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Human Rights Implications of National Security Laws in India: Combating Terrorism While Preserving Civil Liberties

Keywords

Human Rights Law, National Security, Terrorism, Comparative Law, Democracy

HUMAN RIGHTS IMPLICATIONS OF NATIONAL SECURITY LAWS IN INDIA: COMBATING TERRORISM WHILE PRESERVING CIVIL LIBERTIES

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*"Liberty is itself the gift of the law and may by the law [be] forfeited or abridged."*¹

*"[T]he principle that no one shall be deprived of his life and liberty without the authority of law was not the gift of the Constitution. It was a necessary [corollary] of the concept relating to sanctity of life and liberty; it existed and was in force before the coming into force of the Constitution."*²

I. INTRODUCTION

The September 11, 2001 attacks in New York and Washington D.C.,³ and the December 13, 2001 attack on the Indian Parliament⁴ have intensified the debate regarding the necessity of formulating national security laws in India and the laws' potentially serious impact on human rights and civil liberties.⁵ The strengthening of national security laws⁶ worldwide is apparently pursued with the objective of

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1. *Jabalpur v. Shukla*, 1976 1 S.C.R. 172 (Ray, C.J.).

2. *Id.* (Khanna, J., dissenting).

3. For an interesting read on the impact of these acts on human rights, see Philip B. Heymann, *Civil Liberties and Human Rights in the Aftermath of September 11*, 25 HARV. J.L. & PUB. POL'Y 440 (2002).

4. For more information on the terrorist attack on the Indian Parliament, see Embassy of India, Recent Events, *Terrorist Attack on the Parliament of India*, at http://www.indianembassy.org/new/parliament_dec_13_01.htm (last visited May 2, 2005).

5. For a critical perspective on responses to terrorism, see Martha Crenshaw, *Unintended Consequences: How Democracies Respond to Terrorism*, 21 FLETCHER F. WORLD AFF. 153 (1997). See also, Note, *Responding to Terrorism: Crime, Punishment and War*, 115 HARV. L. REV. 1217 (2002) (discussing past acts of terror and the United States' response to them).

6. For an excellent understanding of the Anti-terrorism laws in the U.S., see Joshua D. Zelman, *Recent Developments in International Law: Anti-Terrorism Legislation – Part One: An Overview*, 11 J. TRANSNAT'L L. & POL'Y 183 (2001); see also Joshua D. Zelman, *Recent Developments in International Law: Anti-Terrorism Legislation – Part Two: The Impact and Consequences*, 11 J. TRANSNAT'L L. &

combating terrorism⁷ and other forms of internal and external threats to the States and the societies in which people live. In response to these developments, the Indian government passed a new anti-terrorism law, which in this author's view, was draconian and unnecessary. The Indian government promulgated this law notwithstanding substantial public opinion against its passage. In fact, the National Human Rights Commission of India (NHRC) critiqued the Prevention of Terrorism Act of 2002 (POTA)⁸ when it was still a bill. After a unanimous decision that "there is no need for the enactment of a law based on the Draft Prevention of Terrorism Bill [of] 2000," the NHRC recommended the bill not be passed.⁹ While the constitutional validity of POTA was upheld by the Supreme Court of India in a later decision, the United Progressive Alliance (UPA) government led by the Congress party that came to power in India in May 2004 after the elections repealed POTA by way of a Presidential Ordinance on 21 September 2004.¹⁰ However, the fact that some of the provisions of POTA came by way of a new avatar in the amendments to the Unlawful Activities (Prevention) Act (UAPA) has once again brought to the focus how governments tend to tinker with human rights when responding to terrorism or in the name of preserving national security.¹¹

Human rights and national security are at times perceived to be at odds with one another.¹² When government officials speak about national security, their arguments rest primarily upon the premise that protecting human rights and civil liberties is at times subservient to protecting national security. In India, the government has passed stringent laws protecting national security and combating terrorist threats, but these same laws cannot pass the test of human rights scrutiny. During the last five decades since independence, India has made significant efforts to strengthen the legal, constitutional, and institutional framework to protect, promote and institutionalize human rights. Since the 1980s, the Indian judiciary, particularly the Supreme Court of India,¹³ has supported these efforts through numerous judgments limiting the powers of government—including police and other enforcement machinery—while simultaneously expanding the notions of

POL'Y 421 (2002).

