge and activities." Despite no evidence linking her to the organization, the police intimidated and beat her father and other members of her family and ultimately filed POTA charges against her.³⁸⁵

In several states, POTA charges have been filed against other youths below age eighteen, including some as young as ten. In some cases, these charges were brought to intimidate or retaliate against parents who were the real subjects of interest.³⁸⁶ In others, the charges have involved arbitrary police action that intersects with efforts to intimidate particular social groups. Since another statutory regime exclusively governs offenses by minors, the Madras High Court ultimately held that POTA charges could not be brought against minors and ordered two youths in Tamil Nadu to be released. The stigma of having been charged under POTA remains for these youths, however, and in other states several of the cases against youths have proceeded.³⁸⁷

³⁸³ *Id.* at 53-54 (statement by K. Chandru).

³⁸⁴ *Id.* at 204 (excerpt from the Preliminary Report of the All India Fact Finding Team on POTA Cases in Jharkhand).

³⁸⁵ *Id.*

³⁸⁶ *See infra* section V.B.

³⁸⁷ Many of these youths have come from lower caste, tribal, and religious minority communities. TERROR OF POTA, *supra* note 12, at 20; *see also id.* at 33-39 (statement by individuals accused under

Special laws like POTA create tremendous incentives and opportunities for overreaching, owing to both the relaxed procedural rules available and the police's understandable desire to be perceived as actively responding to terrorism.³⁸⁸ To the credit of each of them, the BJP-led government recognized and attempted to respond to this problem in its initial efforts to strengthen the review committee mechanism in 2003, and the current Congress-led government openly acknowledged this problem when it decided to repeal POTA altogether.³⁸⁹ While POTA's repeal eliminates this problem for now, it appears likely that *any* legislative scheme conferring extraordinary powers and relaxing the normal procedural rules in particular categories of cases will risk being misused in the absence of prompt, effective, and transparent mechanisms to exercise meaningful oversight of investigative and prosecutorial decisions.

B. *Police Misconduct and Abuse*

Human rights advocates have documented significant evidence of police misconduct in connection with the application of POTA, including violations of procedural rights, corruption, intimidation and extortion, torture, and staged encounter killings. These allegations are consistent with well-documented patterns of police misconduct and abuse outside the antiterrorism context, deriving from structural problems with the police more generally, and the abuses themselves intersect with the selective and discriminatory applications of the law discussed above.³⁹⁰

Despite the extensive procedural protections available to accused

POTA); *id.* at 40 (statement by K. Chandru); *id.* at 202-04 (statement by G.N. Saibaba); Kanhaiah Bhelri, *Catch 'Em Young*, THE WEEK, Mar. 16, 2003, available at <http://www.the-week.com/23mar16/events9.htm>; Mukul, *supra* note 379; see Asian Centre for Human Rights, *The Status of Children in India* 62-69 (Oct. 2003), <http://www.achrweb.org/reports/india/crc-rpt.pdf>.

³⁸⁸ Charu Sudan Kasturi, *Under the Shadow of a Dead Act*, THE TELEGRAPH (Kolkata), July 13, 2005, available at http://www.telegraphindia.com/1050713/asp/atleisure/story_4981971.asp (according to review committee members, number of accused in Gujarat and Maharashtra is disproportionately high "because the police in Maharashtra and Gujarat – states keen to be seen at the forefront of the fight against terror – often failed to distinguish between conspirators and normal criminals").

³⁸⁹ *Review Committee to Check Misuse of POTA*, *supra* note 322; Alope Tikku, *Terror Law Substitute With a Human Face*, THE TELEGRAPH (Kolkata), Aug. 24, 2004, available at http://www.telegraphindia.com/1040824/asp/nation/story_3667229.asp.

³⁹⁰ *E.g.*, Arvind Verma, *A Uniform Betrayal*, INDIA TOGETHER, June 2004, <http://www.indiatogether.org/2004/jun/gov-betray.htm> (improper use of physical force by the police "typically follows a pattern" by which "upper castes and economically well off people are usually not subject to these atrocities" while "Dalits, lower castes and poor people have long ago accepted that the police will act against them as henchmen of the upper and land-holding castes"); see *infra* section VI.A.

individuals under the Indian Constitution and Code of Criminal Procedure, and the detailed guidelines for police conduct articulated by the Supreme Court of India and the NHRC, human rights groups have reported widespread disregard of the procedural rights afforded to individuals subjected to criminal investigation and prosecution.³⁹¹

For example, the rights guaranteed at the time of arrest routinely have been violated for individuals being investigated under POTA. In Gujarat, the police have detained and taken many individuals into custody – in some cases for days or weeks – in connection with pending POTA investigations without formally arresting them, disclosing the basis for detention, or even documenting their custody or interrogation.³⁹² In fact, the Gujarat police have implicitly acknowledged this practice, noting that they “do not arrest a person as soon as he is detained. We first question him and after we have established his *prima facie* involvement in the crime, he is arrested.”³⁹³ Individuals frequently have been taken into custody from their homes at night, with overwhelming force and large numbers of officers, and these detentions often have been accompanied by the ransacking of detainees’ homes and intimidation of their family members. When the individuals sought by the police have not been available, the police have instead often taken family members (including minor children and elderly parents) into custody essentially as “hostages,” to induce the individuals of interest to submit to police custody. This practice appears to have been particularly common in Gujarat, but individuals have been detained on similar bases in other states.³⁹⁴

Even when individuals have been formally arrested, the rights and guidelines for arrest required by law have routinely been violated. With some frequency, custody memos and other documents recording the arrest have not been prepared, detainees have not been produced before magistrates within 24 hours, and family members or friends of the detainees have not been informed of the fact and location of detention, in some cases, for many days.

³⁹¹ TERROR OF POTA, *supra* note 12, at 33, 36-38, 79-83, 169, 171, 182-83, 200 (statements by individuals accused under POTA and family members of accused individuals); *id.* at 75 (statement by M.A. Vanaja and M.A. Shakeel); *id.* at 157-66 (statement by Bharat Jhala); *id.* at 189-90 (statement by Zakia Jowher); AMNESTY INT’L, ABUSE OF THE LAW IN GUJARAT, *supra* note 362, at 4-14; *see supra* subsections II.B.1-2 & note 58.

³⁹² AMNESTY INT’L, ABUSE OF THE LAW IN GUJARAT, *supra* note 362, at 6; TERROR OF POTA, *supra* note 12, at 20, 154 (statement by Mukul Sinha).

³⁹³ AMNESTY INT’L, ABUSE OF THE LAW IN GUJARAT, *supra* note 362, at 7. While the police claim to have power under the Code of Criminal Procedure to engage in this practice, no such authority exists. *Id.* at 7-8.

³⁹⁴ *E.g.*, TERROR OF POTA, *supra* note 12, at 20; *id.* at 33-40 (statements by individuals accused under POTA), 159-66 (statement by Bharat Jhala), 188-91 (statement by Zakia Jowher).

Detainees also have not been given access to counsel or medical examinations – even in the face of court orders requiring such access.³⁹⁵

Considerable evidence also suggests that individuals detained under POTA have been tortured and subjected to cruel, inhuman, or degrading treatment while in custody. These reports are consistent with the longstanding and well-documented concern that even in cases unrelated to allegations of terrorism, police in India routinely resort to torture, which has been described as the “principal forensic tool” of the Indian police.³⁹⁶ Reports of torture have been documented throughout India, and have been particularly severe in connection with the POTA cases pending in Gujarat.³⁹⁷ Although individuals have feared retaliation for coming forward with allegations against the police, examples of torture and cruel, inhuman, and degrading treatment have been extensively documented, including severe beatings, use of narcoanalysis or “truth serum,” use of electric shocks to the genitals and other parts of the body, and various forms of psychological abuse.

These forms of abuse appear to have been intended in many instances to coerce detainees into confessing or implicating others. In every state which the project participants visited, evidence suggests that the police have often coerced detainees (or in some cases their family members) to sign blank sheets of paper, which later could be filled by the police with a statement confessing or implicating someone else. Some have been forced to read statements while being audiorecorded or to memorize false statements to be recited later before a magistrate. Detainees also have been forced to cooperate in the creation of fabricated evidence, such as videos of the accused holding weapons in poses directed by the police. If detainees refused to cooperate, the police have threatened further detention or mistreatment of the detainees or their family members – and even have threatened that the

³⁹⁵ *E.g.*, AMNESTY INT’L, ABUSE OF THE LAW IN GUJARAT, *supra* note 362, at 13-14; TERROR OF POTA, *supra* note 12, at 172, 175 (statements by individuals accused under POTA and family members of accused individuals).

³⁹⁶ TERROR OF POTA, *supra* note 12, at 17; *see also* Amnesty Int’l, Open letter to Law Minister Jana Krishnamurthi about the forthcoming trial of Abdul Rehman Geelani and three others, ASA 20/010/2002, at 2, 4-5 (Jul. 8, 2002), [http://news.amnesty.org/library/pdf/ASA200102002ENGLISH/\\$File/ASA2001002.pdf](http://news.amnesty.org/library/pdf/ASA200102002ENGLISH/$File/ASA2001002.pdf) (discussing allegations of police torture and severe mistreatment of S.A.R. Geelani, a professor charged and ultimately acquitted of involvement in the December 2001 attack on Indian Parliament); Subhash Gatade, *Brutalising Inmates the “Tihar Way,”* HIMAL SOUTH ASIAN, Jan. 2004, available at http://www.himalmag.com/2004/january/report_3.htm (discussing allegations of torture and mistreatment of Geelani and other detainees held in “high-risk ward” of Delhi’s Tihar Jail).

³⁹⁷ AMNESTY INT’L, ABUSE OF THE LAW IN GUJARAT, *supra* note 362, at 11-13; TERROR OF POTA, *supra* note 12, at 154 (statement by Mukul Sinha); *id.* at 159-66 (statement by Bharat Jhala).

detainees or their family members might be killed in staged encounters.³⁹⁸

Oversight by magistrates of police detention and interrogation practices under POTA appears to have been ineffectual in many cases. When detainees have appeared before magistrates, the magistrates have not always scrutinized the circumstances of the individuals' arrest and detention closely.³⁹⁹ In one instance, a magistrate ordered the police to take a detainee who had been severely tortured to the hospital, but the police ignored that order and returned him to the jail without consequence.⁴⁰⁰ In other instances, magistrates have been complicit in the mistreatment, either directly intimidating detainees into confessing or, in at least one case, all but explicitly giving the police the green light to torture detainees further to obtain their confession.⁴⁰¹

These reports of human rights violations in cases under POTA are consistent with violations that long have been documented by advocates, journalists, and government institutions outside the antiterrorism context. Government institutions have extensively documented torture and other human rights violations by the police, and both the Supreme Court of India and the NHRC have noted with concern the frequency of encounter killings by the police and the evidence that many of these killings have been staged or the result of other police misconduct. In response, both the Court and the NHRC have issued guidelines to be followed by the police to document and properly investigate all such deaths.⁴⁰²

³⁹⁸ E.g., TERROR OF POTA, *supra* note 12, at 154, 159-66, 168, 172, 174-75; AMNESTY INT'L, ABUSE OF THE LAW IN GUJARAT, *supra* note 362, at 5-7; Nandita Haksar & K. Sanjay Singh, *December 13, SEMINAR*, Jan. 2003, at 120, available at <http://www.india-seminar.com/2003/521/521%20nandita%20haksar%20&%20k.%20sanjay%20singh.htm>. In Gujarat, at least one individual was killed in an apparent fake encounter after refusing to sign a false confession, and his death has been used by the police to set an example when threatening others. TERROR OF POTA, *supra* note 12, at 153-54. In Andhra Pradesh, the use of POTA in connection with encounter killings is somewhat different – there, the police have charged individuals who have been killed in apparently fake encounters under POTA posthumously, apparently as part of the police's effort to justify and cover up these fake encounter deaths. *Id.* at 16-17; *id.* at 66-67 (statement by K. Balagopal); *id.* at 88-89 (statement by R. Mahadevan).

³⁹⁹ TERROR OF POTA, *supra* note 12, at 34, 37 (statements by individuals accused under POTA); *id.* at 88 (statement by R. Mahadevan); Haksar & Singh, *supra* note 398 (discussing prosecution of A.R. Geelani, which ultimately led to acquittal by Delhi High Court and Supreme Court of India, for conspiracy in 2001 Parliament attack case).

⁴⁰⁰ TERROR OF POTA, *supra* note 12, at 172 (statement by family member of individual accused under POTA).

⁴⁰¹ *Id.* at 178-79 (statement by individual accused under POTA); *id.* at 190 (statement by Zakia Jowher); Azim Khan, *Gujarat: Four Years After the Genocide*, COUNTERCURRENTS.ORG, Feb. 25, 2006, <http://www.countercurrents.org/comm-azimkhan250206.htm>.

⁴⁰² See HRW, PRISON CONDITIONS IN INDIA, *supra* note 69, at 7-14; REDRESS TRUST, *supra* note 65; Rama Lakshmi, *In India, Torture by Police Is Frequent and Often Deadly*, WASH. POST, Aug. 5, 2004, at

C. “Back Door” Preventive Detention

While India has several different laws explicitly and directly authorizing preventive detention, in some respects both TADA and POTA, too, have functioned primarily as preventive detention laws. In each state visited by the project participants, prolonged detention without charge or trial appeared to be the norm, rather than the carefully limited exception. Indeed, as discussed above, both TADA and POTA explicitly facilitated this pattern with their exceedingly stringent standards for obtaining bail, on the one hand, and their relaxed procedural rules and time limits governing pretrial police investigations, on the other. Accordingly, many individuals have been detained under POTA throughout the six month period within which the police may conduct its investigation and then simply released without charge upon the deadline for filing a charge sheet.⁴⁰³ For individuals who ultimately have been charged, examples of prolonged detention without bail beyond the six month period have been found in virtually every state in which POTA has been applied.

- In the Tamil Nadu cases involving leaders of the TNM, each defendant was detained without bail for at least 16 months. Although arrested in Chennai, and despite a judge’s order to the contrary, some defendants were separately jailed in other cities. The defendants eventually were granted bail on the condition that they surrender their passports and not leave Chennai, speak to the media, or address public meetings.⁴⁰⁴
- Vaiko, the MDMK member of Parliament charged in Tamil Nadu, was detained without bail for approximately 19 months. His appeals for bail, which were opposed by the state prosecutor, were finally

A11, available at <http://www.washingtonpost.com/ac2/wp-dyn/A41162-2004Aug4.html>; NAT’L HUMAN RIGHTS COMM’N OF INDIA, GUIDELINES ON CASES OF ENCOUNTER DEATHS (1997), <http://nhrc.nic.in/Documents/CasesOfEncounterDeaths.pdf>; NAT’L HUMAN RIGHTS COMM’N OF INDIA, REVISED GUIDELINES/PROCEDURES TO BE FOLLOWED IN DEALING WITH DEATHS OCCURRING IN ENCOUNTERS (2003), <http://nhrc.nic.in/Documents/RevisedGuidelinesDealingInEncounterDeaths.pdf>.

⁴⁰³ For example, approximately 25 percent of the 76,000 individuals arrested under TADA were released by the police without ever being charged. *See supra* note 226.

