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Trojan Horses?
Efficacy of Counter-terrorism Legislation in a Democracy
Lessons from India

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Terrorism raises genuine security concerns. And the state attempts to address these concerns through various measures. The use of counter-terrorism legislation is one such measure, employed especially by democracies. The basic rationale is that a legal framework deals with terrorism, which is considered undemocratic, in a democratic way. In other words, legislations ought to adequately deter terrorist groups, but at the same time, prevail on other counter-terrorism methods of the state from encroaching on human rights of the innocent. How far this is true, especially in the Indian context? Have the counter-terror laws of India been successful in enhancing security? If so, in what manner? If not, why and what are the problems involved?

Terrorism as a Security Threat

If terrorism is defined as "an act of violence which targeted civilians for the purpose of political subversion of the state to intimidate a population, or to compel a government or an international organisation to do or abstain from doing any act," then the threats arising from such acts are phenomenal. A principal characteristic of terrorism, distinguishing it from many other forms of violence, is its ability to strike directly at perceptions of personal security.[1] Terrorism is a complex phenomenon imbued with political, social, economic and psychological factors. The emergence of terrorism as a weapon of proxy war between hostile nations has further added to this complexity. Terrorism, thus, is not only a threat to state security, but has become a primary source of 'human insecurity'.

Terrorism is taken seriously not just because of what it represents, but also because of what it brings about. Directly, terrorism is a threat to

core human rights like the right to life, the right to personal liberty and security, the right to humane treatment, the right to due process and to a fair trial, the right to freedom of expression, and the judicial protection and its correspondent obligation to respect and ensure all human rights without discrimination.[2] Terrorism threatens norms, rules and institutions largely because it dents the rule of law, human rights, democratic procedures for settling political disputes and the laws of war. In this sense, "terrorism is a threat to the global normative structure without which security would be impossible to realise."[3] In the post-Cold War era, terrorism figured at the top in the list of new threats to security.

After 9/11, the threat from terrorism has been identified as the most dangerous threat by states. This is so not only because of the increased ruthlessness of the attacks, but also due to their lethality and unpredictability. A growing percentage of terrorist attacks are designed to kill as many people as possible. The trend toward higher casualties reflects the changing motivation of today's terrorists. Terrorist groups lack a concrete political goal other than to punish their enemies. The terrorist threat is also changing in ways that makes it more dangerous and difficult to counter. New terrorist threats can suddenly emerge from isolated conspiracies or obscure cults with no previous history of violence. Guns and conventional explosives have so far remained the weapons of choice for most terrorists. Such weapons can cause many casualties and are relatively easy to acquire and use. Increased possibilities of weapons of mass destruction reaching terrorist groups like Al Qaeda have further heightened the threat level. The adoption of suicide tactics by several terrorist groups has raised the threat perception to alarming proportions. 'Globalised terrorism', thus, effectively assimilates diverse forms of political violence with the consequence of unifying and amplifying the threat. Ignatieff summarises the scope of the threat that is more indirect in nature,

> A succession of large-scale attacks would pull at the already-fragile tissue of trust that binds us to our leadership and destroy the trust we have in one another. Once the zones of devastation were cordoned off and the bodies buried, we might find ourselves, in short order, living in a national-security state on continuous alert, with sealed borders, constant identity checks and permanent detention camps for dissidents and aliens.

> Our constitutional rights might disappear from our courts, while torture might reappear in our interrogation cells. The worst of it is that the government would not have to impose tyranny over the cowed populace. We would demand it for our own protection...That is what defeat in a war on terror looks like. We would survive, but we would no longer recognise ourselves.[4]

Countering Terrorism through Laws

Counter-terrorism is a mix of public and foreign policies designed to limit and eliminate the actions of terrorist groups and their support network – both men and material – in an attempt to protect the general public from terrorist violence. As a type of policy, counter-terrorism encompasses a range of actions. Counter-terror strategies adopted by various states differ, depending on their understanding of terrorism as a security threat. When confronted with terrorism, democracies[5] face a unique challenge. The challenge comes in the form of the undemocratic nature of terrorism. Terrorists are fundamentally anti-democratic and have no regard for human rights; they have their own 'code of conduct' and seek to destroy the very structures and institutions that form the basis of democratic life. Terrorists often view democracies as 'soft', usually on the grounds that "their publics have low thresholds of cost tolerance and high ability to affect state policy."[6] As one scholar puts it, terrorism "is the most flagrant form of defiance of the rule of law. It challenges the government's prerogative of the monopoly of armed force within the state. Terrorists attempt to replace the laws of the state by their own laws of the gun and the kangaroo court."[7] In short, terrorism is the anti-thesis to democracy. In that case, is it possible to address this 'undemocratic' problem within the framework of democracy?

This is what is known as the 'democratic dilemma' faced by every democratic country confronted by terrorism. On the one hand, it has to protect the territorial integrity, sovereignty and security of its people from the arbitrary violence by the terrorists. If it fails to fulfill this task, its authority and credibility is undermined. On the other hand, a democratic state alienates the population and loses its legitimacy in case it slips into repression and authoritarianism in the process of combating terrorism.[8]

It is generally assumed that the 'criminal justice model' is the better option for democracies to overcome the 'democratic dilemma' they face. Terrorism inevitably involves the commission of a crime. Since democracies have well-developed legislations, systems and structures to deal with crime, the criminal justice system should be at the heart of their counter-terrorism efforts.[9] Legal regimes, so goes the rationale, enable "fair" prosecution of perpetrators and supporters of terrorist acts; open and public trials give adequate social stigma to terrorists and their supporters, thus, acting as deterrence for others from committing acts of terror. A fair trial increases public faith in the government and, at the same time, loosens the terrorists' justification of a "fight against repressive regimes". 'Judicial review' ensures that the legal response is in accordance with the 'rule of law' and 'juries' reinforce community standards of fairness. The 'adversarial process' exposes ineffective or arbitrary law enforcement. Overall, the 'checks and balances' present in the system guarantee utmost efficiency and, at the same time, assure that innocents are not penalised. It is further argued that while serving their sentence, prisons or rehabilitation centres would help terrorists to get back into the mainstream, when they are released after their prison terms.