7. For an international relations perspective on terrorism, see Shashi Tharoor, *September 11, 2002: Understanding and Defeating Terrorism, One Year Later*, 27 FLETCHER F. WORLD AFF. 9 (2003).

8. For further reading on the Prevention of Terrorism Act (POTA), see L.K. THAKUR, *ESSENTIALS OF POTA AND OTHER HUMAN RIGHTS LAWS* (2002).

9. *Id.* at 257-62 (discussing NHRC's opinion on POTA while still a bill).

10. *People's Union for Civil Liberties v. Union of India*, 2004 9 S.C.C. 580; A.I.R. 2004 S.C. 456.

11. V.Venkatesan, *POTA Reinvented*, FRONTLINE, Oct. 23, 2004, available at <http://www.frontlineonnet.com/fl2122/stories/20041105004811000.htm> (last visited May 2, 2005).

12. For a very interesting perspective on drawing the balance between the combat against terrorism while protecting human rights, see Emanuel Gross, *Democracy's Struggle against Terrorism: The Powers of Military Commanders to Decide upon the Demolition of Houses, the Imposition of Curfews, Blockades, Encirclements and the Declaration of an Area as a closed Military Area*, 30 GA. J. INT'L & COMP. L. 165 (2000).

13. For further reading on the Supreme Court of India, see SUPREME BUT NOT INFALLIBLE – ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA (B.N. KIRPAL et al. eds., 2000) [hereinafter KIRPAL].

freedom and liberty. These limitations were justified by invoking a broad and purposive interpretation of Fundamental Rights, which are enshrined in Chapter III of the Constitution of India.¹⁴

The international human rights framework, conventions or treaties to which India was a signatory or ratifying party, also justified the limitations on governmental powers. However, the contemporary reality of Indian executive governance demonstrates the weaknesses and inadequacies of the treaties and conventions. As a result, police, military and para-military forces continue to violate human rights. This problem underscores the need to develop a culture amongst law enforcement officials that respects human rights as a *sine qua non* for the preservation of the rule of law. Passing certain laws under the guise of protecting national security in India offers an occasion to examine the human rights understanding in a constitutional sense. These laws granted significant powers to the Indian executive, thus providing greater opportunity for abuse and violation of fundamental rights.

This article addresses the issue of Indian national security law operation and the efforts to combat terrorism while protecting human rights as follows:

First, it provides an overview of the historical background of national security and human rights issues in India within the context of the Constituent Assembly debates;

Second, it explains the legal and constitutional framework of national security legislation in India and the limitations on governmental exercise of power as provided in the Indian Constitution. It also analyzes certain national security cases decided by the Indian judiciary. Further, it considers how the balance between protecting national security and promoting human rights has been achieved;

Third, it explains the legal framework of the anti-terrorism laws in India with particular reference to the Prevention of Terrorism Act of 2002 (POTA) and examines its critical implications from a human rights standpoint. It also discussed the decision of the Supreme Court of India in upholding the constitutional validity of POTA, while underlining the need for checks and balances in enforcing anti-terrorism laws. However, the forming of a Congress-led government in India has resulted in POTA being repealed. This is a significant positive development as far as resistance of the human rights movement is concerned to ensure that civil liberties are not compromised in the fight against terrorism and the need for protecting national security. However, fears are expressed as to how strengthening of other criminal law legislation can potentially have the same effect of POTA.

Fourth, it evaluates the human rights consequences of emergency provisions under the Indian Constitution with the intent to examine their present status of jurisprudence. It also critically examines certain decisions of the Supreme Court of India which have resulted in the development of habeas corpus law.