⁴⁰⁴ TERROR OF POTA, *supra* note 12, at 51 (statement by K. Chandru); *see supra* subsections V.A.3. Ironically, the bail conditions were more stringent than the circumstances of their detention, which permitted them to give interviews while in transit to and from court and to write letters from jail. TERROR OF POTA, *supra* note 12, at 51.

granted by the Madras High Court in 2004.⁴⁰⁵

- Among those individuals formally arrested in Gujarat under POTA, a large number have been refused bail, even after becoming eligible for the normal bail standard after one year in jail. As of August 2004, 172 individuals charged under POTA were in jail, while only 17 had been released on bail.⁴⁰⁶ Detention for close to two years appears to have been routine.
- In other states, the percentages of POTA defendants released on bail also have been low. For example, as of August 2004, only 11 of the 88 POTA accused in Maharashtra, 5 of the 36 POTA accused in Andhra Pradesh, 1 of the 29 POTA accused in Uttar Pradesh, and none of the 48 POTA accused in Delhi had been released on bail.⁴⁰⁷

The use of criminal antiterrorism laws in this fashion is simultaneously troubling and counterintuitive. Over forty years ago, David Bayley noted that the availability of preventive detention under Indian law was a tempting potential source of government abuse, since at least conceptually, it usually would be easier to obtain a preventive detention order, with its lower evidentiary standard and burden of proof, than a criminal conviction, which requires a full-blown trial and proof of guilt beyond a reasonable doubt. “Preventive detention is sure,” noted Bayley, while “conviction is uncertain and time-consuming.”⁴⁰⁸

In practice, however, the experience under both TADA and POTA show that if the police are not primarily concerned with obtaining convictions – and in the absence of meaningful oversight and scrutiny at the outset of an investigation and throughout its duration – pretrial detention under criminal antiterrorism laws can serve as a “back door,” functional

⁴⁰⁵ *Id.* at 42-45 (statement by individual accused under POTA). During his detention, Vaiko, who actually had voted in Parliament to enact POTA, was denied a request for an adjournment by the trial and appellate courts to travel to Delhi to participate in parliamentary debates on amending POTA. *Id.*

⁴⁰⁶ Tikku, *supra* note 389; *see also* TERROR OF POTA, *supra* note 12, at 151 (statement by Mukul Sinha) (noting that only one of the 75 accused in Godhra case was released on bail, while most of those accused of post-Godhra anti-Muslim violence were released on bail).

⁴⁰⁷ Tikku, *supra* note 389.

⁴⁰⁸ Bayley, *supra* note 112, at 108; *see also* Fali S. Nariman, *Why I Voted Against POTO*, THE HINDU, Mar. 24, 2002, available at <http://www.hindu.com/thehindu/2002/03/24/stories/2002032402140800.htm> (“Preventive detention of suspected terrorists is easier to administer [than criminal antiterrorism laws] since it does not involve prosecution, trials or painfully extracting confessions to establish proof”).

equivalent to preventive detention, but without even the limited procedural protections that the Constitution requires for preventive detention laws. The limited statistics available concerning POTA's use suggest a pattern similar to the patterns that prevailed under TADA. Conviction rates under POTA have been very low, and the number of cases withdrawn for lack of evidence has been quite high.⁴⁰⁹

Indeed, some officials have candidly acknowledged the role played by TADA and POTA to enable preventive detention. As noted above, one senior police official openly described the police's sequential use of the NSA and TADA in Punjab during the 1980s, which effectively extended the overall period of preventive detention beyond what the law authorized.⁴¹⁰ More recently, R.K. Raghavan, a former IPS officer, has argued that

[t]he impact of laws such as TADA is more on prevention than on detection. It will be unfair to go merely by statistics of failures in court. We will never know, even in a setting of high terrorist crime, how many offences have in fact been deterred by the greater discretion and freedom of field operations that the police enjoy under enactments such as POTO.⁴¹¹

In Gujarat, where very few individuals accused under POTA have been released, a police official admitted that POTA in part had been used against the Godhra accused "to forestall the possibility of more of the accused obtaining bail," as would have been possible under ordinary criminal laws.⁴¹²

The near-certainty of pretrial detention under TADA and POTA has been aided by what one Indian lawyer terms the "fear psychosis"

⁴⁰⁹ See Kasturi, *supra* note 388 (noting high rate of withdrawal of POTA cases for lack of evidence and low numbers of cases that actually have gone to trial). Indeed, by August 2004, on the eve of the statute's repeal, convictions had been obtained in only five POTA cases – four in Delhi, and one in Jharkhand. Tikku, *supra* note 389. There are indications that similar patterns have prevailed under antiterrorism laws in countries. See Craig Murray, *The UK Terror Plot: What's Really Going On?*, Aug. 14, 2006, available at http://www.craigmurray.co.uk/archives/2006/08/the_uk_terror_p.html (noting that only two percent of British Muslims arrested under antiterrorism legislation have been convicted, mostly for minor crimes rather than terrorism-related offenses).

⁴¹⁰ See *supra* note 228 and accompanying text.

⁴¹¹ R.K. Raghavan, Column, *Old Wine In a New Bottle?*, FRONTLINE, Oct. 27-Nov. 9, 2001, available at <http://www.flonnet.com/fl1822/18221140.htm>.

⁴¹² Stavan Desai, *In Gujarat, Only Godhra Case is Fit Enough for POTA*, INDIAN EXPRESS, Apr. 3, 2003, available at http://www.indianexpress.com/res/web/plc/full_story.php?content_id=21360. The official "hastened to add that that wasn't the main reason."

surrounding antiterrorism legislation.⁴¹³ The stigma associated with “terrorism”-related charges often is enough to intimidate some judges from sufficiently protecting the rights of the accused, particularly when it comes to release from detention. This phenomenon may be particularly pronounced in bail applications presented to the special courts, whose independence is compromised by the manner in which they are constituted.⁴¹⁴ But as one Indian lawyer has suggested, even bail applications before the High Courts have been prejudiced in this fashion:

Today the judiciary is under extreme tension to deal with any POTA case. In fact, our bail applications went before at least three Division Benches [of the Madras High Court]. Each Division Bench excused itself from hearing the case. They thought hearing the case also amounted to supporting POTA or POTA detainees. We have put in a great deal of effort to persuade the High Court judges to hear the case. It took six months to hear ordinary bail applications. With every case of POTA, there is greater amount of reluctance on the part of the members of the judiciary even to hear them. . . . So while the Act must be repealed we have to deal with the fear psychosis surrounding such legislation.⁴¹⁵

Given the susceptibility of laws like TADA and POTA to misuse, Fali Nariman, a prominent Indian lawyer and member of Parliament, has gone so far as to suggest that even the limited safeguards available under Indian preventive detention laws might be “better” than criminal laws like POTA, at least if the post-Emergency constitutional amendments concerning preventive detention are implemented. Nariman argues that with preventive detention, the police have fewer incentives to torture detainees than in criminal investigations, since they need not “secure a confession to be proved at a trial,” and that because the post-Emergency amendments require Advisory Board members to be current High Court judges, “[t]he confidence of the public in the established courts [would be] a safeguard against abuse.”⁴¹⁶

⁴¹³ TERROR OF POTA, *supra* note 12, at 56-57 (statement by K. Chandru).

⁴¹⁴ *Id.* at 63 (statement by K. Chandru).

⁴¹⁵ *Id.* at 56-57 (statement by K. Chandru).

⁴¹⁶ Nariman, *supra* note 408. On the post-Emergency constitutional amendments concerning preventive detention, see *supra* section III.C.

Nariman's comments are striking, since India's preventive detention laws have been widely abused – most obviously during the Emergency, but also during non-Emergency periods – and have continued to be criticized as inconsistent with international human rights norms.⁴¹⁷ Absent proper derogation from applicable treaties and sufficient procedural protections, India's use of preventive detention may not be appropriate or consistent with human rights norms. As discussed earlier, India neither has purported to derogate from its obligations under the ICCPR nor explained its failure to do so, and a number of fundamental rights implicated by preventive detention are nonderogable in any event.⁴¹⁸ However, as Nariman's comments suggest, and as the documented experience in India confirms, the conventional view favoring criminal antiterrorism laws over preventive detention laws may not be warranted *unless* there are sufficient safeguards against prolonged – and effectively preventive – pretrial detention pending trial. As with TADA, for the vast majority of people detained under POTA no conviction may be necessary for the objectives of the police to be realized. In the words of Rajeev Dhavan, “[t]he process is the punishment.”⁴¹⁹

The restoration with POTA's repeal of the normal bail standard under ordinary law is an important step in limiting the potential for pretrial detention under the criminal laws from being used as an end run around the constitutional limits on preventive detention. However, several central and state laws, including the NSA, continue to authorize preventive detention, and these laws should be scrutinized closely to assess whether reforms might be necessary to address the human rights concerns that critics have identified.

⁴¹⁷ See, e.g., SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, PREVENTIVE DETENTION AND INDIVIDUAL LIBERTY 7-14 (2000) [hereinafter SAHRDC, PREVENTIVE DETENTION] (arguing that preventive detention provisions in Constitution are inconsistent with international law and that preventive detention only should be permitted during formally declared periods of emergency; Goodman, *supra* note 111 (discussing wide abuses of NSA “to detain trade union leaders, human rights activists, political opponents, underprivileged castes, and ordinary criminal suspects for long periods of time” without safeguards required by Constitution and international law); U.N. Human Rights Committee, *supra* note 234, ¶ 18 (noting concerns over use of NSA); Lal, *supra* note 10 (noting misuse of NSA against “ordinary criminals [who are] difficult to punish under normal [criminal] laws”).

ABCNY has expressed similar concerns in other contexts, having previously criticized the use of preventive detention in countries including Northern Ireland and the United States. See, e.g., Gerald P. Conroy et al., *Northern Ireland: A Report by a Mission of the Committee on International Human Rights*, 59 REC. ASS'N B. CITY N.Y. 314, 328 (2004), Committee on Federal Courts, *The Indefinite Detention of “Enemy Combatants”: Balancing Due Process and National Security in the Context of the War on Terror*, 59 REC. ASS'N B. CITY N.Y. 41 (2004).

⁴¹⁸ SAHRDC, PREVENTIVE DETENTION, *supra* note 417, at 7-14; see *supra* subsection II.B.3.

⁴¹⁹ Dhavan, *supra* note 235.

D. Threats and Intimidation against Lawyers

There also has been evidence of threats and intimidation against lawyers and human rights defenders who have sought to document human rights violations under POTA and defend individuals who have been detained or charged under the law. Under the U.N. Basic Principles on the Role of Lawyers, states have an obligation to ensure lawyers are able to perform their professional roles free from intimidation or other improper interference and to “adequately safeguard[]” them when their security is threatened.⁴²⁰ While lawyers with whom the project participants met disagreed on the extent to which they or their colleagues have been threatened or abused, in Gujarat, in particular, several lawyers agreed with the assessment of one human rights organization that “harassment and intimidation of human rights defenders working with members of the Muslim community in the state appears to be widespread.”⁴²¹ Lawyers representing Muslims accused in the Godhra case have faced threats and intimidation for doing so, and Muslim lawyers in Gujarat have largely withdrawn altogether from representing individuals accused under POTA because of these threats. Intimidation and pressure also has come from other lawyers. In Gujarat, a resolution considered by one of the lower court bar associations strongly discouraged attorneys from representing any Muslims charged in the Godhra case. As a result of these formal and informal pressures, the same small handful of lawyers – including lawyers from outside the state altogether – have tended to represent almost all of individuals accused under POTA in Gujarat.⁴²²

Similarly, in the prosecution under POTA of four individuals charged with involvement in the 2001 attack on the Indian Parliament building – the first major prosecution under POTA – many lawyers were initially reluctant to represent the defendants at all, out of an unwillingness to be associated with the case.⁴²³ While an All-India Defense Committee to

⁴²⁰ U.N. Basic Principles on the Role of Lawyers, *supra* note 85, ¶¶ 16-17.

⁴²¹ AMNESTY INT’L, ABUSE OF THE LAW IN GUJARAT, *supra* note 362, at 3 & n.6.

⁴²² See also HRW, WORLD REPORT 2005, *supra* note 203, at 268-69 (noting threats against human rights defenders in Gujarat).

⁴²³ Haksar & Singh, *supra* note 398. While all four defendants were convicted by the POTA special court, two were acquitted by the Delhi High Court. The Supreme Court sustained those acquittals and reduced the death sentence of a third defendant to 10 years’ imprisonment. See Anjali Mody, *Geelani, Afsan Guru Acquitted in Parliament Attack Case*, THE HINDU, Oct. 30, 2003, available at <http://www.hindu.com/2003/10/30/stories/2003103007840100.htm> (discussing High Court judgment); J. Venkatsean, *Apex Court Upholds Gilani’s Acquittal*, THE HINDU, Aug. 5, 2005, available at <http://www.hindu.com/2005/08/05/stories/2005080504180100.htm> (discussing Supreme Court judgment); see generally 13 DECEMBER: THE STRANGE CASE OF THE ATTACK ON THE INDIAN

support one defendant, S.A.R. Geelani, ultimately drew support from many prominent Indian citizens, the level of intimidation and prejudicial media coverage associated with the case was very high. Indeed, Geelani, who was acquitted by the Delhi High Court, was shot and seriously injured in February 2005 outside his lawyer's home and office, as he arrived to meet with her to discuss the government's then-pending appeal of his acquittal to the Supreme Court of India.⁴²⁴

These accounts are consistent with reports documenting similar and worse incidents. While human rights defenders generally operate freely in India, there also have regularly been serious incidents in which particular human rights defenders have been threatened, intimidated, and in some cases even killed for their work, particularly in areas where social conflict has been intense.⁴²⁵ However, as it has with other special representatives and rapporteurs within the U.N. system, India has tended to avoid international engagement on the subject of human rights defenders, repeatedly declining to invite the U.N. Secretary General's Special Representative on Human Rights Defenders to visit the country or to respond to most of her inquiries for information about alleged incidents involving human rights defenders.⁴²⁶

PARLIAMENT – A READER (Penguin Books ed. 2006) (hereinafter 13 DECEMBER: A READER).

⁴²⁴ See Nandita Haksar, *Tried by the Media: The SAR Geelani Trial*, in CRISIS/MEDIA: SARAI READER 2004, at 159-64 (2004) (discussion by Geelani's lawyer of prejudicial climate of Parliament attack prosecution); Shuddhabrata Sengupta, *Media Trials and Courtroom Tribulations: A Battle of Images, Words and Shadows*, in 13 DECEMBER: A READER, *supra* note 423, at 29, 40-56; *Parliament Attack Case Bounces Back: Prof Geelani Shot At in Delhi*, INDIAN EXPRESS, Feb. 9, 2005, available at http://www.indianexpress.com/res/web/ple/full_story.php?content_id=64347. While the police have not determined who attacked Geelani, concerns have been raised that the police failed to take sufficient steps to protect the accused, witnesses, lawyers, and judicial officers associated with the highly-charged case. See, e.g., Amnesty Int'l, Press Release, India: Concerns for Syed Geelani, ASA 20/012/2005 (Feb. 18, 2005), <http://web.amnesty.org/library/Index/ENGASA200122005>.