It is found, however, that the existing criminal laws are not adequate to sufficiently equip the institutions of the government, especially the security forces, to deal with the rising sophistication of terrorism. Terrorists are now widespread, well-networked, with support links all over, and more organised in terms of technology and resources. Some call this 'new terrorism', where a group may be a "networked, multinational enterprise with a global reach which aims to inflict death and destruction on a catastrophic scale."[10] Added to this is the new dimension of a criminal-terrorist nexus of dangerous proportions. So, to deal with the "well-armed and far more dangerous and modernised enemy," exclusive counter-terror laws are required to supplement the existing criminal laws, as what is at stake is not just law and order but the very existence of state and society. As terrorism tends to exploit the very values of democracy, special counter-terror legislation would try and plug those loopholes which the terrorists take advantage of.[11] Accordingly, the deterrence value of the existing criminal laws is raised to a new level.

However, how far have these extraordinary laws been successful in preventing and deterring terrorism? To answer this question, the Indian case is taken for empirical analysis for two broad reasons: India stands out as a successful and functional democracy, not only in the South Asian region, but in the entire developing world; further, it has also been confronting all kinds of protracted internal conflicts severely impinging on its security, sovereignty and development.

The Indian Case: Threats and Legal Responses

India's long struggle with various forms of politicised violence has created a "chronic crisis of national security."[12] Since security is perceived as "an integral component of its [India's] development process,"[13] it has become part of the very "essence of India's being." The main sources of insecurity to India are terrorism, organised crime, violence based on communal and caste divides, criminalisation of politics, inequality, etc. Of these, terrorism figures prominently. In fact, India is one of the worst affected countries by terrorism. In the recent period, India has witnessed more terrorist incidents than any other country in the world.[14] However, the international community recognised and acknowledged this only very recently.

Traditionally, threats to India's territorial and internal security existed in four main forms: rebellion in Punjab, militancy in Jammu and Kashmir, insurgency in the northeast of the country, and left-wing extremism in its central part. Every case has "a distinct identity moulded by its geopolitical and socio-economic context."[15] To these four main forms, a new dimension has come to the fore in the garb of Islamic terrorism with international linkages. External sponsorship to all the above violent manifestations also added to the complexity of the threat.[16]

To secure, especially, the 'high priority' internal security, India has relied more on the military option. Political and developmental models have been underplayed. As a post-colonial developing state, the use of force came naturally to India. Since terrorism challenged the very credibility and legitimacy of the state, the military approach came also as a reflex action of what the state knew "best and found convenient to resort to".[17] The military approach involves, apart from the employment of security forces, extensive use of legal provisions like counter-terrorism laws and emergency

provisions to strengthen the hands of the security forces. The colonial strategy of "overawing the people" with the use of force continues to this day.[18] For instance, despite various reform proposals, the Police Act of 1861 continues to govern policing throughout India even today. Although the law and order function is the province of federal units (states), the Indian Constitution authorises 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 to safeguard overall internal security of India.[19] Pursuant to this authority, the Indian government enacted several laws conferring sweeping powers like search, arrest, and preventive detention authority upon the armed forces, even authorising them to shoot to kill suspected terrorists or insurgents. While doing so, the government could not resist the pressure to "give short shrift" to the fundamental rights of their citizens.

The basic argument placed during the enactment of such special laws is that the existing criminal laws are incapable of meeting emerging threats, that the conventional criminal laws approach crimes as "as an individual infraction violating individual rights" missing out "movements that collectively subvert and disrupt the structures of governance and enforcement themselves."[20] The impulse to enact special laws, therefore, stems from real and perceived problems concerning the effectiveness of the regular criminal justice system itself, which create intense pressures to take particular offences outside of that system. In this regard, the National Human Rights Commission (NHRC) noted that anti-terrorism laws are ostensibly justified because:

- It is difficult to secure convictions under the criminal justice system; and
- Trials are delayed [under the regular courts].[21]

There is "a tendency towards the 'routinising of the extraordinary' through the institutionalisation of emergency powers during non-emergency times and without formal derogation from human rights obligations."[22]

The justification for special laws also drew significantly on the prevailing international environment. In the aftermath of the 9/11 terrorist attacks, pro-terror law arguments got bolstered by the anti-terrorism initiatives of developed countries like the United States and the United Kingdom and stipulations

from the United Nations Security Council (UNSC). UNSC Resolution 1373 explicitly called upon all member states to ensure that adequate anti-terrorism measures are taken to prevent and criminalise 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 offences" proscribing "terrorist acts" under domestic law.[23] 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. To monitor states' implementation and compliance, Resolution 1373 established the Counter-Terrorism Committee (CTC). The resolution called upon states to report their progress towards implementation to the CTC within 90 days and periodically thereafter.[24]

During the debate on Prevention of Terrorism Act (POTA) in the Indian Parliament, the proponents of the law repeatedly invoked Resolution 1373 to argue that the Bill was not simply justified on local conditions, but required under international law. After the Prevention of Terrorism Ordinance (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.[25] Upon introducing the Bill in Parliament, LK Advani, the Home Minister, asserted that the Security Council's adoption of the resolution prompted the government to conclude it was India's "duty to the international community... to pass [POTA]."[26] Such justification went on to affect the later adjudication of POTA's legality before the courts. For instance, the Supreme Court of India upheld POTA by stating that because of the Resolution 1373, "it has become [India's] international obligation...to pass necessary laws to fight terrorism."[27]

In response to terrorism and other threats to security, many special laws have been enacted/repealed from time to time since independence. These

laws broadly fall under three categories: nation-wide; act-oriented or area-specific; and state-specific.

Nation-wide laws

Preventive Detention Act (PDA) of 1950, which authorised 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 defence or security of India, India's relations with foreign powers, state security or maintenance of public order, or maintenance of essential supplies and services. The Act, however, provided for limited procedural protections required by the Constitution – for instance, to provide the detainee with the grounds for detention within five days – and also required the Advisory Board review of all detention orders. Although introduced as a temporary measure "to address exigent circumstances in the aftermath of independence and partition," the Act remained in force for nearly two decades.[28]

The government enacted the *Unlawful Activities (Prevention) Act* (UAPA) in 1967, which gave the central government broad powers 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."[29] But the central government must provide the grounds for such declaration, unless such disclosure was against the public interest. Yet another safeguard is that such notification becomes effective only upon confirmation by a special judicial tribunal that consists of a single High Court judge and has all the powers of a civil court. If confirmed, the declaration remains in force for two years from the date the notification became effective. Once an organisation is declared as "unlawful," the UAPA provides the central government with broad powers to restrict its activities including prohibition of individuals from association or paying or delivering funds or property in support of the banned organisation.[30]

The government enacted the *Maintenance of Internal Security Act* (MISA) in 1971, which more or less retained the provisions of the PDA. The Act gave wide powers of preventive detention, search and seizure of property without warrants, telephone and wiretapping etc. The Act was invoked

liberally during the nation-wide Emergency (1975-77), especially targeting the political opponent of the party in power. The law, through a Constitutional Amendment (39th Amendment) was placed under the 9th Schedule of the Constitution, thereby making it totally immune from any judicial review.[31] As per the election commitment made, the succeeding Janata government repealed MISA in 1978, but after much hesitation and difficulty.