Fifth, it examines the human rights framework and its impact on preventive

14. For an excellent reading to understand the working of the Indian constitution, see GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION – THE INDIAN EXPERIENCE (2000).

detention laws in India;

Sixth, it provides an overview of international developments that have attempted to balance counter-terrorist and national security interests with the protection and promotion of human rights;

Seventh, by differentiating between national security and human security, it provides a way forward and proposes that national security strategies should take into consideration the relevance of human rights and development. The goal of protecting human security will supplement the existing strategies for protecting national security, but human rights and fundamental freedoms cannot be compromised in the pursuit of state security policies. Rather, it is argued that the processes of protecting human rights should result in citizen empowerment—the foundation upon which human security will be achieved. In this regard, it is useful to refer to the recent report of the U.N. Secretary General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, in which there has been an attempt to link some of the issues relating to security to development and human rights.¹⁵ But operationalization of these linkages will require a holistic understanding of human security and its acceptances by states followed by a paradigmatic shift in their approach toward fighting terrorism and preserving national security. This can only result in the rhetoric of the U.N. Secretary General's Report becoming a reality.

Eighth, the Indian experience in balancing national security concerns with human rights commitments is examined in order to provide certain guidelines for other countries. While most countries have already developed, or are in the process of developing, their own national security legislation, the Indian experience is useful to understand the importance of democratic institutions; an independent judiciary, a free press, and a vibrant civil society to protect and promote human rights and civil liberties from the adverse effects of draconian legislation intended to protect citizens from real and perceived threats to national security; and

Finally, the article argues that it is natural for citizens worldwide, including citizens in India, to feel threatened under certain "terrorized" circumstances, but that any State or territory's response to terrorism or other national security threats needs to be fashioned within the domestic and international human rights framework. Understanding that the rule of law cannot be protected by the rule of force supports this argument; hence, India and other countries of the world ought to ensure that in their zeal to combat terrorism and to create a secure environment, they should not pass laws, rules, and regulations that violate constitutional ideals, political culture and other domestic and international human rights commitments.

II. HISTORICAL BACKGROUND AND CONSTITUENT ASSEMBLY DEBATES

During the struggle for independence, leaders of India's national freedom movement resisted the British implementation of "national security" laws; these

15. Report of the U.N. Secretary General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, New York, USA, March 2005, <http://www.un.org/largerfreedom/contents.htm> (last visited May 2, 2005) [hereinafter *Larger Freedom*].

laws were intended to create political dissent within Indian society. For example, the British passed several “preventive detention” laws which continue to exist today. The British defended preventive detention on grounds of extreme threats to public order and national security, even though there were numerous cases in which they were applied arbitrarily.¹⁶ The government-authorized practice of preventive detention in India had been in vogue since the passage of the East India Company Act of 1784. This Act provided for the “detention of any person who was suspected of participating in any correspondence or activities prejudicial or dangerous to the peace and safety of British possessions and settlements in India.”¹⁷

During British rule in India, preventive detention was authorized by the Defence of India Acts of 1915 and 1939, the Government of India Act of 1919, the Rowlatt Act of 1919, and the Bengal Criminal Law Amendment Act of 1925.¹⁸ These laws had provisions enabling the State to detain a person for six months without informing the detainee of the grounds of detention. These laws were subject to enormous abuse in the hands of colonial rulers. They provided very few safeguards while granting discretionary powers to government officials. Because the leaders of the freedom movement were themselves victims of these draconian laws intended to protect “national security”, they personally understood the need to ensure that guaranteed constitutional and fundamental rights would protect individuals from government excesses after independence. Granville Austin rightly points out that the Fundamental Rights and Directive Principles enshrined in the Constitution of India had their deep roots in the struggle for independence and were “included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India.”¹⁹

The drafters of the Constitution of India²⁰ intended to include a chapter on rights within the constitutional framework from the beginning. The Constituent Assembly members, themselves key participants in the freedom struggle, were mindful of problems that would arise when “rights” were left to the discretion of the government. The British were not keen on including rights during their rule, and Dicey defended this view by arguing that enunciation of rights in a Constitution “gives of itself but slight security that the right [had] more than a nominal existence.”²¹ This argument was not appealing to the Constituent Assembly and the members embarked on the task of drafting provisions relating to Fundamental Rights. Assembly members understood that rights would empower the masses of the nascent Indian democracy. The Fundamental Rights Sub-

16. See generally SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, GOVERNMENT DECIDES TO PLAY JUDGE AND JURY 98 (2001) (critically examining the Prevention of Terrorism Ordinance of 2001) [hereinafter SAHRDC].