⁴²⁵ See, e.g., Amnesty Int'l, Action Alert, India: Further Information on Fear for Safety – Human Rights Defenders in Andhra Pradesh, ASA 20/045/2001 (Sep. 13, 2001), <http://web.amnesty.org/library/index/ENGASA200452001> (discussing threats against and murders of senior members of the Andhra Pradesh Civil Liberties Committee, apparently by the police); Amnesty Int'l, Action Alert, Fear for Safety, India, ASA 20/024/2003 (Sep. 2, 2003), <http://web.amnesty.org/library/index/ENGASA200242003> (discussing threats against lawyers in Gujarat defending and protecting witnesses providing testimony against individuals alleged to have participated in post-Godhra communal violence); Amnesty Int'l, Action Alert, Fear for Safety, India, ASA 20/031/2003 (Nov. 10, 2003), <http://web.amnesty.org/library/Index/ENGASA200312003> (discussing renewed death threats against human rights defenders in Gujarat); OBSERVATORY FOR THE PROTECTION OF HUMAN RIGHTS DEFENDERS, HUMAN RIGHTS DEFENDERS IN A "SECURITY FIRST" ENVIRONMENT: ANNUAL REPORT 2003 175 (2004), available at www.omct.org/pdf/observatory/AnnualReport_SecurityFirst/Asia.pdf (discussing police raid in 2003 on offices of People's Watch-Tamil Nadu and personal threats and intimidation of its executive director); see also *supra* note 218 (discussing murder of Jaswant Singh Khalra in Punjab apparently in retaliation against his human rights advocacy).

⁴²⁶ Hina Jilani, *Special Representative of the Secretary-General on Human Rights Defenders, Promotion*

VI. STRUCTURAL CONSIDERATIONS

As in any country, full protection of human rights in India's campaign against terrorism cannot be realized by focusing exclusively on "special" laws, like TADA and POTA, without attention to the broader legal and institutional context in which those laws are situated. Even when special laws create a distinct set of mechanisms and procedural rules, those regimes typically do not operate in a complete vacuum, but rather draw upon the same institutions – police, prosecution, judiciary – used to fight any serious crimes. Accordingly, to the extent that these institutions fail to sufficiently protect human rights when enforcing the ordinary criminal laws, they are certainly no more likely to protect those rights in the high pressure and high stakes context of investigating and prosecuting terrorism-related crimes.⁴²⁷

Moreover, the very existence of these special laws stems from real and perceived problems concerning the effectiveness of the regular criminal justice system itself, which create intense pressures to take particular offenses outside of that system. At one level, these pressures are understandable, for there is no question that India faces challenges in its criminal justice system that, in the words of one observer, rise to a "crisis of legitimacy."⁴²⁸ By removing offenses deemed "too important" to relegate to the regular criminal justice system – including, but not limited to, terrorism-related offenses⁴²⁹ –

and Protection of Human Rights: Human Rights Defenders, Addendum: Compilation of Developments in the Area of Human Rights Defenders, ¶¶ 738-51, U.N. Doc E/CN.4/2006/95/Add.5 (Mar. 6, 2006).

⁴²⁷ See, e.g., TERROR OF POTA, *supra* note 12, at 113 (statement by Nitya Ramakrishnan) (noting the "crusading spirit that institutions adopt" when prosecuting antiterrorism cases, which causes "a slow but sure closing of the Indian mind on issues of investigative accountability").

⁴²⁸ Ramanathan, *supra* note 236.

⁴²⁹ See CBI ANNUAL REPORT 2005, *supra* note 36, at 45 (discussing special courts established "exclusively for the trial of CBI cases"); Ramanathan, *supra* note 236 (discussing special laws and courts established to try corruption cases); Siddharth Narrain, *A Bill and Some Concerns*, FRONTLINE, June 18-July 1, 2005, available at <http://www.flonnet.com/fl2213/stories/20050701002904000.htm> (discussing Communal Violence (Suppression) Bill and its proposed use of special courts and other mechanisms akin to those found in TADA and POTA); Editorial, *Fast-Track Justice Will Help, But Trial Should Be Fair*, THE TRIBUNE (Chandigarh), Aug. 12, 2003, available at <http://www.tribuneindia.com/2003/20030812/edit.htm#1> (discussing proposal by National Minorities Commission chairman to use fast track courts to try riot cases); Shantonu Sen, *A System In Need Of Change*, SEMINAR, June 1995, at 35 (proposing separate courts for white collar crimes, sessions trials, and other criminal cases). As Jayanth Krishnan and Marc Galanter have observed, similar pressures in the civil justice system have spurred efforts to bypass the subordinate judiciary, rather than to "undertake the Sisyphean task of reforming the lower courts," by creating special tribunals with exclusive jurisdiction over cases involving, for example, motor vehicle accidents, consumer complaints, labor disputes, and government employment disputes. Marc Galanter & Jayanth Krishnan, *Debased Informalism: Lok Adalats and Legal Rights in Modern India*, Paper Presented to First South Asian Regional Judicial Colloquium on Access to Justice, at 9-10 (2002), available at http://www.humanrightsinitiative.org/jc/papers/jc_2002/background_papers/galanter%20krishnan.pdf; see

special laws seek to ensure that these offenses will be investigated, prosecuted, and adjudicated more effectively and attempt to restore a sense of legitimacy in their adjudication. For terrorism-related offenses, in particular, the use of special courts and procedural rules ostensibly bypasses the inefficiencies and backlogs in the regular judiciary and provides a set of procedural rules designed specifically to deal with the distinctive problems presumed to exist in terrorism-related cases. In the process, the use of special laws also conveys a social and political message about the importance of those offenses.⁴³⁰

At the same time, however, these special laws have invariably constituted an incomplete response to this crisis of legitimacy, focusing exclusively on procedural efficiency, in the form of relaxed rules for the government, without also ensuring that human rights are adequately protected and violations meaningfully remedied – which also are vital to restoring and maintaining the legitimacy of criminal law adjudication.⁴³¹ As both the low conviction rates under TADA and POTA and the persistence of terrorism suggest, the relaxation of procedural rules in the government's favor has not necessarily ensured that the system operate more effectively in prosecuting and bringing individuals involved with terrorism to justice.

The use of special laws in India, therefore, presents a dilemma. Without efforts to reform the police and criminal justice system more generally, the pressures to bypass the regular system of justice through the enactment of special laws will persist in any category of cases deemed sufficiently “important.” At the same time, the use of special laws may itself reduce the political will to engage in the arduous, long-term effort to realize broader reforms, which are necessary to increase both the effectiveness of the

Krishnan, *supra* note 241, at 281-82.

⁴³⁰ See Ramanathan, *supra* note 236; Krishnan, *supra* note 241, at 280-81. As the Law Commission of India noted when proposing the legislation that ultimately became POTA, the sole reason for authorizing the use of special courts to adjudicate POTA offenses was the “anxiety to have these cases disposed of expeditiously.” LAW COMM’N 173RD REPORT, *supra* note 238, ch. 6. The NHRC has similarly noted that antiterrorism laws like POTA are ostensibly justified because “(i) it is difficult to secure convictions under the criminal justice system; and (ii) trials are delayed [under the regular courts].” NHRC, *Opinion Regarding Prevention of Terrorism Bill*, *supra* note 240, ¶ 6.4.

⁴³¹ See *Kartar Singh v. State of Punjab*, (1994) 2 S.C.R. 375, 1994 Indlaw SC 525, ¶ 366 (“[if] the law enforcing authority becomes a law breaker, it breeds contempt for law, it invites every man to be come a law unto himself and ultimately it invites anarchy”); *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (“Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. . . . To declare that, in the administration of the criminal law, the end justifies the means . . . would bring terrible retribution”); *supra* notes 7-8.

criminal justice system and the overall level of human rights protection.⁴³² Moreover, in most instances these special laws have replicated or intensified the human rights concerns that are present within the regular system, thereby compromising the system's legitimacy. To fully address the human rights issues arising from India's special laws against terrorism, therefore, it is essential also to consider ways to improve and reform the police and criminal justice system more generally, both to ensure that human rights are more adequately protected and remedied and to alleviate the pressures to enact special laws that result from the underlying weaknesses within the regular criminal justice system.

A. Police Reform

Individuals and organizations across a broad spectrum – including citizens groups, members of the public, nongovernmental organizations, government commissions, police officials themselves, and even senior members of both the BJP and the Congress Party – have recognized the need to reform the Indian police, which is still governed by the 145-year-old framework established by the British.⁴³³ Indeed, while the need for reform has only become more acute, as the police have become more powerful, more politicized, and less accountable, meaningful reform has proven complicated and elusive. Although central and state police commissions were established soon after independence to study possible changes to the inherited colonial institutions, the work of these commissions did not lead to meaningful reforms.⁴³⁴ Only in the aftermath of the Emergency did police

⁴³² See Navlakha, *supra* note 333 (by creating offenses that bypass the regular courts and criminal justice system, “issues concerning the need to reform the collapsing criminal justice system are avoided”).

⁴³³ E.g., COMMONWEALTH HUMAN RIGHTS INITIATIVE, REPORT OF THE NATIONAL ROUNDTABLE ON POLICE REFORMS 2 (2002), available at http://www.humanrightsinitiative.org/publications/police/rte_report_delhi_2002.pdf (noting statement by then-Deputy Prime Minister L.K. Advani advocating replacement of Police Act of 1861 in order to ensure that police become “responsible, accountable, and people friendly”); S. Satyanarayanan, *PM Against Frequent Transfers of Cops*, THE TRIBUNE (Chandigarh), Sep. 2, 2005, available at <http://www.tribuneindia.com/2005/20050902/nation.htm> (quoting Home Minister Shivraj Patil’s statement that “[t]ime has come to critically examine the Indian Police Act, 1861, as to what extent it is meeting the requirement of the present day policing”); R.K. Raghavan, *On Police Reforms*, FRONTLINE, Aug. 17-30, 2002, available at <http://www.flonnet.com/fl1917/19171170.htm> (noting “near unanimity among a cross-section of our opinion leaders” that police must “change radically in order to become people-friendly”); Yadav & Kumar, *supra* note 1 (discussing recent opinion poll indicating that only 42 percent of public believe they would receive fair treatment from the police, while as many as 36 percent fear discrimination).

⁴³⁴ Subramanian, *supra* note 23; S.C. Misra, *Structural Changes*, SEMINAR, Oct. 1977, at 18, 18-19. The new police laws enacted by some states after independence did not significantly deviate from the 1861 Act. See MAJU DARAWALA ET AL., COMMONWEALTH HUMAN RIGHTS INITIATIVE, POLICE ACT, 1861:

reform enter the political agenda in any serious way, as two government commissions, the Shah Commission and National Police Commission, documented and examined abuses by the police in some detail. Though its deliberations took place largely in private, the NPC issued eight reports between 1979 and 1981 proposing an extensive array of reforms.⁴³⁵

The NPC's work quickly was brought to an end after the return of Indira Gandhi to power in 1980, and more recent reform efforts have moved haltingly.⁴³⁶ Because police matters are a state subject, the ability of the central government to realize meaningful reform invariably faces significant structural and political challenges. Nevertheless, during the past year the central government has initiated what appears to be a serious effort to replace the Police Act of 1861 and implement significant reform to the police in India.⁴³⁷ Despite the failure as yet of many recent reform efforts to take hold, the work of these many government commissions and of various NGOs has generated some consensus on the ways in which policing in India today falls short of sufficiently embodying democratic principles.

1. Arbitrary, Politicized, and Discriminatory Police Decision-Making

Police decision-making in India has long been arbitrary and politicized and has become more deeply so since independence. Under the 1861 act, the state executive is responsible for "superintendence" of the police. The director of the state police serves at the pleasure of the chief minister and rank and file officers are subject to extensive political pressure. Through this politicized superintendence, political actors have frequently interfered with the police's functional operations, including basic

WHY WE NEED TO REPLACE IT?, at 1 (2005), available at http://www.indiangos.com/government/advocacy_paper_police_act.pdf.

⁴³⁵ See Joshi, *supra* note 25 (quoting statement by former NPC chairman in 1997 that "[i]f there had been no Emergency there would have been no Police Commission").

⁴³⁶ The public release of the final seven of the NPC's eight reports was delayed for almost two years, and its recommendations were disregarded by both the central and state governments. Joshi, *supra* note 25. During the 1990s, two government committees were constituted in response to a writ petition filed in the Supreme Court by two retired police officers seeking an order requiring the government to implement the NPC's recommendations. SINGH, *supra* note 25; see Joshi, *supra* note 25. No action has been taken in response to the recommendations of these two committees, which build upon those first made by the NPC, although both the previous BJP-led government and the current Congress-led government have established internal committees intended to investigate the replacement of the Police Act of 1861. The writ petition is still pending.

⁴³⁷ See Madhav Godbole, *Police Reforms: Pandora's Box No One Wants to Open*, ECON. & POL. WKLY., Mar. 25, 2006.

investigative decisions. For example, politicians frequently have pressured the police to target political opponents in their investigations while simultaneously protecting their friends and allies. In other instances, politicians have pressured the police to make functional decisions designed to manipulate crime statistics in favorable ways. Police officials who resist these political pressures routinely face arbitrary and punitive transfers, disciplinary actions, or even fabricated legal proceedings.⁴³⁸

Observers have long regarded this politicization of decision-making as the fundamental issue to be addressed in seeking to reform the police.⁴³⁹ Accordingly, the most widely invoked of the NPC's proposals in the years since they were first proposed have tended to be those elements intended to eliminate this improper political interference. These proposals include the establishment of a statutory, state security commission in each state to exercise superintendence over the police and the establishment of a fixed, four-year tenure of office for the state director-general of police, who would be selected from a panel of three IPS officers from within the state police force.⁴⁴⁰ Eliminating political interference in functional decision-making is indeed a critically important objective. In implementing measures to advance that goal, however, it will be important to ensure that democratic accountability of the police is preserved – that the police bureaucracy does not become so insulated and autonomous that it is able to act with impunity.⁴⁴¹

In addition to political interference, the police also suffer from the distinct, longstanding problem of corruption at both the subordinate and senior levels.⁴⁴² While corruption is a problem that plagues many institutions

⁴³⁸ DARAWALA ET AL., *supra* note 434, at 4-5 (discussing problem of illegitimate political interference with police decision-making); R.K. Raghavan, *An Insider's View – From the Outside*, FRONTLINE, Dec. 8-21, 2001, available at <http://www.flonnet.com/fl1825/18251060.htm> (arguing that the “enormous discretion [of] the political executive . . . in planning an IPS officer's career progression” contributes to “lack of courage and a readiness to buckle under political pressure”). As discussed earlier, corruption and communalism are significant problems within the police forces as well. *See supra* Part V.

⁴³⁹ *E.g.*, Godbole, *supra* note 437 (“The most critical issue in police reforms is that of granting functional autonomy to the police”).

⁴⁴⁰ *See, e.g.*, Joshi, *supra* note 25 (characterizing as “most important” among the NPC's recommendations those that seek to “insulat[e] the police from illegitimate political and bureaucratic interference”).

⁴⁴¹ *See* Godbole, *supra* note 437 (noting concern that NPC's proposal for state security commissions could insulate police decision-making from accountability); R.K. Raghavan, *Reforming the Police*, FRONTLINE, Nov. 24-Dec. 7, 2001, available at <http://www.flonnet.com/fl1824/18241120.htm> (discussing need to balance functional autonomy with accountability).