During the Emergency, MISA and other preventive detention laws were amended to permit much longer periods of detention, to make it easier for the government to exercise detention authority without the scrutiny of the Advisory Board, and to eliminate other procedural protections that otherwise applied.[32] These laws, in fact, became "a way of everyday administration and there was neither criteria nor a basis for the detentions under MISA during the Emergency."[33]

Since the 1980s, the government witnessed major challenges to its internal security in the form of politicised violence in the northeast, Punjab, Jammu and Kashmir and Islamic terrorism all over the country. In response, stringent legislation explicitly designed to combat "terrorism" was brought in from time to time.

The first in the series was the *National Security Act* (NSA). The new Congress government under Indira Gandhi introduced the NSA in 1980, which remains in effect even today. The NSA restored many of the provisions of the PDA and the MISA. Ironically, the Act "presaged years of new repressive legislation" including Terrorism and Disruptive Activites Prevention Act (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."[34] The NSA authorises preventive detention for up to 12 months, and the procedural requirements are essentially the same as under the PDA and MISA. The Act also gives immunity to those security forces involved in quelling the violence.

Terrorist Affected Areas (Special Courts) Act (TAAA) was enacted by Parliament in 1984. The Act established special courts to adjudicate certain "scheduled offences" related to terrorism in areas designated by the central government, for specified time periods, as "terrorist affected."[35] The statute required the special courts to hold proceedings *in camera* unless the

prosecutor requested otherwise, and authorised the courts to take measures to keep witness identities secret upon a request by either the prosecutor or the witnesses themselves. The TAAA also instituted a stringent bail standard under which an individual accused of a scheduled offence could not be released if the prosecutor opposed it, absent reasonable grounds to believe the accused was not guilty, and extended the time for which an individual may be detained pending investigation from 90 days to one year.

A more sweeping legislation under the name of *Terrorist and Disruptive Activities (Prevention) Act* (TADA) appeared in 1985. It explicitly defined a series of new, substantive terrorism-related offences of general applicability, which could be prosecuted by state governments throughout the country without any central government designation that the area in which the offence took place was "terrorist affected," unlike its predecessor TAAA. TADA made it a crime to:

- Commit a "terrorist act;"[36]
- 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;"
- "Harbour or conceal, or attempt to harbour or conceal any person knowing that such person is a terrorist;" or
- Hold property that has been "derived or obtained from commission of any terrorist act" or that "has been acquired through the terrorist funds;"
- To commit any "disruptive activity," defined as any act, speech, or conduct that, "through any other media or in any other manner whatsoever," either "questions, disrupts, or is intended to disrupt, whether directly or indirectly, the sovereignty and territorial integrity of India," or "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."[37]

Apart from including the stringent bail and pre-trial detention provisions and the special procedural rules for the special courts under the TAAA, TADA allowed for the admission of confessions made to police officers as substantive evidence as long as the officer's rank was Superintendent or higher.[38]

When TADA came up for renewal in May 1995, the then-Congress-led government lacked sufficient support to renew the law; it was, therefore, allowed to lapse. As a replacement, the government introduced the Criminal Law Amendment Bill, incorporating several of the controversial provisions found in TADA. However, due to concerns expressed by various human rights bodies, this Bill was left in cold storage.

The Bharatiya Janata Party (BJP)-led National Democratic Alliance (NDA) government in 1999 commissioned the Law Commission of India to undertake a study to determine whether a new anti-terrorism legislation was necessary. The Commission, in its report, proposed the Prevention of Terrorism Bill,[39] which differed very little from the dormant Criminal Law Amendment Bill of 1995 or the much-feared TADA. The Vajpayee government's efforts to introduce a new anti-terrorism law based on this proposal from the Law Commission did not fructify because of stiff resistance not only from the opposition parties, but also from coalition partners of the government and the National Human Rights Commission (NHRC). The common thread of apprehension was that the new law would be as ineffective as its predecessor laws in combating terrorism due to by-and-large similar provisions.[40]

However, the 9/11 attacks in the United States muted the resistance to the proposed law. The government brought in the *Prevention of Terrorism Ordinance* (POTO)[41] to review its "hobbled laws" and "dilatory procedures."[42] The government's resolve to convert the Ordinance into proper law got strengthened due to two high-profile attacks in India: on the Legislative Assembly of Jammu and Kashmir in October 2001 and an audacious assault on the Indian Parliament building in December 2001. The government charged that those who were opposing the enactment of the new anti-terrorist law "would be wittingly or unwittingly pleasing the terrorists by blocking it in Parliament."[43] Ultimately, the government successfully enacted the *Prevention of Terrorism Act* (POTA) into law in March 2002 in an extraordinary joint session of both Houses of Parliament.

The POTA directly criminalises:

- Commission of a "terrorist act;"[44]
- 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;"

- "Voluntarily harbour[ing] or conceal[ing], or attempt[ing] to harbour or conceal any person knowing that such person is a terrorist;"
- "Possession of any proceeds of terrorism;" and
- 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."