17. *Id.* at 98.

18. *Id.* at 99.

19. GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 50 (1966).

20. For further reading, see V.N. SHUKLA, CONSTITUTION OF INDIA (Mahendra P. Singh ed., 10th ed. 2001 & Supp. 2003) [hereinafter SHUKLA].

21. AUSTIN, *supra* note 14, at 58 n.29 (citing A.V. DICEY, THE LAW OF THE CONSTITUTION 207 (1961)).

Committee (FRSC) worked on the rights chapter with a fairly high degree of consensus, apart from a disagreement surrounding the highly contested issue as to what extent personal liberty should be infringed in order to secure government stability and public peace.²²

The rights included in the Constitution were meant to be fundamental and enforceable by the courts through writ jurisdiction. Nevertheless, when it came to limiting these rights and debating their non-absoluteness, opinion was varied. The real issue was identifying acceptable ways to limit the basic freedoms of speech, assembly, association, and movement—the Fundamental Rights enshrined in the Constitution. It was in this context that the Constituent Assembly had to face the question of personal freedom versus national security.²³ On March 25, 1947, the FRSC drafted the “right to freedom” provisions of the Constitution and voted to qualify each with the proviso that the exercise of these rights is subject to “public order and morality.”²⁴ As far as freedom of assembly, the Assembly attached the restrictive proviso of the Irish Constitution.²⁵ The horrible communal violence that occurred in India during the time of the debates undoubtedly had a profound impact upon the nature and shape of the constitutional provisions. On April 14, 1947, the FRSC inserted into the ‘rights-of-freedom’ introduction clause a phrase making the rights subject to suspension in emergency; for example, a threat to national or provincial government security constituted an emergency.²⁶ During the deliberations of late 1947 and 1948, the Drafting Committee made the rights of free speech, assembly, association, and movement subject to public order, morality, health, decency, and public interest. In the case of free speech, an utterance would not have to undermine the authority of the state or be seditious or slanderous in order for the emergency exception to apply.²⁷

During the debate on the Draft Constitution, speakers attacked the proviso regarding public order and morality in response to the great momentum providing for expanded freedom and liberty with minimal limitation.²⁸ Granville Austin, commenting on the situation, said: “Thakur Das Bhargava led the final assault, moving an amendment that would put a ‘soul’ back in Article 13 by inserting the word ‘reasonable’ before ‘restrictions’ in the various provisos.”²⁹ That amendment was a great victory for individuals who had resisted certain notions of security that compromised liberty. The insertion of the reasonableness limitation on the Article 19 restrictions (Article 13 of the Draft Constitution) of the Constitution of India is

22. AUSTIN, *supra* note 14, at 63.

23. *Id.* at 69.

24. *Id.*

25. See generally *id.* n.78 (referring to the minutes of a March 17, 1947 meeting, at which the Prasad papers, File 1-F/47, were discussed). Article 40(6) (i) of the Irish Constitution allows the prevention or control of meetings deemed a danger or a nuisance to the general public or in the vicinity of the Parliament buildings. *Id.*

26. *Id.* at 70-71.

27. *Id.* at 73 n.92 (referring to Article 13 of the Draft Constitution).

28. *Id.* at 73.