⁴⁴² Godbole, *supra* note 437 (discussing “rampant corruption” within Indian police); Arvind Verma, *Rescuing the Police Force*, INDIA TOGETHER, Dec. 2003, <http://www.indiatogether.org/2003/dec/opi-police.htm> (noting that Indian police “have been corrupt . . . from the very beginning” and that this internal corruption is “not due to the pressures of dishonest politicians”).

in India, research by one NGO has concluded that the Indian public regards the police as the most corrupt institution in the country.⁴⁴³ At the lower and intermediate levels of the police hierarchy, officers frequently abuse their power by extorting money from complainants, witnesses, defendants, and other members of the public.⁴⁴⁴ While corruption traditionally has been less prevalent at more senior levels, bribery and extortion among senior officers nevertheless remains an increasing problem. As one former IPS officer has suggested, the widespread acceptance within the Indian police of the notion that significant personal “perks” may legitimately be conferred upon senior police officials at public expense. This legacy of the colonial period has institutionally embedded and reinforced corruption as part of the organizational culture and supervision practices of the Indian police.⁴⁴⁵

In many contexts, Dalit, other lower caste, tribal, and religious minority communities disproportionately suffer the effects of this politicized and corrupt police decision-making. As advocates have long noted, police institutions frequently embody the same religious and caste-based inequalities found in society at-large, failing to protect vulnerable communities from abuses at the hands of private actors, failing to investigate or prosecute those private actors, and in some cases directly perpetrating abuses against those communities. To help overcome this increasingly institutionalized communalism and casteism, further steps may be necessary to end discrimination and increase diversity within the police forces, as the NPC recommended.⁴⁴⁶

2. Accountability for Human Rights Violations

Few effective mechanisms exist to ensure police accountability for human rights violations and other misconduct. Internal oversight and

⁴⁴³ *Police Top ‘Corrupt’ South Asia List*, BBC NEWS, Dec. 17, 2002, at http://news.bbc.co.uk/2/hi/south_asia/2584735.stm (discussing survey by Transparency International).

⁴⁴⁴ Arvind Verma, *Cultural Roots of Police Corruption in India*, 22 POLICING 264, 267-70 (noting that police “[i]nvestigation of cases, decisions to arrest a suspect, submit a charge-sheet or close some pending investigation are all processes that are generally influenced pecuniary considerations,” and that the power to “institute criminal cases and arrest anyone on mere suspicion enables” the police to be “notorious extortionists”).

⁴⁴⁵ *Id.* at 270-75.

⁴⁴⁶ See *supra* note 356; HRW, BROKEN PEOPLE, *supra* note 347, at 23, 32-33, 187-92 (discussing various ways in which “perpetuation of human rights abuses against India’s Dalit population is intimately connected to police abuse”); Doel Mukerjee, Commonwealth Human Rights Initiative, *Police Reform Initiatives in India*, Presentation to South Asia Partnership Canada (July 2, 2003), at 9, www.humanrightsinitiative.org/publications/police/police_reform_initiative_india.pdf (noting “prevalen[ce]” of discrimination within the police to the point where some rural police forces are internally segregated on basis of caste).

accountability mechanisms tend not to be effective. Under state and central police laws, senior officers may dismiss, suspend, or reduce the rank of lower-ranked police officers who are negligent or unfit in the exercise of their duties or have committed one of several enumerated offenses.⁴⁴⁷ However, the offenses that subject officers to discipline tend to involve violations of superior officers' command authority, rather than violations of human rights standards.⁴⁴⁸ Disciplinary procedures are complicated, time-consuming, and subject to political interference. Moreover, police are often loath to investigate vigorously allegations of misconduct by their colleagues, seeking to avoid drawing negative attention to the police as an institution.⁴⁴⁹

External remedies are also difficult to pursue. Human rights violations often are not actionable under the criminal law, and in any event, the Code of Criminal Procedure requires prior government authorization, which is rarely forthcoming, before criminal proceedings may be initiated against any government official. In the few instances in which criminal charges have been brought, convictions have been few and sentences short.⁴⁵⁰ Individuals whose fundamental rights under the Constitution have been violated may seek compensation and prospective relief from the Supreme Court or a High Court by filing a writ petition.⁴⁵¹ While the Supreme Court and the High Courts have ordered compensation in many cases and repeatedly criticized law enforcement officials for failing to take appropriate steps to curb human rights abuses by the government, these remedies have proven largely ineffectual.⁴⁵² When the Supreme Court and High Courts have ordered investigations of alleged abuses arising in cases

⁴⁴⁷ G.P. JOSHI, COMMONWEALTH HUMAN RIGHTS INITIATIVE, POLICE ACCOUNTABILITY IN INDIA 11 (2002), *at* http://www.humanrightsinitiative.org/programs/aj/police/papers/gpj/police_accountability_in_india.pdf.

⁴⁴⁸ For example, the Police Act of 1861 subjects police officers to administrative discipline for (1) willful or negligent breach of any rule, regulation, or order, (2) absence from duties without permission or reasonable cause, (3) engaging in other employment, (4) cowardice, and (5) causing unwarrantable violence to any person in the officer's custody. Police Act of 1861, § 33; Joshi, *supra* note 447, at 11. This command authority-oriented approach to internal discipline derives in part from the colonial decision to make police officers accountable to local district magistrates, who in turn were accountable to the British. Verma, *supra* note 25.

⁴⁴⁹ JOSHI, *supra* note 447, at 12.

⁴⁵⁰ INDIA CODE CRIM. PROC. § 197; *see* DARAWALA ET AL., *supra* note 434, at 6; KELKAR'S CRIMINAL PROCEDURE, *supra* note 49, at 226-32.

⁴⁵¹ INDIA CONST. arts. 32, 226. The government may be held vicariously liable for violations of these rights by public officials and public employees, and victims' claims are not barred by sovereign immunity. *See Nilabati Behera v. State of Orissa*, (1993) 2 S.C.C. 746 (defense of sovereign immunity does not apply to claim arising under public law even though it would be available in private law tort action based on same facts).

⁴⁵² REDRESS TRUST, *supra* note 65, at 10.

already before them, investigators and prosecutors have frequently disregarded those orders.⁴⁵³ This reluctance to investigate and prosecute appears to result in part from embedded conflicts of interest, since police and prosecutors in effect are expected to investigate and prosecute their colleagues, and in part from an attitude among law enforcement and security officials that torture, illegal detention, and related practices are tolerable and indeed necessary tools in combating crime and terrorism.⁴⁵⁴

The process of seeking remedies from the Supreme Court and High Courts is also beyond the means of many victims. Even with the assistance of counsel, the time and travel necessary limit the ability to seek recourse from the higher judiciary. When combined with the prevalence of attacks on and violent intimidation of victims, witnesses, and human rights attorneys and activists, many victims are unable or unwilling to pursue these remedies.⁴⁵⁵

Finally, the NHRC and state human rights commissions offer limited recourse for victims of human rights abuses.⁴⁵⁶ While the NHRC has lobbied the government and suggested reforms to end torture by police and security forces, ensure accountability for violations, and encourage reparation and compensation for victims in individual cases, its recommendations often have been disregarded, particularly when it has recommended prosecution of government officials.⁴⁵⁷ Moreover, the NHRC and state human rights commissions have many competing human rights responsibilities other than police oversight.

The NPC's recommendations did not directly address the issue of accountability – the state security commissions proposed by the NPC instead emphasized oversight of police functioning and performance. Any current reform proposals should seek to upgrade the full range of mechanisms by which the police and other government officials may be held accountable, in

⁴⁵³ REDRESS TRUST, *supra* note 65, at 21-22. The subordinate courts, which handle the majority of cases and are thus more likely to encounter allegations of government abuse, are unlikely to order investigations of alleged government abuses at all. *Id.*

⁴⁵⁴ See, e.g., Jupinderjit Singh, *Cops Accused of Extra Judicial Killings To Be Protected: Singla*, THE TRIBUNE (Chandigarh), Mar. 22, 2006, available at <http://www.tribuneindia.com/2006/20060322/punjab1.htm#1> (discussing proposal to protect police officials who “take extra-judicial measures to combat terrorism” from prosecution on the ground that “extra-ordinary circumstances require[] extra-ordinary steps”).

⁴⁵⁵ REDRESS TRUST, *supra* note 65, at 31.

⁴⁵⁶ In addition to establishing the NHRC, the PHRA contemplates the establishment of state-level human rights commissions and special district-level human rights courts, designed to adjudicate cases arising from alleged human rights violations more rapidly. As of 2003, while state human rights commissions have been established by 16 of India's 28 states, very little progress has been made towards the establishment of effective human rights courts.

⁴⁵⁷ REDRESS TRUST, *supra* note 65, at 5.

order to fulfill the obligation under the ICCPR to provide meaningful and effective remedies for rights violations.⁴⁵⁸

B. Effectiveness and Professional Capacity of the Criminal Justice System

Structural reform efforts also must seek to upgrade the overall capacity of the criminal justice system. Conviction rates for individuals arrested by the state police forces have been consistently and dramatically falling since independence. While the conviction rate in ordinary cases under the Indian Penal Code was 64.8 percent in 1961, it has subsequently fallen to 62.0 percent in 1971, 52.5 percent in 1981, 47.8 percent in 1991, and 42.5 percent in 2004.⁴⁵⁹ Certainly, reforms should seek to improve these conviction rates, since the government should not prosecute individuals without sufficient evidence to support a conviction. At the same time, simply increasing conviction rates will not ensure the overall effectiveness of reform. Rather, reformers must also seek to improve the *reliability* of the criminal process, so that the public may be confident that individuals who are investigated, prosecuted, and convicted are, in fact, guilty of the offenses with which they have been charged.⁴⁶⁰

As the NHRC and others frequently have noted, improving the overall effectiveness of the criminal justice system to prosecute terrorism and other serious crimes requires attention to all three stages of the criminal justice process: investigation, prosecution, and adjudication. First, improving the effectiveness of police investigation requires a serious investment and commitment to strengthen their overall professionalism and capacity to do their jobs. Especially when fighting serious crime, the police endure tremendous burdens and serious dangers in their work, and are not

⁴⁵⁸ ICCPR, *supra* note 80, art. 2; see U.N. Basic Principles on the Right to a Remedy, *supra* note 85, ¶¶ 19-23.

⁴⁵⁹ CRIME IN INDIA 2004, *supra* note 227, at 192. As noted above, the conviction rates under special antiterrorism laws such as TADA and POTA have been considerably lower. See *supra* notes 226-227 & 409 and accompanying text.

⁴⁶⁰ Cf. Sen, *supra* note 429, at 34 (while police are “results-oriented” and therefore focused on obtaining convictions, “police chiefs have a greater responsibility to scrutinize the way results are achieved”). In the United States, these principles are implemented in part through administrative guidelines for federal prosecutors, which provide that, “as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact,” based on a reasonable belief that admissible evidence “sufficient to obtain and sustain a conviction” will be available. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.220(B) (2006), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.220.

particularly well compensated. At the same time, as discussed above, the police are frequently hindered in their work by political interference. As a result, morale among the police is low, and this low morale is exacerbated by the wide mistrust of the police within the Indian public at large.

Investigative procedures and mechanisms under Indian law have not significantly changed since the 19th century.⁴⁶¹ With limited ability to collect, preserve, and analyze physical evidence, investigations proceed very slowly. The police rely disproportionately on witness statements, which increases the incentive to engage in coercive interrogation practices. As Indian observers have noted, attention needs to be devoted to training, the development of advanced forensic skills and facilities, and the separation within the police of responsibility for conducting investigations from the day-to-day responsibilities for maintaining law and order.⁴⁶²

Second, the quality and independence of the prosecution needs to be enhanced. The NHRC has expressed concern that for terrorism cases, in particular, more experienced prosecutors need to be appointed in order to ensure that cases are prosecuted more effectively, and the quality of the prosecution may indeed be one factor contributing to the failure to successfully obtain convictions in many cases.⁴⁶³ There also are indications that the numbers of prosecutors are insufficient to handle the large volume of pending cases.⁴⁶⁴ But the need to reform the prosecution extends much further, requiring more effective guarantees of prosecutorial independence from the police and politicians in all criminal cases.⁴⁶⁵ During the colonial

⁴⁶¹ JAMES VADACKUMCHERY, HUMAN RIGHTS AND INDIAN POLICE 128 (1996) (“Lack of investigative expertise of police officers is . . . one of the causes for large scale violations of human rights”); see also Verma, *supra* note 444, at 268; Ved Marwah, *Reforming Police Investigation*, SEMINAR, June 1995, at 30.

⁴⁶² VADACKUMCHERY, *supra* note 461, at 128; see also NHRC, *Opinion Regarding Prevention of Terrorism Bill*, *supra* note 240; Grover, *supra* note 356, at 358; R.K. Raghavan, *Between Crime and Punishment*, FRONTLINE, May 25-June 7, 2002, available at <http://www.flonnet.com/fl1911/19111110.htm>.

⁴⁶³ NHRC, *Opinion Regarding Prevention of Terrorism Bill*, *supra* note 240. In cases involving terrorism and other serious crimes, the inability to protect witnesses from intimidation may be another factor. See, e.g., Asia-Pacific Human Rights Network, *Justice At Risk: The Need for a Witness Protection Programme in India*, HUMAN RIGHTS FEATURES, HRF/108/04, <http://www.hrhc.net/sahrdc/hrfeatures/HRF108.htm> (Nov. 17, 2004) (discussing intimidation of key prosecution witness in case involving post-Godhra communal riots in Gujarat).

⁴⁶⁴ See Asia-Pacific Human Rights Network, *Access to Justice: Reform Schemes Must Not Wander Off Into ADR Wilderness*, HUMAN RIGHTS FEATURES, HRF/108/04 (Oct. 29, 2004), <http://www.hrhc.net/sahrdc/hrfeatures/HRF107.htm> [hereinafter HRF, *Access to Justice*] (noting that prosecutors are “enormously understaffed, often resulting in adjournments as a single prosecutor is representing two separate cases at the same time”).

⁴⁶⁵ See AMAN PANCHAYAT TRUST, THE ROLE OF THE PUBLIC PROSECUTOR IN THE CRIMINAL JUSTICE SYSTEM ¶¶ 2.0-2.1, 3.0-3.2 (2005), available at http://www.amanpanchayat.org/test/hsc_public_pros_reportsum.htm.

period and for many years after independence, criminal cases generally were prosecuted by the police, not an independent cadre of lawyers. As Arvind Verma, a professor and former IPS officer, has noted, this lack of prosecutorial independence is itself a vestige of colonialism, under which most prosecuting attorneys, who were Indian, were subordinate to senior police officers, who were British.⁴⁶⁶

Since independence, the Law Commission and Supreme Court have repeatedly emphasized the importance of ensuring prosecutorial independence from the police. However, in many states this separation does not exist, at least in practice if not formally.⁴⁶⁷ Recent amendments to the Code of Criminal Procedure now formally authorize the states to establish separate Directorates of Prosecution within their home departments. However, the states are not required to do so, and the new provisions do not specify any guidelines to ensure the independence of these directorates. Indeed, some Indian observers have raised concerns that by placing the prosecution under the aegis of the home departments, the amendments might further compromise, rather than enhance, prosecutorial independence from the police.⁴⁶⁸ Especially given the vital potential role that prosecutors can play in either resisting *or* exacerbating police abuses, further reforms likely will be necessary to ensure both meaningful independence and accountability for prosecutors.⁴⁶⁹

Finally, reform efforts must seek to improve the capacity of the

⁴⁶⁶ Verma, *supra* note 444, at 268-69.

⁴⁶⁷ *Id.* at 268 (“[T]he decision to send any case for trial is . . . that of the superintendent [of police] and prosecutors have little control over the cases sent for trial.”).