The statute does not define a "terrorist organisation" in substantive terms, providing instead that,

- The central government may designate and ban a "terrorist organisation" if it believes that entity is "involved in terrorism;" and
- An organisation 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.[45]

Pre-trial detention under POTA can go up to six months[46] and bail provisions are stringent.[47] The law explicitly provides that the accused is not entitled to have counsel present "throughout the period of interrogation."[48] As for confessions, they are admissible as substantive evidence if made to police officers not lower in rank than Superintendent of Police and in an "atmosphere free from threat or inducement."[49] POTA also authorised the central and state governments to establish "special courts" to adjudicate offences punishable under the statute.[50] POTA conferred broad immunity upon government officials for actions taken under the statute "in good faith" or "purported to be done in pursuance of the Act."[51]

Due to the above highly controversial provisions, POTA became one of the major issues during the election campaign in May 2004. As promised, the Congress-led United Progressive Alliance (UPA) repealed POTA in the same year and re-enacted the amended version of Unlawful Activities (Prevention) Act, 1967.[52] But this statute retains most of POTA's substantive terrorism-related offences. 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 authorising the central government to designate as a "terrorist organisation" any entity that has been designated as such

by the UN Security Council;[53] second, the amendments explicitly require an individual liable for an offence related to membership in a designated "terrorist organisation" to intend to support the organisation's activities. 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.[54] The UAPA did away with the special courts altogether. Terrorism-related offences shall now be tried in the same courts as any other criminal offences, without any special executive control over jurisdiction or judicial administration. The UAPA also eliminated the power of the courts to try defendants *in absentia*. However, the discretion of the courts to hold *in camera* proceedings, potentially in prejudicial settings, or take other steps to protect the identity of prosecution witnesses, but not defence witnesses, has been retained.[55]

Act-Oriented or Area-Specific Laws

Anti-hijacking Act, 1982: This was brought in response to the spate of hijackings by Sikh terrorist organisations, to deter hijackers. Under this Act, hijackers are liable for punishment if found guilty of causing harm to passengers or crew members of the hijacked flight, apart from seizure of any aircraft by force or intimidation or through any unlawful means.[56]

Armed Forces (Special Powers) Act, No. 28 of 1958 was passed on 11 September 1958 to confer certain special powers to the members of the armed forces in disturbed areas in the states of Assam and Manipur, and after an amendment in 1972, it was extended to the whole northeastern region. Under the Act, armed forces personnel were given broad powers in a disturbed area to shoot any person acting in contravention of the law – but after giving due warning, search any [who has committed cognisable offence] place without warrant, and destroy any place from where attacks on armed forces are made.[57] This is the most dreaded law in the northeast. The same Act was invoked in the state of Jammu and Kashmir in 1990 under the *Armed Forces (Jammu and Kashmir) Special Powers Act, No. 21 of 1990*.

Armed Forces (Punjab and Chandigarh) Special Powers Act, No. 34 of 1983: This Act enabled the Governor of the state to declare the whole or parts of the state as "disturbed." The aim was to entrust special powers to the security forces to quell violence in the state. It allowed the armed forces personnel to arrest without warrant any person who had committed or about whom "reasonable suspicion" existed was about to "commit a cognisable offence." They are also authorised to enter into any premises without a search warrant to execute an arrest or to prevent any offence from taking place. Under this Act, civil liberties can be suspended in the "disturbed" area. The legislation prevented the prosecution of armed forces personnel for any actions carried out under powers conferred by this Act.[58]

State-Specific Laws

These apart, the individual states also possessed their own version of security laws. Notable among them include (in the order of chronology):

- *Madras Suppression of Disturbances Act (1948);*
- *Bihar Maintenance of Public Order Act (1949);*
- *The Assam Maintenance of Public Order (Autonomous District) Act (1952);*
- *The Assam Disturbed Areas Act (1955);*
- *The Nagaland Security Regulation Act (1962);*
- *Uttar Pradesh Control of Goondas Act (1970);*
- *West Bengal Maintenance of Public Order Act (1972);*
- *Jammu and Kashmir Public Safety Act (1978);*
- *Assam Preventive Detention Act (1980);*
- *Punjab Disturbed Areas Act (1983);*
- *Chandigarh Disturbed Areas Act (1983);*
- *Gujarat Prevention of Anti-Social Activities Act (1985);*
- *Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act (1986);*
- *Jammu and Kashmir Disturbed Areas Act (1990);*
- *Maharashtra Control of Organised Crime Act (1999);*
- *Karnataka Control of Organised Crime Act (2000);*
- *Andhra Pradesh Control of Organised Crime Act (2001);*
- *Chhattisgarh Special Public Security Act (2005).*

Overall, the counter-terror laws of India are characterised by:

- Emphasis on protection of the state rather than the people;
- Overreaction to the threat posed and far more drastic measures than necessary;
- Hasty enactment without giving much room for public debate or judicial scrutiny;
- Overly broad and ambiguous definitions of terrorism that fail to satisfy the principle of legality;
- Pre-trial 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 who fail to ensure the right to effective remedies.[59]

Given the above mentioned negative characteristics, counter-terrorism laws in India did not serve the very purpose for which they were enacted. Most importantly, they could not help in apprehending the key members of terrorist organisations involved in violence. Instead, the laws were liberally used as 'political weapons' to settle scores with political rivals and those who dissented with the ruling regimes. As a result, they removed the moderate voices from the scene, while allowing enough space for the militant ones.

The counter-terror legislation could not prevent harassment of innocent civilians. This increased public discontent and, in effect, strengthened the belief in the repressive nature of the regimes. Consequently, those innocents who were affected due to the harassment of security laws played into the hands of the militants to resist the "repressive regimes". As the Supreme Court of India rightly recognised, "Terrorism often thrives where human rights are violated," and "the lack of hope for justice provides breeding grounds for terrorism."[60] The very name "prevention of terrorism" (in POTA), for instance, sent the wrong signals. The provisions of these laws entrusted the

security forces with enormous discretionary powers, which were blatantly misused. These inflicted more wounds by creating a "uniform phobia." Thus, these laws reduced the legitimacy of the state and its institutions further. They were seen as part of the "grand design for legitimising repression."[61]

The safeguards in the counter-terror legislation were not adequate to prevent their misuse. While the Indian judiciary is overburdened, other bodies like the Human Rights Commission were not sufficiently empowered to prevent the arbitrariness of these laws. Had these safeguards worked by giving some sense of justice to the people, it could have, to an extent, reduced the numbers that favoured militancy. Most importantly, the special laws hid the rot in the entire criminal justice system. The net effect was that the terror laws quickened the isolation of the targeted community and increased the number of sympathisers and recruits of militancy. The alienated, as a result, are also less likely to cooperate with law enforcement, depriving the security forces of information and resources that can be used to counter terrorism.

