

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

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

SUMMARY AND RECOMMENDATIONS

^{*} 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.

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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.

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

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.