⁴⁶⁸ Code of Criminal Procedure (Amendment) Act, No. 25 of 2005, § 4; see SAHRDC, CRIMINAL JUSTICE HANDBOOK, *supra* note 52, at 121; Siddharth Narain, Op-Ed, *Amending the Criminal Procedure Code*, THE HINDU, July 25, 2005, available at <http://www.hindu.com/2005/07/25/stories/2005072503571000.htm> (noting concerns about prosecutorial independence). Some proposals would even further undermine prosecutorial independence by self-consciously placing the prosecution under the control of the police and even requiring the Director of Prosecution to be a senior police officer. *E.g.*, 1 GOVERNMENT OF INDIA, MINISTRY OF HOME AFFAIRS, REPORT OF THE COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM 125-30, 278-79 (Justice V.S. Malimath, Chairperson, 2003) [hereinafter MALIMATH COMMITTEE REPORT]; see INT’L COMM’N OF JURISTS, CRIMINAL JUSTICE REFORM IN INDIA: ICJ POSITION PAPER, REVIEW OF THE RECOMMENDATIONS MADE BY THE JUSTICE MALIMATH COMMITTEE FROM AN INTERNATIONAL HUMAN RIGHTS PERSPECTIVE 20 (Aug. 2003) [hereinafter ICJ, CRIMINAL JUSTICE REFORM IN INDIA], available at http://www.icj.org/IMG/pdf/India_crim_justice_reform.pdf (criticizing Malimath Committee proposals on prosecution).

⁴⁶⁹ *E.g.*, Sen, *supra* note 429, at 35 (proposing “judicial cum police agency to screen all decisions by state and central police investigating agencies either to file charge sheets or drop investigations”); see generally AMAN TRUST, *supra* note 465; Bikram Jeet Batra, *Public Prosecution – In Need of Reform*, INDIA TOGETHER, July 5, 2005, <http://www.indiatogether.org/2005/jul/gov-prosecute.htm> (discussing concerns about prosecution and proposed reforms); James Vadackumchery, THE POLICE, THE COURT AND INJUSTICE 107-26 (1997) (discussing need to improve capabilities and independence of prosecution).

Indian judiciary itself. Without question, the Indian judiciary has played a critical role since independence in advancing and defending India's commitment to the rule of law and its constitutional values. However, it has done so under tremendous pressures and resource constraints, particularly at the subordinate court levels.⁴⁷⁰ In 1986, Justice P.N. Bhagwati of the Supreme Court of India declared that the Indian judiciary was "on the verge of collapse," crushed by a backlog of cases that was undermining the legitimacy of the justice system.⁴⁷¹ Twenty years later, the situation has only become more severe.

One dimension of the problem involves basic numbers. The Indian judiciary has only 10.5 judges per million citizens, compared to 41.6 per million in Australia, 50.9 per million in the United Kingdom, 75.2 per million in Canada, and 107.0 per million in the United States.⁴⁷² Caseload statistics reflect these disparities. At the end of 2005, the subordinate courts had over 25 million pending cases, of which approximately 18 million were criminal cases.⁴⁷³ Large backlogs contribute to extensive delays in adjudication, increases in litigation costs, loss or diminished reliability of evidence by the time of trial, unevenness and inconsistency in the verdicts that ultimately are reached at trial, and an attendant reduction of faith in the justice system among members of the public.⁴⁷⁴ The consequences are particularly severe for the large numbers of "undertrials" who languish in prolonged periods of detention while awaiting trial – in some cases, even beyond the maximum periods to which they could be sentenced if convicted.⁴⁷⁵

Perhaps to an even greater extent than with police reform, both the government and the Supreme Court have been very active in recent years in

⁴⁷⁰ See P.P. Rao, *Combating Corruption in the Judiciary*, PUCL BULL., July 2003, available at <http://www.pucl.org/Topics/Law/2003/corruption.htm> (noting "impressive record" and traditionally "very high" credibility of judiciary among India's public institutions).

⁴⁷¹ Quoted in Ramanathan, *supra* note 236.

⁴⁷² CHRI, POLICE ORGANISATION IN INDIA, *supra* note 35, at 6; HRF, *Access to Justice*, *supra* note 464.

⁴⁷³ Chief Justice Y.K. Sabharwal, Justice Sobhagmal Jain Memorial Lecture on Delayed Justice 5-6 (New Delhi, July 25, 2006), http://www.supremecourtfindia.nic.in/new_links/Delayed%20Justice.pdf. In the High Courts, there were approximately 3.5 million pending cases at the end of 2005, of which approximately 650,000 were criminal cases. *Id.* at 4-5; see also *Live Up to People's Expectations, President Tells Judiciary*, THE HINDU, July 30, 2006, available at <http://www.hindu.com/2006/07/30/stories/2006073002121100.htm> (quoting Chief Justice Y.K. Sabharwal); Krishnan & Galanter, *supra* note 429, at 6.

⁴⁷⁴ E.g., Sabharwal, *supra* note 473, at 2-3.

⁴⁷⁵ See, e.g., Ritu Sarin, *Friday: Thousands of Undertrials Will Get Right to Walk Free*, INDIAN EXPRESS, June 22, 2006, available at <http://www.indianexpress.com/story/7018.html>.

raising the profile of judicial reform as an issue.⁴⁷⁶ Meaningful reform will require significant investments to increase the numbers of judges, upgrade and expand courtrooms and other facilities, and implement methods to improve judicial efficiency and productivity through, for example, increased use of technology and improved case management techniques.

Some initiatives already are being implemented. For example, recent legislation has provided for the potential release of thousands of individuals who have subject to prolonged detention pending trial and, for the first time, has introduced the concept of plea bargaining into the Indian criminal justice system for certain offenses carrying maximum potential sentences of less than seven years.⁴⁷⁷ Other proposals would expand the use of “fast track” courts and alternative tribunals for certain offenses, hire ad hoc judges and establish “double shifts” for sitting judges, and implement various procedural mechanisms to reduce delays, such as limits on interlocutory appeals and the use of pretrial hearings to narrow issues to be litigated. Senior government officials and members of the higher judiciary also have recognized the need to address the problem of corruption and to improve training for judges and judicial staff and the quality of adjudication, particularly in the subordinate courts – in part by considering the establishment of an all-India judicial service to staff the subordinate courts.⁴⁷⁸

These efforts to find ways to promote greater efficiency in adjudication are entirely appropriate given the challenges faced by the Indian judicial system. At the same time, the challenge of managing this burgeoning caseload simultaneously heightens the need for caution and attentiveness to procedural protections. As we have witnessed in the United States, in the context of the Justice Department’s recent efforts to clear heavy backlogs in administrative adjudication of immigration cases, streamlined justice can

⁴⁷⁶ See Sabharwal, *supra* note 473; Prime Minister Manmohan Singh, Address Before Conference of Chief Minister and Chief Justices of High Courts (New Delhi, Sep. 18, 2004) (“Singh, Sep. 18, 2004 Speech”), <http://pmindia.nic.in/speech/content.asp?id=293>; Prime Minister Manmohan Singh, Address Before Conference of Chief Minister and Chief Justices of High Courts, (New Delhi, Mar. 11, 2006) (“Singh, Mar. 11, 2006 Speech”), <http://pmindia.nic.in/speech/content.asp?id=293>; President A.P.J. Kalam, Address at the Inauguration of the Diamond Jubilee Celebrations of Jammu and Kashmir High Court, at 5-11 (Srinagar, July 29, 2006), <http://presidentofindia.nic.in/presentation/splangnewPDF%20Format802.pdf>.

⁴⁷⁷ See Sarin, *supra* note 475 (discussing amendments to Code of Criminal Procedure providing for release of defendants not facing death penalty and who have been detained for at least half of potential prison term to which, if convicted, they could be sentenced); *Plea Bargaining Comes Into Effect From Today*, INDLAW.COM, July 5, 2006, available at <http://www.indlawnews.com/A52073C542B23FD58A4F82FBCA5F51EC>.

⁴⁷⁸ Sabharwal, *supra* note 473; Maneesh Chhibber, *All-India Judicial Service On The Anvil*, THE TRIBUNE (Chandigarh), July 17, 2006, available at <http://www.tribuneindia.com/2006/20060717/main3.htm>; Singh, Sep. 18, 2004 Speech, *supra* note 476; HRF, *Access to Justice*, *supra* note 464; Rao, *supra* note 470.

compromise the quality of adjudication and create opportunities for improper political influence – indeed, one prominent federal judge has criticized the quality of adjudication as having “fallen below the minimum standards of legal justice.”⁴⁷⁹ Similar risks appear present in India’s initiatives to streamline the administration of justice. While plea bargaining can help to reduce delays by facilitating earlier disposition of criminal cases in which the defendants do not contest their guilt and, in some instances, cooperation against more culpable defendants, it is important that any system of plea bargaining be regulated and subject to procedural safeguards.⁴⁸⁰ Past efforts to use alternative or informal adjudication in India also have not been entirely successful either in ensuring efficiency or fully protecting the legal rights of Indian citizens, and it will be important to understand the limitations of those efforts when more broadly seeking to rely upon institutions such as “fast track” courts to adjudicate criminal cases.⁴⁸¹

While some prominent proposals – most notably those suggested by the government committee chaired by Justice V.S. Malimath – would seek to streamline the administration of criminal justice simply by making it easier for the police and prosecution to obtain convictions, such an approach would be mistaken.⁴⁸² It fails to recognize that the limitations in the current system

⁴⁷⁹ *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) (Posner, J.). Other federal judges and a broad range of organizations (including the New York City Bar Association) and former federal immigration officials have made similar criticisms. *E.g.*, *id.* at 829 (collecting cases); COMMITTEE ON FEDERAL COURTS, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE SURGE OF IMMIGRATION APPEALS AND ITS IMPACT ON THE SECOND CIRCUIT COURT OF APPEALS 18-19 (2004), www.abcnyc.org/pdf/report/AppealSurgeReport.pdf; DORSEY & WHITNEY LLP, BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT, STUDY CONDUCTED FOR THE AMERICAN BAR ASSOCIATION COMMITTEE ON IMMIGRATION POLICY, PRACTICE, AND PRO BONO (2003), http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf; Pamela MacLean, *Judges Blast Immigration Rulings*, NAT’L L.J., Oct. 24, 2005, at S1; T. Alexander Aleinikoff & David A. Martin, Op-Ed, *Ashcroft’s Immigration Threat*, WASH. POST, Feb. 26, 2002, A21, available at <http://www.washingtonpost.com/ac2/wp-dyn/A2177-2002Feb25> (essay by two former general counsels of Immigration & Naturalization Service criticizing apparent use of streamlining initiative to remove administrative adjudicators with whose substantive decisions the Attorney General disagrees).

⁴⁸⁰ *See, e.g.*, Human Rights Documentation Centre, *In the Name of Malimath: Bill On Plea-Bargaining Seeks To Subvert Justice*, HUMAN RIGHTS FEATURES, HRF/88/03, <http://www.hrdc.net/sahrdc/hrfeatures/HRF88.htm> (Nov. 30, 2003) [hereinafter HRF, *In the Name of Malimath*]. Under federal law in the United States, acceptance of guilty pleas is carefully regulated by the Constitution’s due process guarantees and by provisions of the Federal Rules of Criminal Procedure which require the judge to ensure that the plea is voluntary and has a sufficient factual basis and confers broad discretion upon the judge to accept or reject the plea. *See* FED. R. CRIM. P. 11.

⁴⁸¹ *E.g.*, Galanter & Krishnan, *supra* note 429 (discussing informal adjudication mechanisms for civil disputes); *see also* V. Venkatesan, *For Fast Track Justice*, FRONTLINE, July 7-20, 2001, available at <http://www.flonnet.com/fl1814/18140910.htm>; Sabharwal, *supra* note 473, at 17-18 (proposing expansion of “fast track” courts to adjudicate minor criminal matters presently handled by magistrates).

⁴⁸² *See* MALIMATH COMMITTEE REPORT, *supra* note 468. The Malimath Committee’s approach has been much criticized by Indian advocates and other experts on judicial reform. *See, e.g.*, ICJ, CRIMINAL

stem from a comprehensive set of challenges involve the very capacity of India's institutions to investigate, prosecute and adjudicate criminal cases effectively. As such, real progress likely will come not through procedural "short cuts" designed to help the police obtain more convictions in the short term, but rather through a comprehensive approach to institutional capacity-building. While this approach may take an extended period of time to realize, it is an approach to which many Indian officials and other citizens appear sincerely committed.

VII. ROLE OF THE INTERNATIONAL COMMUNITY

While recent debate over India's antiterrorism laws has been shaped principally by a domestic political context which has evolved over many decades, that debate has not taken place in an international vacuum. Rather, especially in the aftermath of the September 2001 terrorist attacks, the debate in India has been influenced significantly by the antiterrorism initiatives of other countries, including the United States, and the U.N. Security Council, for which the United States and United Kingdom have been driving forces.⁴⁸³

A. Resolution 1373 and the Counter-Terrorism Committee

Within weeks after the September 2001 attacks, the Security Council adopted Resolution 1373 pursuant to its powers under Chapter VII of the U.N. Charter, which authorizes the Council to take measures "to maintain or restore international peace and security" in response to any "threat[s] to the peace, breach[es] of the peace, or act[s] of aggression" – and to mandate, rather than simply to call for, compliance by member states.⁴⁸⁴ Resolution

JUSTICE REFORM IN INDIA, *supra* note 468; AMNESTY INT'L, INDIA: REPORT OF THE MALIMATH COMMITTEE ON REFORMS OF THE CRIMINAL JUSTICE SYSTEM: SOME OBSERVATIONS, ASA 20/025/2003, Sep. 19, 2003, available at [http://web.amnesty.org/library/pdf/ASA200252003ENGLISH/\\$File/ASA2002503.pdf](http://web.amnesty.org/library/pdf/ASA200252003ENGLISH/$File/ASA2002503.pdf); Pratap Bhanu Mehta, Op-Ed, *Presumed Guilty: A Criminal Justice System Modelled On the POTA Is Worrisome*, THE TELEGRAPH (Kolkata), Nov. 20, 2003, available at http://www.telegraphindia.com/1031120/asp/opinion/story_2592514.asp; *Asia-Pacific Human Rights Network, Malimath Panel Finds Reform Vital But Rights Dispensable*, HUMAN RIGHTS FEATURES, HRF/84/03, <http://www.hrdc.net/sahrdc/hrfeatures/HRF84.htm> (Sep. 15, 2003); HRF, *In the Name of Malimath*, *supra* note 480.

⁴⁸³ These international influences have long been present. For example, the Law Commission of India's report in 2000 endorsing the bill that ultimately became POTA discussed recent antiterrorism laws and proposals in the United States and United Kingdom, among other countries, as partially justifying the use of special laws in India as well. LAW COMM'N 173RD REPORT, *supra* note 238, chs. 2-3.

⁴⁸⁴ S.C. Res. 1373, U.N. Doc. S/Res/1373 (Sep. 28, 2001); U.N. Charter art. 39.