Such a trend is evident in Jammu and Kashmir and the northeast of India. Citing the example of counter-terrorism in Punjab, Jaswant Singh noted that the singling out of Punjab for emergency treatment may have contributed to the "psychological isolation of the beleaguered state."[62] This applied to other states of India as well. The enactment of powerful, nation-wide anti-terrorism laws without sufficient safeguards to constrain their misuse and ensure national uniformity in their application led to human rights abuses and disparate patterns of enforcement throughout the country. Even developed countries like Britain are not devoid of such a trend. When the House of Lords found that legislation permitting the administrative detention of foreign terrorist suspects violated human rights, Lord Hoffmann observed:

> Terrorist crime, serious as it is, does not threaten our institutions of government or our existence as a civil community. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.[63]

Since terrorists often deliberately seek "to provoke an over-reaction" and thereby drive a wedge between the 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.[64] One reason why state terrorism goes unrecognised is that often it "masquerades as justice."[65] In the words of the Supreme Court of India, "If 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."[66]

As the then-UN Secretary General Kofi Annan observed, in the name of security, liberties are being sacrificed, weakening rather than strengthening common security.

> Internationally, the world is seeing an increasing misuse of what I call the "T-Word" terrorism, to demonise opponents, to throttle freedom of speech and the press, and to delegitimise legitimate political grievances'. The 'collateral damage' of the war against terrorism – individual bodies and values including damage to the presumption of innocence, to precious human rights, to the rule of law, and to the very fabric of democratic governance.[67]

Such concerns are more widespread in developing countries when compared to the developed ones. The main reason for this is that the special laws in the developing countries undergo less democratic scrutiny compared to those in the developed states. The institutions in the developing democracies are not adequate to conduct such scrutiny. This is not to say that the scrutiny is far superior in developed democracies; it is only comparatively better.

While terrorism is destructive of human rights, counter-terrorism, its opposite, does not necessarily restore and safeguard human rights. These special anti-terrorism laws have not proven particularly effective in combating terrorism. Terrorism has persisted as a problem, notwithstanding the presence of numerous special laws, under which few of the individuals charged have been convicted. Ironically, several major terrorist acts, including the attack

on the Akshardham Temple complex and the 2003 Mumbai blasts took place while POTA was in effect. In fact, the attack on the Indian Parliament on 13 December 2001 took place, while POTA was in existence in the form of an ordinance (POTO). The Indian state of Maharashtra has had a comprehensive anti-terrorism legislation in place for several years. Yet, most of the terrorist attacks in the recent past took place in this state, including the one on 26 November 2008. As Jaswant Singh 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 the primary error lies in seeking containerised, instant formulae; there is no such thing as the 'solution'.[68]

As a noted human rights lawyer and former Attorney General of India observed "[A] liberal democratic system that replicates the methods of terrorists in its anti-terrorist policies, threatens to undermine its own foundations."[69]

One cannot, therefore, come to a firm assertion that the counter-terrorism legislation in India has increased overall security in general. On the contrary, it has been counter-productive because of significant human rights concerns. As one commentator aptly puts it, "If the purpose of terrorism is to terrorise, that of anti-terrorism is to terrorise more."[70] Some go to the extent of arguing that the danger to democratic values "comes more from our reaction to terrorism than the thing itself."[71] As Ignatieff emphasises, "…the historical record shows that while no democracy has ever been brought down by terror, all democracies have been damaged by it, chiefly by their own overreactions."[72] Such situations, thus, result in the ultimate paradox of the response of democracies to the threat of terrorism: it is not terrorism itself, but the reaction to that threat, that can destroy democratic states.[73] Andrew Silke writes in this respect, "Terrorist groups can endure

military strikes, 'targeted assassinations' and other harsh measures, not because the people and resources lost are not important, but because the violence works to increase the motivation of more members than it decreases, and works to attract more support and sympathy for the group than it frightens away."[74]

Conclusion: Lessons from India's Experience

Indian experiences are instructive for all democracies that face the challenge of developing effective legal responses to terrorism and other security threats, while at the same time, wish to protect human rights in an enduring way. India has justified the enactment and use of counter-terror laws, pointing fingers at what "developed democracies" were doing to counter terrorism. India has been facing serious threats to its security both from terrorism and other forms of political violence. Various forms of anti-terror and security laws have been brought in to tackle the menace. However, the legal framework has only witnessed limited success. Counter-terror laws in India have come into being reflecting the Indian style of handling terrorism – namely, ad hocism. No single law has prevailed throughout. From time to time, depending on the regime at the Centre, legislation has come into being and then faded. Analyses of the linkage between counter-terror laws and security in India reveal many interesting findings.

Political Consensus on Terror Laws: There has been no political consensus on the use of terror laws in India. While right-wing parties like the BJP took a pro-legal framework against terrorism, centrist parties like the Congress thought otherwise. Thus, there is no consensus on the use of laws as an effective antidote to terrorism. The opposition parties opposed terror laws on the grounds of the "repressive character," but when they come to power, invariably, they too resorted to other laws conferring similar, overlapping authority. There is, thus, a cyclical pattern of enactment and repeal without addressing the underlying structural issues. Political interests have determined the parties' perceptions on counter-terror laws rather than the merit of the situation.

Enactment: In India, terror laws in most cases have been enacted in response to a particular crisis and often been repealed when faced with strong political opposition or a perception that the crisis has passed. 'Urgency' of a

situation cannot be an excuse for hasty enactment of counter-terror laws. What is required is careful drafting with the foresight of the 'effects' and 'side effects' of such laws. The draft should be widely circulated and given sufficient time for parliamentary and public scrutiny. In that case, a government can expect wider acceptance by the people than a situation wherein laws are brought out suddenly. Simultaneously, the laws should be placed for intense judicial examination before being enacted.

'One size does not fit all' is what one would be provoked to say when looking at the legal transplants and colonial traditions in the counter-terror laws of India. Every country should deal with the threats of militancy in its own way by taking into consideration the local conditions and not just by blindly copying other countries. The laws should confirm with the 'rule of law' and 'due process of law'. If the response is not in conformity with democratic norms, it might cause a 'credibility gap' for the state.

Implementation: Good laws remain good as long as the people who implement them are good. The provisions should be clear and unambiguous enough not to leave room for enormous discretionary powers to law enforcement. In addition, there should not be any political interference. The use of the police should be considered in implementing counter-terror laws. The employment of the armed forces, which are principally trained to wage war, should be avoided in the maintenance of law and order. They should be summoned only in the case of an extreme emergency. Proper safeguards should be built in to prevent any kind of misuse by law enforcement.