1373, which was sponsored by the United States, represents a sweeping use of the Council's Chapter VII authority, an "unprecedented" and "far-reaching" initiative that does not simply respond to the particular events of September 2001 or require mere compliance with existing international treaty obligations concerning terrorism, but instead legislates new, binding rules of international law that are neither explicitly nor implicitly limited in time.⁴⁸⁵

Finding that the September 2001 terrorist attacks constituted "a threat to international peace and security," Resolution 1373 requires member states, among other things, to prevent and criminalize the financing or collection of funds for "terrorist acts," to freeze assets or resources of persons who commit or are involved in the commission of terrorist acts, to prohibit the making of any assets, resources, or services available to persons who commit or are involved in the commission of terrorist acts, to bring to justice any persons who commit or are involved in financing, planning, preparing, or supporting "terrorist acts," and to legislate separate, "serious criminal offenses" proscribing "terrorist acts" under domestic law.⁴⁸⁶ The resolution does not define "terrorism" or "terrorist acts," leaving each state to define those terms for itself.⁴⁸⁷ Nor does the resolution affirmatively require states to heed human rights obligations, although subsequent resolutions have explicitly "call[ed] upon" and "reminded" states to ensure that antiterrorism measures comply with international human rights, refugee, and humanitarian law.⁴⁸⁸

To monitor states' implementation and compliance, Resolution 1373 established the Counter-Terrorism Committee, a standing committee composed of all fifteen Council members. The resolution called upon states to report their progress towards implementation to the CTC within 90 days and periodically thereafter. The resolution did not elaborate further upon the

⁴⁸⁵ Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT'L L. 333, 334 (2003); Jane E. Stromseth, *Imperial Security Council – Implementing Security Council Resolutions 1373 and 1390*, 97 AM. SOC'Y INT'L L. PROC. 41 (2003); Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901, 902 (2002); Kim Lane Scheppele, *Other People's Patriot Acts*, 50 LOY. L. REV. 89, 91-93 (2004).

⁴⁸⁶ Resolution 1373 also "calls upon" states to become parties to the twelve existing international conventions and protocols concerning terrorism, to fully implement those agreements and previous Security Council resolutions addressing terrorism, to improve border security, and to exchange information with and provide judicial assistance to other member states in terrorism-related criminal proceedings.

⁴⁸⁷ Nicholas Rostow, *Before and After: The Changed UN Response to Terrorism Since September 11th*, 35 CORNELL INT'L L.J. 475, 484 (2002).

⁴⁸⁸ S.C. Res. 1456, ¶ 5, U.N. Doc. S/Res/1456, (Jan. 20, 2003); S.C. Res. 1566, pmb., U.N. Doc. S/Res/1566 (Oct. 8, 2004).

CTC's mandate, leaving the CTC itself to define its agenda and approach to implementation.⁴⁸⁹ States appear to have taken their obligations under the resolution seriously. Compliance with the resolution's reporting requirements has been higher than with previous Security Council mandates, and states also have responded positively to the CTC's effort to encourage ratification of existing international antiterrorism conventions and protocols.⁴⁹⁰

B. Indian Antiterrorism Laws and Resolution 1373

Since its adoption, Resolution 1373 has played a significant role in helping to frame the debate over antiterrorism laws in India. In the earliest debates in 2001 and 2002 over the bill that ultimately became POTA, proponents repeatedly invoked the resolution to argue that the bill was not simply justified, but required under international law. After POTO was promulgated in 2001, for example, the Home Secretary publicly stated that the ordinance "implements in part the obligation on member states imposed" by Resolution 1373.⁴⁹¹

News reports and commentary also were attuned to the obligatory nature of Resolution 1373's Chapter VII requirements, at times incorrectly suggesting that all of POTA's provisions were necessary to comply with the Security Council's mandate. Some media reports stated that because the resolution "makes it mandatory" for member states to help combat terrorism,

⁴⁸⁹ At least initially, the CTC has emphasized cooperation with member states to build their capacity and infrastructure to combat terrorism, rather than singling out countries for non-compliance with the resolution. Rosand, *supra* note 485, at 335. The work of the CTC is supported by the Counter-Terrorism Executive Directorate, which was established in March 2004. S.C. Res. 1456, *supra* note 488.

⁴⁹⁰ See DAVID CORTRIGHT ET AL., FOURTH FREEDOM FORUM & JOAN B. KROC INST. FOR INT'L. PEACE STUDS., AN ACTION AGENDA FOR ENHANCING THE UNITED NATIONS PROGRAM ON COUNTER-TERRORISM 5-7 (2004), available at http://www.nd.edu/~krocinst/polbriefs/Action_Agenda.pdf. All 191 U.N. member states submitted initial reports documenting their efforts to comply with the resolution, with 160 states doing so within nine months of the resolution's adoption. U.N. SCOR, 57th Sess., 4561th mtg. at 2, U.N. Doc. S/PV.4561 (statement of Jeremy Greenstock). States have responded positively to the CTC's requests for follow-up reports, submitting a total of well over 600 reports as of 2006. This record of compliance is particularly striking when compared with the much lower level of compliance with reporting obligations under human rights treaties such as the ICCPR.

⁴⁹¹ NHRC Chief, *Govt Lock Horns Over Terror Law*, TIMES OF INDIA, Nov. 3, 2001, available at <http://timesofindia.indiatimes.com/articleshow/86584295.cms>; see Government of India, Press Brief on Chief Ministers' Conference on Internal Security, Nov. 17, 2001, <http://pib.nic.in/archieve/lreleeng/lyr2001/mov2001/17112001/r171120014.html> (noting Home Minister's statement that "some provisions of [POTO] were in part implementation of the UN Resolution"); I.D. Swami, Op-Ed, *POTO Is A Must To Tackle Terrorism*, THE TRIBUNE (Chandigarh), Nov. 11, 2001, available at <http://www.tribuneindia.com/2001/20011111/edit.htm#1> (argument by Minister of State for Home Affairs that POTO is necessary in part because "[t]he nation is committed to the UN Security Council to take measures to deal with terrorism").

enactment of comprehensive antiterrorism legislation would be “vital for the government to fulfill its international commitments.”⁴⁹² Editorial commentators asserted this imperative even more strongly. A retired army officer, for example, asserted that because all states are “required by . . . Resolution 1373 to promulgate anti-terrorism laws within 90 days and report completion to the secretary general[,] POTO need not . . . be made such a big political issue.”⁴⁹³

Resolution 1373 also played a prominent role in parliamentary debates leading to the enactment of POTA. Upon introducing the bill in Parliament, the Home Minister, L.K. Advani, asserted that the Council’s adoption of the resolution prompted the government to conclude it was India’s “duty to the international community . . . to pass [POTA].”⁴⁹⁴ Similarly, former Law Minister Ram Jethmalani – who later repudiated his support of POTA altogether⁴⁹⁵ – suggested that the government had been obliged to promulgate POTO in order to comply with the Security Council’s mandate to enact “suitable legislation” to combat terrorism:

We are a responsible Member of the United Nations. After
[Resolution 1373’s adoption], I am sorry to say that the
Ordinance was not issued for full one month and three days.
It took the Home Ministry 33 days But when it was

⁴⁹² CL Manoj & Nilova Roy Chaudhury, *States May Rob Centre of POTO Glory*, THE STATESMAN (Kolkata), Mar. 26, 2002, available at <http://www.thestatesman.net/page.arcview.php?clid=1&id=11830&usrsess=1>.

⁴⁹³ Ashok K. Mehta, Op-Ed, *The Common Enemy*, REDIFF, Nov. 24, 2001, <http://www.rediff.com/news/2001/nov/24ashok.htm> (op-ed by retired major general in Indian army); see also K.P.S. Gill, Op-Ed, *Fight Terror, Not POTO*, HINDUSTAN TIMES, Nov. 5, 2001 (arguing that POTO is justified in part because “the United Nations has itself mandated that all states must adopt necessary legal instruments ‘to prevent terrorism and to strengthen international co-operation in combating terrorism’”); Gill, *supra* note 1, at 5-6 (invoking U.N. resolutions “that impose a duty on all member states to legislate effectively to control the activities of terrorists and their support organisations” and arguing that enactment of permanent, “comprehensive set of counter-terrorism laws” would help India comply with U.N. mandate).

⁴⁹⁴ Parliament of India, Joint Session Debate, Mar. 26, 2002, at <http://164.100.24.208/debate/debtext.asp?sno=3795&ser=&smode=t> (statement of L.K. Advani); Lok Sabha Debate, Mar. 18, 2002, at <http://164.100.24.208/debate/debtext.asp?sno=3791&ser=&smode=t> (statement of L.K. Advani); see also V. Venkatesan, *The POTA Passage*, FRONTLINE, Apr. 13-26, 2002, available at <http://www.flonnet.com/fl1908/19081020.htm> (noting Indian home minister’s suggestion that POTA’s enactment “would meet a call made by [Resolution 1373]”); Krishna Prasad, *The Rediff Special: Everything You Wanted To Know About POTO*, REDIFF, Nov. 19, 2001, <http://www.rediff.com/news/2001/nov/19spec.htm> (noting government’s position that by promulgating POTO, “India is only complying with [Resolution 1373], enjoining member states to undertake comprehensive measures to deal with terrorism”).

⁴⁹⁵ Ram Jethmalani, “My Support For POTA Was A Serious Mistake,” THE HINDU, July 16, 2004, available at <http://www.hindu.com/2004/07/16/stories/2004071604521100.htm>.

issued it was in compliance with our obligations under international law and . . . our obligations as a Member of the [United Nations].⁴⁹⁶

If Parliament failed to enact POTA into law, Jethmalani continued, India “would stand exposed before the comity of Nations” and would be “guilty of breach of [its] international obligations.”⁴⁹⁷

Other members of Parliament made similar suggestions.⁴⁹⁸ Indeed, at least one of the bill’s *opponents* accepted the contention that POTA was required by Resolution 1373, arguing that the bill should be rejected in spite of any such obligation.⁴⁹⁹ The NHRC also has been acutely aware of India’s obligation to comply with the resolution, noting the “complexity of protecting human rights in the new international climate prevailing since 11 September 2001 and the adoption of [Resolution 1373].”⁵⁰⁰

This public discourse within India about the significance of Resolution 1373 also affected the later adjudication of POTA’s legality before the courts. In upholding POTA against challenges under the Indian Constitution and applicable international human rights treaties, the Supreme Court of India noted, almost in passing, that because of the resolution, “it has become [India’s] international obligation . . . to pass necessary laws to fight terrorism.”⁵⁰¹ The Court did not elaborate on this assertion or identify any specific provisions in POTA it deemed necessary to fulfill this obligation.

Resolution 1373 even cast a shadow over the debates in 2004 over

⁴⁹⁶ Rajya Sabha Debate, Mar. 21, 2002, at http://rajyasabha.nic.in/rsdebate/deb_ndx/195/21032002/4to5.htm (statement of Ram Jethmalani); see also Lok Sabha Debate, Mar. 18, 2002 (statement of L.K. Advani), *supra* note 494 (“When the Security Council passed this Resolution in September 2001, shortly after that, the Government thought it proper to bring an Ordinance, which we call POTO”).

⁴⁹⁷ Rajya Sabha Debate, Mar. 21, 2002, *supra* note 496 (statement of Ram Jethmalani). Indeed, even after renouncing his prior support for POTA, Jethmalani attributed his support almost entirely to his perception that POTA was necessary for India to comply with Resolution 1373. Jethmalani, *supra* note 495.

⁴⁹⁸ See Rajya Sabha Debate, Mar. 21, 2002, http://rajyasabha.nic.in/rsdebate/deb_ndx/195/21032002/3to4.htm (statement of B.P. Apte) (suggesting that Resolution 1373 requires enactment of POTA); Lok Sabha Debate, Mar. 18, 2002, *supra* note 494 (statement of Bhartruhari Mahtab) (same).

⁴⁹⁹ Lok Sabha Debate, Mar. 18, 2002, *supra* note 494 (statement of E.M. Sudarsana Natchiappan). *But see* Parliament of India, Joint Session Debate, Mar. 26, 2002, *supra* note 494 (statement of Kabil Sibal) (disputing claim that Resolution 1373 required enactment of POTA); *id.* (statement of J. Chitranjan) (same).

⁵⁰⁰ NAT’L HUMAN RIGHTS COMM’N OF INDIA, ANNUAL REPORT 2002-03, at 4, available at <http://nhrc.nic.in/Documents/AR/AR02-03ENG.pdf>.

⁵⁰¹ *People’s Union for Civil Liberties v. Union of India*, A.I.R. 2004 S.C. 456, 466.

POTA's repeal. In Parliament, supporters of POTA asserted that the statute had been enacted because India "had committed to the enactment of an anti-terror law" upon the Security Council's adoption of Resolution 1373, and suggested that repeal might violate the resolution.⁵⁰² Editorials similarly suggested that POTA's repeal might "compromise India's obligation under [Resolution 1373] to take special measures against terrorism in the wake of [the September 2001 attacks]," and that it was "very doubtful" that the repealed POTA provisions that were simultaneously reenacted as amendments to UAPA would sufficiently comply with the resolution.⁵⁰³ At the same time, some government officials have stated that these amendments to UAPA, including the provisions defining "terrorism," self-consciously were designed in part to ensure that India fulfilled its obligations under the resolution.⁵⁰⁴

These invocations of Resolution 1373 have tended to be selective or opportunistic. They fail to distinguish carefully between those legal provisions that are required by the Council and those that are not, suggesting instead that POTA or other omnibus antiterrorism measures are required in their entirety to comply with the Security Council's dictates. Advocates of POTA have rarely, if ever, noted any countervailing human rights obligations, whether under domestic or international law, that also demand compliance.⁵⁰⁵

C. Human Rights Concerns

The CTC's own legal expert has acknowledged that inevitably, aspects of the antiterrorism laws enacted by states to comply with Resolution

⁵⁰² E.g., Statement of Arun Jaitley in opposition to Prevention of Terrorism (Repeal) Bill, 2004 and Unlawful Activities (Prevention) Amendment Bill, 2004, http://www.bjp.org/Publication/D_Parliament_Jaitley.htm. One member of Parliament went so far as to say that POTA "ha[d] . . . been endorsed by the United Nations." *Heated Exchanges Over Repeal of POTA*, THE HINDU, Dec. 4, 2004, available at <http://www.hindu.com/2004/12/04/stories/2004120407041100.htm> (quoting Rajiv Ranjan Singh).

⁵⁰³ Editorial, *In the Name of Muslims' Safety, UPA Plays Into Sangh's Hands*, INDIAN EXPRESS, May 28, 2004; Prakash Singh, Op-Ed, *Hello Mr. Terrorist, Please Come In*, INDIAN EXPRESS, Sep. 24, 2004 (op-ed by former director-general of Indian Border Security Force).

⁵⁰⁴ See Tikku, *supra* note 389 (discussing memo by Home Ministry stating that post-repeal amendments to UAPA "were largely aimed at fulfilling India's obligations under the post-9/11 UN Security Council resolutions").

⁵⁰⁵ See *POTO Changes Not Enough, Says NHRC*, TIMES OF INDIA, Jan. 3, 2002, available at <http://timesofindia.indiatimes.com/articleshow/88343000.cms> (noting criticism by NHRC chairperson that POTO represented "misapplication of U.N. Resolution 1373" and failed to heed fundamental rights guarantees under Indian Constitution).

1373 would “not be fully compatible with human rights concerns.”⁵⁰⁶ However, the Security Council and CTC have not been sufficiently attentive to these inevitable human rights concerns, in either the initial drafting of the resolution or subsequent efforts to monitor and facilitate states’ compliance. At best, the CTC has failed to make consistency with human rights norms a sufficient priority, essentially disclaiming responsibility to be attentive to human rights standards when monitoring and facilitating states’ efforts to implement Resolution 1373’s antiterrorism requirements. At worst, the CTC may in some instances be enabling human rights violations by “push[ing] governments to show results without at the same time explicitly raising relevant and empirically well-founded human rights concerns.”⁵⁰⁷

Perhaps in part because Resolution 1373 does not affirmatively refer to any international human rights, humanitarian, or refugee law obligations to be heeded when implementing its antiterrorism requirements, the CTC initially took the position that its mandate did not encompass any human rights concerns at all. Soon after the CTC was established, its first chair, Jeremy Greenstock, explicitly disclaimed any obligation to ensure that states implemented Resolution 1373 in a manner consistent with human rights norms. While pledging to “remain aware of the interaction with human rights concerns,” Greenstock stated that “[m]onitoring performance against other international conventions, including human rights law, is outside the scope of the [CTC’s] mandate,” and that instead, “[i]t is . . . open to other organizations to study States’ reports and take up their content in other forums.”⁵⁰⁸ Greenstock reiterated the same message on other occasions, stating that the CTC would make its operations sufficiently transparent to permit NGOs and others to identify and bring concerns to the “established human rights machinery,” but that the CTC had no responsibility to ensure that states respect human rights when implementing the resolution.⁵⁰⁹

⁵⁰⁶ United Nations, Human Rights Committee Briefed on Work of Counter-Terrorism Committee, Press Release No. HR/CT/630, Mar. 27, 2003, available at <http://www.un.org/News/Press/docs/2003/hrct630.doc.htm> [hereinafter U.N. Press Release, Mar. 27, 2003] (discussing briefing by Curtis Ward).

⁵⁰⁷ HUMAN RIGHTS WATCH, HEAR NO EVIL, SEE NO EVIL: THE U.N. SECURITY COUNCIL’S APPROACH TO HUMAN RIGHTS VIOLATIONS IN THE GLOBAL COUNTER-TERRORISM EFFORT 3 (2004), <http://www.hrw.org/backgrounder/un/2004/un0804/index.htm> [hereinafter HRW, HEAR NO EVIL]; INT’L BAR ASS’N, INTERNATIONAL TERRORISM: LEGAL CHALLENGES AND RESPONSES 30-31 (2003).

⁵⁰⁸ U.N. SCOR, 57th Sess., 4453rd mtg. at 5, U.N. Doc. S/PV.4453 (statement of Jeremy Greenstock); see also Rosand, *supra* note 485, at 340.

⁵⁰⁹ U.N. SCOR, 57th Sess., 4561th mtg. at 21, U.N. Doc. S/PV.4561 (statement of Jeremy Greenstock). One official close to the Security Council went even further, suggesting that attention to human rights concerns arising from states’ implementation of Resolution 1373 was not only outside the CTC’s mandate, but also unnecessary, since the CTC’s efforts would invariably advance human rights norms based on the following syllogism:

These statements reflect a cramped view of Resolution 1373's mandate and, more generally, the importance of adhering to human rights norms when fighting terrorism. Far from falling outside the scope of the resolution, human rights considerations are well within the CTC's mandate.⁵¹⁰ Terrorism is highly correlated with the presence of human rights abuses, weaknesses in the rule of law, and major political grievances.⁵¹¹ When governments violate human rights in their efforts to combat terrorism, they effectively "cede to [terrorists] the moral high ground" and "provok[e] tension, hatred and mistrust of government among precisely those parts of the population where [terrorists are] most likely to find recruits."⁵¹² In this context, respect for human rights is not merely an independent moral or legal obligation, to be compartmentalized and relegated to institutions dedicated exclusively to "human rights" as a freestanding set of concerns. Rather, respect for human rights is itself a strategic imperative, an integral element of any "comprehensive strategy" to combat terrorism.⁵¹³

Resolution 1373 is, in essence, a call to implement a regime of law. If Resolution 1373 is properly implemented, the rule of law will be strengthened. In turn, human rights, which depend on the rule of law for their consistent vindication, will be strengthened.

Rostow, *supra* note 487, at 485. This logic is flawed, however, for if "proper implementation" is not defined to incorporate human rights concerns, then human rights may be undermined, rather than strengthened, by the CTC's efforts to promote compliance with the resolution's provisions mandating antiterrorism measures.

⁵¹⁰ See The Secretary-General, A Global Strategy for Fighting Terrorism, Keynote Address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security (Mar. 10, 2005) [hereinafter Secretary-General, Global Strategy], available at www.unfoundation.org/files/pdf/2005/A_Global_Strategy_for_Fighting_Terrorism.pdf; The Secretary-General, *In Larger Freedom: Towards Development, Security, and Human Rights for All, Report of the Secretary-General*, ¶ 140, U.N. Doc. A/59/2005 (Mar. 21, 2005) [hereinafter Secretary-General, *In Larger Freedom*] ("We only weaken our hand in fighting the horrors of . . . terrorism if, in our efforts to do so, we deny the very human rights that these scourges take away from citizens. Strategies based on the protection of human rights are vital for both our moral standing and the practical effectiveness of our actions"); *supra* notes 9-12 and accompanying text.

⁵¹¹ Secretary-General's High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶¶ 147-48 (2004), <http://www.un.org/secureworld>, [hereinafter High Level Panel Report]; CORTRIGHT ET AL., *supra* note 490, at 23-24; U.N. High Commissioner for Human Rights, Address to the Counter-Terrorism Committee of the Security Council (Oct. 21, 2002), [http://www.unhchr.ch/hurricane/hurricane.nsf/\(Symbol\)/etc.2002.En?OpenDocument](http://www.unhchr.ch/hurricane/hurricane.nsf/(Symbol)/etc.2002.En?OpenDocument) ("Human rights violations create a ripe environment for terrorism. Fundamental grievances, embedded in a denial of human rights and basic justice, must be addressed if we are to ensure that terrorist groups cannot cloak their acts with a spurious veil of justification").

⁵¹² Secretary-General, Global Strategy, *supra* note 510, at 5; see HRW, HEAR NO EVIL, *supra* note 507, at 2 ("[C]ounter-terrorism measures anywhere that are accompanied by systematic or egregious rights abuse risk provoking, in reaction, increased support for violent extremism").

⁵¹³ High Level Panel Report, *supra* note 511, ¶¶ 147-48; see Secretary-General, *In Larger Freedom*, *supra* note 510, ¶ 144 (discussing importance of "mainstreaming" human rights by incorporating attention to human rights "into decision-making and discussion throughout the work" of United Nations).

Despite the centrality of human rights to any successful campaign against terrorism, the CTC has not incorporated human rights norms into its operations to any significant degree. In its general guidance to states preparing their compliance reports, the CTC does not request any information concerning states' efforts to heed human rights obligations when implementing their antiterrorism initiatives.⁵¹⁴ Nor has the CTC appeared to identify and consider human rights concerns upon reviewing states' initial and subsequent reports. As one organization concluded based on its review of those reports in 2004, the CTC has typically failed to question or otherwise respond to states' descriptions of antiterrorism laws or other actions that quite apparently implicate human rights concerns, either on their face or as applied in states with known human rights problems, or to scrutinize assertions by states that are "demonstrably inaccurate."⁵¹⁵

In some instances, these human rights concerns have been foreseeable and apparent. For example, because the resolution requires states to take a series of actions targeting "terrorism" and "terrorist acts" without defining those terms, states have exercised tremendous discretion to rely on their own definitions without any guidance on how to ensure that those definitions do not sweep in activities protected under international human rights law. Absent such standards, no consensus definition has emerged from the many definitions of "terrorism" that states have promulgated. While the CTC has required states to report their definitions of "terrorism," and has facilitated technical assistance to states in drafting new antiterrorism laws, the CTC has failed to scrutinize or inquire about those aspects of these definitions that may be problematic from a human rights perspective.⁵¹⁶ India's definition of terrorism in POTA and UAPA illustrates the problem. As discussed above, the open-endedness of that definition has facilitated a wide range of abuses.⁵¹⁷ Yet, while India reported its enactment of this definition to demonstrate its compliance with Resolution 1373, the CTC

⁵¹⁴ Guidance for the Submission of Reports Pursuant to Paragraph 67 of Security Council Resolution 1373 (2001) of 28 September 2001, <http://www.un.org/Docs/sc/committees/1373/guide.htm>.

⁵¹⁵ HRW, HEAR NO EVIL, *supra* note 507, at 3.

⁵¹⁶ Ben Saul, *Defintion of "Terrorism" in the UN Security Council, 1985-2004*, 4 CHINESE J. INT'L L. 141, 160 (2005); *see* U.N. High Commissioner for Human Rights, *supra* note 511 ("I am concerned by reports . . . of too many states enacting anti-terrorism legislation that is too broad in scope (namely, that allows for the suppression of activities that are, in fact, legitimate)"); Briefing by Sir Nigel Rodley, Vice-Chairperson, Human Rights Committee, to Security Council Counter-Terrorism Committee, June 19, 2003, <http://www.unhchr.ch/hurricane/hurricane.nsf/0/EE1AC683F3B6385EC1256E4C00313DF5?opendocument>, ¶¶ 7-8 (discussing human rights concerns in measures adopted by states to implement Resolution 1373).

⁵¹⁷ *See supra* subsection IV.B.1. and part V.

appears not to have raised any rights-based concerns about this definition with the Indian government.⁵¹⁸

The CTC also appears not to have “regularly raise[d] human rights on its own initiative or . . . consistently use[d] information coming from human rights treaty bodies or U.N. monitoring mechanisms in its follow-up questions to member states.”⁵¹⁹ For example, in each of the reports that India has submitted to the CTC, it has implied that its antiterrorism laws are required by Resolution 1373.⁵²⁰ The first two reports characterize and extensively discuss POTO and POTA as fundamental pieces of legislation implementing India’s obligations under the resolution to criminalize and suppress acts of terrorism. Neither report, however, makes any effort to distinguish between those provisions in POTO and POTA that are required by Resolution 1373 and those that are not. India’s second report extensively discusses many of POTA’s provisions, including those governing the definition of “terrorist acts,” establishment of special courts, admissibility of confessions to police officers and other evidence, and requirements for bail, as if all were required by Resolution 1373, but without explaining why it considered any of those provisions obligatory.⁵²¹ Nor do these reports discuss in any comparable detail India’s domestic or international human rights obligations, or any measures that India may have taken to ensure that its antiterrorism laws comply with those obligations.

Similarly, when inquiring about the training programs that India has in place to ensure the effectiveness of the “executive machinery” to prevent and suppress the financing of terrorist acts, the CTC seem not to have shown interest in whether such training programs also address the need to monitor and ensure compliance by these entities with human rights norms.⁵²² In providing this information to the CTC in its fourth report, India accordingly offered no details about the steps it takes to train its personnel to protect

⁵¹⁸ See Government of India, Responses to CTC Questions, U.N. Doc. S/2003/452, (Annex) at 6 (Apr. 21, 2003) [hereinafter India CTC Report #3]. Similar problems appear in the “terrorism” definitions reported by other states, whose vague and broad provisions variously fail to give fair notice of the activities being proscribed or sweep within their ambit legitimate speech and associational activities protected by international law. HRW, HEAR NO EVIL, *supra* note 507, at 7-8; INT’L BAR ASS’N, *supra* note 507, at 31.

⁵¹⁹ HRW, HEAR NO EVIL, *supra* note 507, at 8.

⁵²⁰ Report of India to the Counter-Terrorism Pursuant to Resolution 1373, U.N. Doc. S/2001/1278 (Annex) (Dec. 27, 2001); Security Council Resolution 1373: Supplemental Report Submitted by India, U.N. Doc. S/2002/883 (Annex) (Aug. 7, 2002) [hereinafter India CTC Report #2]; India CTC Report #3, *supra* note 518; Government of India, Fourth Report to the Counter-Terrorism Committee, U.N. Doc. S/2004/451 (Annex) (June 3, 2004) [hereinafter India CTC Report #4].

⁵²¹ India CTC Report #2, *supra* note 520, at 5, 7-9.

⁵²² India CTC Report #4, *supra* note 520, at 4.

human rights in the use of this “executive machinery.”⁵²³

More recently, the Security Council has clarified, in Resolutions 1456, 1566, and 1624, that attention to human rights must indeed play a central role in the antiterrorism initiatives required by Resolution 1373.⁵²⁴ To its credit, the CTC has made a sustained effort since its creation to engage in dialogue with OHCHR and other international institutions charged with ensuring compliance with human rights obligations. Successive High Commissioners for Human Rights and others with expertise in human rights issues have met with the CTC to convey their perspectives on how the CTC should increase its attentiveness to human rights issues.⁵²⁵ In addition, the U.N. Human Rights Committee has been briefed by the CTC’s legal expert and has been afforded an opportunity to convey its perspectives directly to the CTC.⁵²⁶ Since its earliest days the CTC also has made efforts to ensure that its work is sufficiently transparent to permit outside institutions both to monitor and critique the compliance reports submitted by member states as well as to evaluate the work processes of the CTC itself.⁵²⁷

The CTC also has taken additional measures to incorporate the human rights mandate of Resolution 1456 into its work more directly than it had previously. Letters sent by the CTC to states since May 2003 have incorporated the language in Resolution 1456 reminding states that they must ensure that their antiterrorism measures comply with international human rights, refugee, and humanitarian law.⁵²⁸ And the CTC has committed to establish a regular liaison between the CTED, which was newly established by Resolution 1566, and OHCHR.⁵²⁹

At least to date, however, these efforts have failed to address the fundamental barrier to sufficient incorporation of human rights considerations into the CTC’s work – namely, the CTC’s own failure to take sufficient ownership of international human rights obligations as an integral

⁵²³ *Id.* at 4-5.

⁵²⁴ S.C. Res. 1456, *supra* note 488, ¶ 5 (Jan. 20, 2003) (“calling upon” states to ensure that their antiterrorism measures “comply with all their obligations under international law,” and to “adopt such measures in accordance with . . . international human rights, refugee, and humanitarian law”); S.C. Res. 1566, *supra* note 488, pmb1 (Oct. 8, 2004) (“[r]eminding” states to comply with international human rights, refugee, and humanitarian law obligations); S.C. Res. 1624, U.N. Doc. S/RES/1624, para. 4 (Sep. 14, 2005) (“stress[ing] that” states’ antiterrorism measures should comply with international human rights, refugee, and humanitarian law obligations).

⁵²⁵ HRW, HEAR NO EVIL, *supra* note 507, at 6-7.

⁵²⁶ U.N. Press Release, Mar. 27, 2003, *supra* note 506.

⁵²⁷ Rosand, *supra* note 485, at 335.

⁵²⁸ CORTRIGHT ET AL., *supra* note 490, at 24.

⁵²⁹ HRW, HEAR NO EVIL, *supra* note 507, at 7.

part of its mandate under Resolution 1373. As the Secretary General and others have frequently noted, “[u]pholding human rights is not merely compatible with a successful counterterrorism strategy,” but rather is an “essential element” in any successful effort to combat terrorism.⁵³⁰ As it proceeds with its efforts to monitor states’ compliance with Resolution 1373, and the Council’s subsequent clarifications of that resolution in Resolutions 1456, 1566, and 1624, the CTC should ensure not simply that those efforts do not interfere with fundamental rights, but rather that they affirmatively integrate human rights standards as a central element necessary to ensure success in the campaign against terrorism.