Police: While institutional continuity has served well in some 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.[75] The police is one of those inherited institutions. The police, especially, has remained principally as an instrument of coercive state power and political intelligence. It is not far from the truth to say that in the police of contemporary India, "the Raj lives on."[76] In this regard, the Supreme Court of India observed that the Indian Constitution "did not seek to destroy the past institutions; it raised an edifice on what existed before."[77]

Meaningful reform of the police in India has been elusive since independence. Initiatives for police reforms have been several, as also the failures. Many reports of commissions set up to look into reforms of the police lie idle. The

main reason behind the lack of reforms is the lethargy of the federal units of India to which the subject of 'law and order' belongs. While there has been a serious effort in the recent past from the central government to replace the Police Act of 1861 and implement significant reforms,[78] nothing is tangibly visible on the ground. Presently, the politicisation of decision-making is the fundamental issue that has been plaguing the police institution. Therefore, one of the critical reforms required in the Indian police is the granting of functional autonomy from undue political interference.[79] The central government and all the state governments have to seriously consider implementing the recommendations of the National Police Commission (NPC). The NPC *inter alia* suggested 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 Indian Police Service (IPS) officers from within the state police force.[80] While insulating the police from political interference, sufficient checks should be incorporated to make sure that the democratic accountability of the police is preserved, so that the police bureaucracy does not become so autonomous that it is able to act with impunity.[81]

Corruption and communalism are two other important issues afflicting the police. This is mainly due to lack of good supervision practice in the institution. A superior officer cannot take immediate and timely action on his/her subordinates due to complicated and time-consuming disciplinary procedures. Also, mechanisms to ensure police accountability for human rights violations and other misconduct are too few and weak.

Criminal Justice System: On analysing the counter-terror laws of India, yet another important lesson that flows is improving the overall capacity of the criminal justice system. An overhaul is required in all three stages of the criminal justice process: investigation, prosecution, and adjudication.

- Principally, investigative procedures and mechanisms are not up to the mark. Low morale and lack of investigative skills in the police are the main factors responsible for large-scale human rights violations. As a result, there is a disproportionate reliance on confessions and witness statements.[82] There has to be a conscious and serious effort to strengthen the overall professionalism and capacity of the police.

Especially, due attention is required for proper training, the development of advanced forensic skills and facilities, and the separation within the police of the responsibility for conducting investigations from the day-to-day responsibilities for maintaining law and order.

- The second concern in the criminal justice system that requires attention is the independence of prosecution. The more the prosecution is independent of the executive, the better the quality of the prosecution, especially in terrorism-related cases. This aspect has been emphasised over and over in the Indian case by the Supreme Court, the Law Commission and the National Human Rights Commission.[83]
- This brings one to a pertinent issue of the quality of judiciary in India that is vested with the responsibility of adjudication. The Indian judiciary, at least at the higher level, has been more assertive, independent, rights-conscious, and fairly free of political interference. However, the main problem is the huge backlog of cases due to resource and manpower constraints.[84] Due to this, there are enormous delays in the adjudication, increases in litigation costs, loss or diminished reliability of evidence by the time of trial, and unevenness and inconsistency in the verdicts that are ultimately delivered at trials. Consequently, large numbers of undertrials languish in jails, while awaiting trial. In many cases, the detention under trial even exceeds the maximum periods to which they [the undertrials] could be sentenced if convicted. Justice delayed is, of course, justice denied. Such incapability of delivering justice in time has the danger of reduction of faith in the justice system among members of the public. Therefore, this problem should be addressed on a priority basis.

***Civil Society*:** The role of civil society is vital in moderating the abusive nature of the security laws. In India, human rights activists, bar associations and individual lawyers have long played an important role in challenging human rights violations that have occurred in the name of security. Especially, the media in India have been independent and capable and assertive enough to provide accurate, reliable, and timely information on human rights that is crucial in highlighting the seriousness of human rights violations as a consequence of anti-terror laws and the consequent redressal.

***Comprehensive Approach*:** As one strategist has noted, "Terrorism is not ubiquitous and neither is it uncontainable, but the potential for its occurrence is virtually as widespread as is the manifestation of bitter political antagonisms…reduce the latter and you will reduce, though not eliminate, the former."[85] The main objective of security laws should be to moderate political antagonism rather than aiding the repressive arm of the state. It should be acknowledged that socio-economic pressures, unmet political aspirations, personal bitter experiences of innocents and their relations with the repressive arm of the state, etc. contribute to the terrorist reservoir. The aim of the terror laws should be to take all these into considerations. As David Fromkin said, "Terrorism wins only if you respond to it in the way that the terrorists want you to: which means that its fate is in your hands and not in theirs." It is in the hands of the state. As a former UN Secretary General pointed out, "We should all be clear that there is no trade-off between effective action against terrorism and the protection of human rights. On the contrary, I believe that in the long term, we shall find that human rights, along with democracy and social justice, are one of the best prophylactics against terrorism."[86]

Security laws could be one of the "best prophylactics" in countering terrorism, provided they plug all loopholes that provide space for human rights abuses. The core counter-terrorism strategy should revolve around "less fear-mongering" and "more confidence."[87] Adhering to human rights obligations when combating terrorism, therefore, helps to ensure that advocates of violence do not win sympathy from the ranks of those harmed and alienated by the state.[88] It must be emphasised that attentiveness to human rights concerns is not simply a moral and legal imperative, but also a crucial strategic imperative. Special laws must also seek to ensure that terrorism-related offences are investigated, prosecuted, and adjudicated more effectively and, in turn, bring down the "crisis of legitimacy." For this purpose, comprehensive reforms are required in the entire criminal justice system.

Notes

1. Ian O Lesser, "Countering The New Terrorism: Implications for Strategy," in IO Lesser et al, *Countering the New Terrorism* (Santa Monica, CA: RAND Corporation, 1999), p. 96.
2. Michael Humphrey, "Human Rights, Counter-Terrorism, and Security," Paper presented at the seminar on 'Terrorism and Security Laws' as part of the 'Globalisation and Human Rights Seminar Series,' *The Australian Human Rights Centre, UNSW Faculty of Law*, 27 August 2003.