VIII. CONCLUSION AND RECOMMENDATIONS

Terrorism, which itself represents an attack on human rights that governments have an obligation to combat, is a complicated, serious, and difficult problem to address. When responding to terrorism, however, democratic governments must fully protect human rights to advance both the rule of law and long-term security itself, since violations of human rights often plant the seeds for future acts of terrorist violence. Unfortunately, in much of the former British empire, including India, postcolonial governments have all too often instead maintained and built upon the more authoritarian aspects of the colonial legacy in their emergency, antiterrorism, and other security laws. Especially in recent years, the U.N. Security Council has to some extent facilitated this disregard for human rights by failing to require states to take their international human rights obligations seriously when implementing their antiterrorism obligations under Resolution 1373.

In recent years, however, India has taken several positive steps, repealing POTA and seeking to transform the police and criminal justice institutions that it inherited from the British. Following the recent bomb blasts in Mumbai, the Indian government wisely chose not to reenact new draconian legislation to replace POTA. We welcome and urge the Indian government to maintain this position, even as it seeks to upgrade its intelligence and investigative capacity to more effectively prevent acts of terrorism and hold perpetrators accountable. Independent India’s constitutional tradition is a proud one, and in combating a threat of terrorism that is among the most serious in the world, a durable, enduring, and ever-improving commitment by India to protecting fundamental rights can serve

⁵³⁰ Secretary-General, *Global Strategy*, *supra* note 510, at 5; *see also* Secretary-General, *In Larger Freedom*, *supra* note 510, ¶ 140.

as an important international example. In order to protect human rights and advance both the rule of law and long-term security even more effectively, we offer a number of recommendations as the basis for ongoing, continued dialogue.

A. To the Government of India

1. Repeal all provisions in UAPA raising human rights concerns, and ensure that all antiterrorism and other security laws contain provisions for tighter administrative and judicial oversight of investigative and prosecutorial decision-making, and transparency in that decision-making, to ensure nationwide uniformity and adherence to fundamental rights:
 - Fully implement and enforce all decisions by the central POTA review committees that pending POTA cases which lack prima facie evidence for prosecution should be deemed withdrawn.
 - Establish central government review committees similar to those established upon repeal of POTA to review and dispose of all pending TADA prosecutions, and with a comparable, one-year deadline to dispose of those cases.
 - Establish mandatory nationwide guidelines and standards for investigative and prosecutorial decisions under central security laws by both the central and state governments.
 - Consider eliminating or restricting the authority of state governments to independently investigate and prosecute violations of central government security laws, limiting enforcement of those laws to the central government or to state government institutions subject to central government oversight and control.
 - If state authority to enforce central security laws remains, ensure greater central government oversight and review of state prosecution decision-making under those laws, through requirements such as central government authorization before investigations or prosecutions are initiated and authority for the central government to terminate or take over state investigations and prosecutions that are not proceeding in a manner consistent with central government guidelines and standards.
 - Narrow the definitions of substantive terrorism-related offenses under UAPA to eliminate vagueness and ensure adequate notice

- of the conduct being criminalized.
- Ensure full judicial review of all executive decisions, including the decision to designate “terrorist organisations” under UAPA.
 - Compile, maintain, and publicly disclose statistics concerning prosecution and detention under all central and state security laws that are disaggregated by religion, caste, and tribal status, in order to facilitate accountability and oversight for arbitrary and selective enforcement.
2. Improve the mechanisms available for citizens to seek redress and hold government officials accountable for human rights abuses:
- Protect and provide security to lawyers and other human rights defenders from threats and intimidation, and prosecute all officials and other individuals making such threats or harm to human rights defenders.
 - Eliminate provisions for official immunity in UAPA and other security laws, and eliminate the requirement of prior government consent before prosecution of government officials.
 - Remove the restrictions upon the NHRC’s authority to investigate directly complaints of human rights violations by the armed forces and complaints of violations that arise prior to the current one-year limitations period.
 - Encourage full implementation of the Protection of Human Rights Act of 1993 with the establishment of state-level human rights commissions and district-level human rights courts in all states.
3. Work with state governments, international institutions, and civil society to develop and implement reforms to the state police forces, including as appropriate the recommendations of the National Police Commission, and immediately implement such reforms in the centrally-controlled police forces of Delhi and other union territories:
- Ensure independence of the police in their functional decision-making from improper political influence.
 - Ensure that effective mechanisms are in place to hold police accountable for corruption and violations of fundamental rights.
 - Work to eliminate discrimination within the police on the basis of religion, caste, or tribal status and to increase diversity within the police forces.
 - Establish independent review mechanisms involving civilians or

judge and lawyers to monitor and fully implement the guidelines for arrest and detention articulated by the NHRC and required by the Supreme Court in *D.K. Basu v. State of West Bengal*, A.I.R. 1997 S.C. 610, 623:

- Police officers who arrest and interrogate suspects should wear clear identification;
 - Arresting officers should prepare an arrest memo signed by the suspect and a witness providing the time and date of arrest;
 - Since arrested individuals are entitled to have a friend or relative informed of the place of detention as soon as practicable, arrested persons should be informed of this right immediately;
 - Details of the arrest, including the arresting officers, should be kept in a diary at the place of detention;
 - The arrested person should be examined for injuries at the time of the arrest on request and have the injuries recorded;
 - The arrested person should be examined by a doctor every 48 hours during detention;
 - Copies of all arrest memos and inspection memos should be sent to the magistrate;
 - The arrested person should be permitted to meet with his or her lawyer during interrogation; and
 - A police control room should be established at all headquarters with a display showing the details of all arrested persons and their place of detention.
- Establish independent review mechanisms involving civilians or judge and lawyers to monitor and fully implement the NHRC's guidelines for investigating encounter killings by the police, and ensure that officials are prosecuted for encounter killings that are not committed in self-defense.
4. Work with state governments, international institutions, and civil society to develop and implement appropriate reforms to the criminal justice system:
- Improve the investigative capacity of the police, including training to improve the collection and analysis of physical evidence and investments in more effective facilities to analyze that evidence.

- Separate the prosecutorial function from the police, to ensure the independence and functional autonomy of prosecutorial decision-making.
 - Expand the subordinate judiciary to include more judges.
 - Implement administrative reforms to improve case management.
 - Upgrade the capacity and experience levels of the subordinate judiciary.
5. Establish a commission, modeled on the National Police Commission, to review and recommend reforms to central and state preventive detention laws and the constitutional provisions governing preventive detention to ensure compliance with international human rights standards.
6. Cooperate more fully with institutions responsible for monitoring and implementing compliance with international human rights standards:
- Ratify and withdraw reservations to the U.N. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment, ratify the First Optional Protocol to the International Covenant on Civil and Political Rights, and ensure that domestic legislation fully implements these and other international law obligations.
 - Invite and encourage U.N. human rights bodies and experts to visit India and make recommendations to improve the compliance of India's antiterrorism laws and institutions with international human rights norms, including:
 - Working Group on Arbitrary Detention,
 - Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment,
 - Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance
 - Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions, and
 - Special Rapporteur on the Independence of the Judiciary.
 - Include information on the practical application of India's antiterrorism and security laws and institutions and their compliance with international human rights standards in India's future reports to:

- the Human Rights Committee, on compliance with the International Covenant on Civil and Political Rights (fourth report overdue as of December 31, 2001),
- the U.N. Human Rights Council, as part of its universal periodic review process, and
- the Counter-Terrorism Committee of the U.N. Security Council, on compliance with Resolution 1373.

B. To the State Governments in India

1. Fully implement the central government legislation repealing POTA:
 - Comply promptly and fully with all decisions by the central POTA review committees that pending POTA cases lack of prima facie evidence to prosecute and should be deemed withdrawn.
 - Dismiss all remaining POTA charges, and if there is prima facie evidence against any defendants under ordinary criminal law, prosecute those individuals under ordinary criminal law instead of POTA.
2. Fully investigate and, as appropriate, prosecute or take disciplinary action against all state government officials who may be responsible for fundamental rights abuses, including:
 - Torture, cruel, inhuman, or degrading treatment, arbitrary or false arrest, and arbitrary or illegal detention by law enforcement officials, and
 - Encounter killings by the police and other security forces and prosecute officials for any killings not justified by self-defense.
3. Repeal all state laws conferring extraordinary powers akin to those in TADA and POTA in violation of domestic and international human rights standards.
4. Work with central government, international institutions, and civil society to develop and implement reforms to the state police forces, including as appropriate the recommendations of the National Police Commission, as discussed above.
5. Work with central government, international institutions, and civil society to develop and implement appropriate reforms to the criminal justice system, as discussed above.

C. To the United Nations

1. To the Security Council, Counter-Terrorism Committee, and Counter-Terrorism Executive Directorate
 - Incorporate human rights considerations more openly and directly into the process of monitoring member states' compliance with Resolutions 1373 and 1456:
 - Issue human rights-based detailed guidelines for states to follow when attempting to comply with Resolutions 1373 and 1456.
 - Explicitly require states to submit information concerning the practical application of the antiterrorism laws and institutions covered by Resolution 1373 and their compliance with international human rights law obligations.
 - Recruit specialized personnel with human rights expertise and coordinate with OHCHR to evaluate states' reports to the CTC to determine whether their laws and institutions comply with international human rights law obligations.
 - Incorporate human rights considerations into the process of facilitating technical assistance for states implementing the requirements of Resolution 1373.
 - Build upon the CTC's existing efforts to promote transparency concerning states' compliance with Resolutions 1373 and 1456 by making public the CTC's substantive follow-up communications and inquiries to states about their reports to the CTC.
2. To the Office of the High Commission for Human Rights
 - Coordinate with the CTC to incorporate human rights considerations into the CTC's efforts to monitor states' compliance with the requirements of Resolutions 1373 and 1456.
3. To the Human Rights Council
 - As part of the universal periodic review process, evaluate the consistency of states' antiterrorism laws and institutions with international human rights law obligations.

APPENDIX
ACKNOWLEDGEMENTS AND CHRONOLOGY OF MEETINGS

Both before and after our visit to India, the project participants benefited greatly from the assistance and guidance of many individuals in the United States, including Jean Berman, Jane Desnoyers, Fiona Doherty, Jeanmarie Fenrich, Martin Flaherty, Ryan Goodman, Sharon Hom, Alan Jenkins, Smita Narula, Shalini Nataraj, Dana Neacsu, Alison Parker, Archi Pyati, Peter Rosenblum, Joe Saunders, and Nisha Varia. We especially thank Aarthi Belani, Jennifer Benson, Kory Gruska, Richa Gulati, Meetu Kaul, Jeffrey Lewis, Sanjeet Malik, Vandana Nakka, Sabeena Rajpal, Saira Rao, and Prerna Srivastava, of the law firm of Cleary Gottlieb Steen & Hamilton LLP, and Amitabh Chibber, Kate Cronin-Furman, Rosanna Garza, Mark Hertel, Viren Mascarenhas, Payal Shah, Karthik Srinivasan, and Siddharth Velamoor, students at Columbia Law School, for their invaluable research and other assistance. Support for the project was provided by the City Bar Fund, the Ford Foundation, and Wachtel & Masyr, LLP. In each city we visited, the project participants met with individuals who have been detained or charged under POTA and their family members; to protect their privacy, their names are not included here. None of the individuals with whom the project participants met are responsible for the views expressed in this article. Attorneys, advocates, and government officials interviewed before, during, and after the research visit included the following individuals:

Thursday, October 23, 2003

New York

- Colin Gonsalves, Senior Advocate and Convenor, Human Rights Law Network
- Jean Berman, International Senior Lawyers Project

Thursday, January 22, 2004

Delhi

- Colin Gonsalves, Senior Advocate and Convenor, Human Rights Law Network
- Preeti Verma, Advocate and Director, Human Rights Law Network

Thursday, March 31, 2004

Delhi

- Colin Gonsalves, Senior Advocate and Convenor, Human Rights Law Network

Monday, January 17, 2005

Delhi

- Colin Gonsalves, Senior Advocate and Convenor, Human Rights Law Network
- Amarjit Singh Chandhiok, Senior Advocate and President, Delhi High Court Bar Association
- Members of the Delhi High Court Bar Association

Tuesday, January 18, 2005

Hyderabad

- Jeevan Kumar, Human Rights Forum
- Members of the Hyderabad Criminal Court Bar Association
- K.G. Kannabiran, Senior Advocate and President, People's Union for Civil Liberties
- K. Balagopal, Senior Advocate and Member of Human Rights Forum
- Members of Human Rights Forum

Wednesday, January 19, 2005

Hyderabad

- G. Haragopal, Professor and Coordinator, Human Rights Programme, Department of Political Science, University of Hyderabad

Thursday, January 20, 2005

Chennai

- John Vincent, Advocate and State Law Officer, People's Watch Tamil Nadu
- D. Geetha, Advocate, Human Rights Law Network-Chennai
- R. Diwakaran, Advocate, Human Rights Law Network-Chennai
- K. Chandru, Senior Advocate

Delhi

- Sushil Kumar, Senior Advocate
- Nitya Ramakrishnan, Senior Advocate
- S. Muralidar, Senior Advocate and Member, Bar Council of India

Friday, January 21, 2005

Chennai

- P.T. Perumal, Advocate
- S. Jayakumar, Special Public Prosecutor for POTA Cases, Government of Tamil Nadu

- V. Suresh, Advocate, People's Union for Civil Liberties
- D. Nagasaila, Advocate, People's Union for Civil Liberties

Delhi

- Indira Jaising, Senior Advocate and Director, Women's Rights Initiative, Lawyer's Collective

Saturday, January 22, 2005

Ahmedabad

- Mukul Sinha, Senior Advocate and Founder of Jan Sangharsh Manch
- Zakia Jowher, Senior Fellow, Action Aid International-India
- Members of Jan Sangharsh Manch
- Members of Jan Andolan

Monday, January 24, 2005

Delhi

- Ashok Chand, Deputy Commissioner, Special Cell, Delhi Police
- Rajindar Sachar, Chief Justice (retired), Delhi High Court, and former President, People's Union for Civil Liberties
- Gopal Subramaniam, Senior Advocate and Special Public Prosecutor
- Shanti Bhushan, Senior Advocate and Former Law Minister of India
- Ram Jethmalani, Senior Advocate, Member of Parliament, and former Law Minister of India

Tuesday, January 25, 2005

Delhi

- Usha Mehra, Chief Justice (retired), Delhi High Court, and Chair, POTA Review Committee
- Ravi Nair, Executive Director, South Asia Human Rights Documentation Centre (with his colleagues, Ateesh Chanda, Rineeta Naik, Adam Smith, and Gareth Sweeney)
- P.N. Bhagwati, Chief Justice (retired), Supreme Court of India, and Member, United Nations Human Rights Committee

Thursday, January 27, 2005

Delhi

- P.C. Sharma, Member, National Human Rights Commission, and former Director, Central Bureau of Investigation
- Ajit Bharihoke, Registrar (Law), National Human Rights Commission
- Soli Sorabjee, Senior Advocate and former Attorney General of India

Friday, January 28, 2005

Delhi

- Shivraj Patil, Home Minister of India
- H.R. Bharadwaj, Law Minister of India
- Y. K. Sabharwal, Justice, Supreme Court of India

Tuesday, February 1, 2005

Delhi

- Nitya Ramakrishnan, Senior Advocate

Friday, June 10, 2005

New York

- V. Suresh, Advocate, People's Union for Civil Liberties