3. SM Makinda, "Security and Sovereignty in the Asia-Pacific," *Contemporary Southeast Asia*, Vol. 23, No. 3, 2001, pp. 401-419.
4. Michael Ignatieff, "Lesser Evils," *The New York Times*, 02 May 2004.
5. 'Democracies' are those societies that fulfil the following conditions: Freedom of belief, expression, organisation, demonstration, and other civil liberties, including protection from armed militancy; a 'rule of law' under which all citizens are treated equally and 'due process' is secure; political independence and neutrality of the judiciary and other institutions of 'horizontal accountability' that check the abuse of power, such as electoral administration, audits, and a central bank; an open and pluralistic civil society, including not only associational life but the mass media as well; and civilian control of the military.
6. Robert Pape, "The Strategic Logic of Suicide Terrorism," *American Political Science Review*, Vol. 97, No. 3, August 2003, p. 349.
7. Paul Wilkinson, *Political Terrorism* (London: Macmillan, 1974), p. 12.
8. Boaz Ganor, "Preface," in Jonathan Adiri, *Counter-terror Warfare: The Judicial Front – Confronting the 'Democratic Dilemma' of Counter-terror Warfare and the Evolution of the 'Probable Scope'* (Herzlia: International Policy Institute of Counter-terrorism, July 2005).
9. Lindsay Clutterbuck, "Law Enforcement," in Audrey Kurth Cronin and James M Ludes (eds.), *Attacking Terrorism – Elements of a Grand Strategy* (Washington, D.C.: Georgetown University Press, 2004), p. 141.
10. For more details on 'New Terrorism', see Nadine Gurr and Benjamin Cole, *The New Face of Terrorism: Threats from Weapons of Mass Destruction* (London: IB Tauris, 2000); Andrew Tan & Kumar Ramakrishna (eds.), *The New Terrorism – Anatomy, Trends and Counter-Strategies* (Singapore: Eastern Universities Press, 2002); Mathew J Morgan, "Origins of New Terrorism," *Parameters*, Spring 2004, pp. 54-71; David Tucker, "What's New About the New Terrorism and How Dangerous Is It?" *Terrorism and Political Violence*, Vol. 13, No. 3, Autumn, 2001, pp. 1-14; IO Lesser et al., *Countering the New Terrorism* (Santa Monica, CA: RAND Corporation, 1999); Walter Laqueur, *The New Terrorism: Fanaticism and the Arms of Mass Destruction* (London: Oxford University Press, 1999); Ashton B Carter, John Deutch and Philip Zelikow, "Catastrophic Terrorism," *Foreign Affairs*, Vol. 77, No. 6, November-December 1998, pp. 80-94; Walter Laqueur, "Postmodern Terrorism," *Foreign Affairs*, Vol. 75, No. 5, September-October 1996, pp. 24-36; Alexander Spencer, "Questioning the Concept of 'New Terrorism'," *Peace, Conflict & Development*, No. 8, January 2006, pp. 1-33; Col Russ Howard, "The New Terrorism," *MIT Security Studies Program Seminar*, 09 March 2005.
11. Terrorists especially take advantage of the amount of freedom – of expression, movement and association – available in democratic systems; the prevalence of 'rule of law' and 'due process of law' that makes the prosecution of terrorists difficult; and the existence of free media that gives them the adequate publicity [they need]. William Eubank and Leonard Weinberg demonstrate that most militant incidents occur in democracies and that generally both the victims and the perpetrators are citizens of democracies. Quan Li has found that although militant attacks are less frequent when democratic political participation is high, the kind of checks that a liberal democracy typically places on executive power seems to encourage militant actions.
12. KPS Gill, "The Imperatives of National Security Legislation in India," *Seminar*, No. 512, April 2002.
13. This came out clearly in the National Security Advisory Board's document on India's Nuclear Doctrine.
14. For instance, in 2004, 45 percent of the total terrorist incidents took place in India. The latest figures in the wake of series of terrorist attacks especially in urban centres are more alarming.
15. Chaman Lal, "Terrorism and Insurgency," *Seminar*, No. 483, November 1999.

16. Interaction with Mr ML Kumawat, Special Secretary (Internal Security), Government of India, 18 July 2008, New Delhi.
17. SD Muni, "Responding to Terrorism: An Overview," in SD Muni (ed.), *Responding to Terrorism in South Asia* (New Delhi: Manohar, 2006), p. 456.
18. David Arnold, "Police Power and the Demise of British Rule in India, 1930-47," in David Anderson and David Killingray (eds.), *Policing and Decolonisation: Politics, Nationalism, and the Police, 1917-65* (Manchester: Manchester University Press, 1992), p. 58.
19. Kuldip Mathur, "The State and the Use of Coercive Power in India," *Asian Survey*, Vol. 32, No. 337, 1982, pp. 343-346.
20. Gill, n. 12.
21. National Human Rights Commission of India, *Opinion in Regard: The Prevention of Terrorism Bill, 2000*, para 6.4.
22. Usha Ramanathan, "Extraordinary Laws and Human Rights Insecurities," *Asia Rights Journal*, No. 1, July 2004. Also see Derek P Jinks, "The Anatomy of an Institutionalised Emergency: Preventive Detention and Personal Liberty in India," *Michigan Journal of International Law*, Vol. 22, 2001.
23. To be read with UNSC Resolutions 1456 (20 January 2003) and 1566 (08 October 2004).
24. All 191 UN 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. 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.
25. *The Tribune*, 11 November 2001.
26. Parliament of India, Joint Session Debates, 26 March 2002.
27. People's Union for Civil Liberties vs. Union of India, AIR 2004 SC 456, 466.
28. AG Noorani, "Preventive Detention in India," *Economic and Political Weekly*, Vol. 26, No. 46, 16 November 1991, p. 2608.
29. Unlawful Activities (Prevention) Act, No. 37 of 1967, section 2(1)(o).
30. It is on the onus of the aggrieved person to show to a judge that funds in question are not being used or are not intended for the purpose of the unlawful association. See Section 7 of the Act.
31. But a 9-judge bench in a unanimous verdict delivered on 11 January 2007 ruled that legislations did not get the protection of the Ninth Schedule if they were violative of the basic structure of the Constitution. "Ninth Schedule Open to Challenge: SC," *The Indian Express*, 11 January 2007.
32. Venkat Iyer, *States of Emergency: The Indian Experience* (New Delhi: Butterworths, 2000), pp. 167-170.
33. John Dayal and Ajoy Bose, *The Shah Commission Begins* (New Delhi: Orient Longman, 1978), pp. 37-38.
34. "Time to End Abuses," *Seminar*, No. 512, April 2002.
35. Under Section 2(1)(h), the 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 religions, 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."
36. TADA defined a "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."

37. See Section 4 of the Act.
38. See Section 15 of the Act.
39. Law Commission of India, 173rd Report submitted in 2000.
40. Era Sezhiyan, "Perverting the Constitution," *Frontline*, Vol. 18, No. 25, 08-21 December 2001.
41. Prevention of Terrorism Ordinance, No. 9 of 2001 (24 October 2001). A second ordinance in December 2001 renewed POTO [Prevention of Terrorism Ordinance, No. 12 of 2001 (30 December 2001)] with slight modifications, after Parliament adjourned without enacting the legislation.
42. Prime Minister Atal Behari Vajpayee's address to the nation on terrorist attacks on the United States, 14 September 2001.
43. Parliamentary debates, 07 November 2001.
44. The law defines a "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;" or
    (b) commission of any act "resulting in loss of human life or grievous injury to any person;" or
    (c) 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 causing mass destruction."
45. POTA, Section 18.
46. POTA, Section 49(2)(a) & (b).
47. POTA, Section 49(6) & (7). If the arrested is a non-citizen, POTA flatly prohibits them from being granted bail "except in very exceptional circumstances and for reasons to be recorded in writing." POTA, Section 49(9).
48. POTA, Section 52(4).
49. POTA, Section 32. See Sarayu Natarajan & Ananth Lakshman, "Admissibility of Confessions Taken Under POTA for Conviction of Offences Under the IPC," *Asia Rights Journal*, No. 3, December 2004.
50. POTA, Section 23(4).
51. POTA, Section 57.
52. Prevention of Terrorism (Repeal) Ordinance, No. 1 of 2004 (promulgated on 21 September 2004); Prevention of Terrorism (Repeal) Act, No. 26 of 2004 (enacted on 21 December 2004).
53. UAPA, Section 35(1)(b).
54. UAPA, Sections 2(1)(o)-(p)
55. Kapil Sibal, "What We Talk About When We Talk About Law," *The Indian Express*, 24 September 2008.
56. The Act was brought in to give effect to the UN Convention for the Suppression of Unlawful Seizure of Aircraft, 1970. See Chapter II of the Act for offences and punishments.
57. Special powers are listed under clause 4 of the Act.
58. For full text of the Act, see http://punjabrevenue.nic.in/armsact.htm
59. Anil Kalhan et al, "Colonial Continuities: Human Rights, Terrorism and Security Laws in India," *Colombia Journal of Asian Law*, Vol. 20, No. 1, 2006, p. 96.
60. People's Union for Civil Liberties vs. Union of India, AIR 2004 SC 456, 465.
61. Discussion with Mr Prakash Singh, Former Director General of Police, Uttar Pradesh, November 2008.
62. Jaswant Singh, "Beleaguered State," *Seminar*, No. 345, May 1988, p. 19.
63. Clare Dyer, "It calls into question the very existence of an ancient liberty of which

this country is proud: freedom from arbitrary arrest and detention," *The Guardian*, 17 December 2004.
64. Kalhan et al, n. 59.
65. Michael E Tigar, "Terrorism and Human Rights", *Monthly Review*, November 2001.
66. Kartar Singh vs. State of Punjab, (1994) 2 SCR 375, 1994 Indlaw SC 525, p. 366.
67. Address by Kofi Anan at the 4688th meeting of the UN Security Council, 20 January 2003.
68. Singh, n. 62, p. 14.
69. Soli J Sorabjee, "Subverting the Constitution," *Seminar*, No. 345, May 1988, pp. 35-39.
70. Shaukat Qadir, "The Concept of International Terrorism: An Interim Study of South Asia," *The Round Table: The Commonwealth Journal of International Affairs*, Vol. 90, No. 360, July 2001, p. 333.
71. Benjamin Friedman, "Terrorism Hysteria Watch," *Cato@Liberty*, 23 January 2009.
72. Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton: Princeton University Press, 2004), p. 80.
73. Asta Maskaliunaite, "Protecting Democracy from Terrorism: Lesser Evil and Beyond," *Baltic Security & Defence Review*, Vol. 9, 2007, p. 15.
74. Andrew Silke, "Fire of Iolaus: The Role of State Countermeasures in Causing Terrorism and What Needs to be Done," in Tore Bjorgo (ed.), *The Root Causes of Terrorism: Myths, Reality and Ways Forward* (London: Routledge, 2005), p. 254.
75. KS Subramanian, "Response: The Crisis of the IPS," *Frontline*, Vol. 19, No. 3, 02-15 February 2002.
76. Arvind Verma, "To Serve and Protect," *India Together*, 10 January 2006.
77. State of Gujarat vs. Mithibarwala, AIR 1964 SC 1043.
78. Madhav Godbole, "Police Reforms: Pandora's Box No One Wants to Open," *Economic and Political Weekly*, Vol. 41, No. 12, 25 March 2006.
79. RK Raghavan, "An Insider's View – From the Outside," *Frontline*, Vol. 18, No. 25, 08-21 December 2001.
80. This was recommended by the Second National Police Commission, August 1979.
81. RK Raghavan, "Reforming the Police," *Frontline*, Vol. 18, No. 24, 24 November-07 December 2001.
82. Ved Marwah, "Reforming Police Investigation," *Seminar*, No. 430, June 1995, p. 30.
83. Arvind Verma, "Cultural Roots of Police Corruption in India," *Policing*, Vol. 22, No. 3, pp. 268-269.
84. At the end of 2005, there were approximately 3.5 million pending cases in the Indian High Courts, of which approximately 650,000 were criminal cases. The situation in the subordinate courts were worse where there were over 25 million pending cases, of which approximately 18 million were criminal cases.
85. Colin S Gray, "Combating Terrorism," *Parameters*, Vol. XXIII, Autumn 1993, p. 20.
86. Kofi Annan's address to the UN Security Council meeting, 21 January 2002.
87. Friedman, n. 71.
88. Lal, n. 15.