29. *Id.* at 73-74.

similar to the Due Process clause in the American Constitution.³⁰ This limitation was significant as Indian judges would now have the power to judicially review whether the restrictions were reasonable and if found to be unreasonable, could declare them unconstitutional. The Assembly added the “reasonable” qualification to the freedom of speech guarantee one year later when the first amendment to the Constitution provided that the right to freedom of speech should not prevent, *inter alia*, “the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right by the said sub-clause in the interests of the security of the State, friendly relations with foreign states, [and] public order....”³¹

III. THE LEGAL AND CONSTITUTIONAL FRAMEWORK OF NATIONAL SECURITY LAWS IN INDIA

Over twelve sections, Chapter VI of the Indian Penal Code (IPC) delineates “[offenses] against the State and the Army.” These sections broadly comprise the offenses of: (1) waging, attempting or conspiring to wage war against the Government of India (IPC sections 121, 121A, 122, and 123); (2) assaulting the President of India (or Governor of a State) with an intent to compel or restrain the exercise of any lawful authority (IPC section 124); (3) waging war against a State at peace with the Government of India (IPC sections 125); (4) permitting or aiding the escape of a state prisoner or a prisoner of war (IPC sections 128, 129, 130); and inciting others to rebel against the State (IPC section 124A).³² While the above sections of the Indian Penal Code are intended to protect national security in one form or another, there is little controversy surrounding these sections, except the one on sedition. The word “sedition” under IPC section 124A describes an individual’s activities, whether they are words, deeds or writings, which are intended to disturb the peace and tranquility of the state, and to encourage others to subvert the government established by law.³³

Section 124A of the IPC: Sedition – Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1 – The expression “disaffection” includes disloyalty and all feelings of enmity.

Explanation 2 – Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

30. *Id.* at 74.

31. *Id.*

32. K.D. GAUR, CRIMINAL LAW – CASES AND MATERIALS 635-44 (3d ed. 1999).

33. *Id.* at 635 n.1 (citing RATANLAL & DHIRAJLAL, THE LAW OF CRIMES 415-22 (23d ed. 1991)).

Explanation 3 – Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.³⁴

A textual reading of the sedition section demonstrates that the law is intended to punish the acts or attempts of a person who “brings into hatred or contempt” or creates “disaffection” towards the Government established by law in India. Arguably, such acts could affect national security and should be met with stringent punishment. It is important to differentiate this kind of threat to national security from terrorism, which is discussed later. The three explanations to section 124A corroborate the kind of “hatred or contempt” or “disaffection” that the law is intending to prohibit. The sedition law was subject to constitutional scrutiny under the Constitution of India’s freedom of speech and expression guarantees. Article 19 of the Constitution guarantees Indian citizens six fundamental freedoms: (1) freedom of speech and expression; (2) freedom of assembly; (3) freedom of association; (4) freedom of movement; (5) freedom of residence and settlement; and (6) freedom of profession, occupation, trade, or business.³⁵

None of these freedoms are absolute, and each is specifically restricted by clauses two through six of Article 19, but including the word “reasonable” in Article 19(2) has operated as a useful check to ensure that Parliament does not impose unreasonable restrictions on citizens’ freedoms. Otherwise, the judiciary may declare those restrictions unconstitutional.³⁶ Clauses two through six of Article 19 enumerate the reasonable restrictions the State can impose upon citizens’ freedoms. These restrictions include: the interests of the general public, the security of the State, public order, decency, or morality and other reasons as listed in those sub-clauses. There could be valid justifications for including reasonable restrictions on citizens’ freedoms, because individual liberty may occasionally have to give way to attain society’s general welfare.³⁷ However, because judicial independence is generally maintained in India, courts interpret the freedom restrictions, and the restrictions’ meaning and scope have been elaborated over the years.

In order to highlight the need for balance between individual liberties and social interests, it is useful to refer to the words of Justice Das: “[S]ocial interest in individual liberty may well have to be subordinated to other greater social interests.”³⁸ The constitutional analysis of Article 19’s protected freedoms requires any restriction thereof to be reasonable and designated in the Constitution.³⁹

34. *Id.* at 636.

35. *See generally* SHUKLA, *supra* note 20.

36. *Id.* at 101.

37. *Id.*

38. *Id.* at 100 n.10 (citing *Gopalan v. State of Madras*, A.I.R. 1950 S.C. 27).

39. *Id.* at 102.

Reasonable restrictions on freedom of speech and expression can be imposed in the interests of the security of the State. The wording “security of the state” is subject to numerous interpretations; thus, judicial interpretation of these words is important, lest the ambiguity can provide a source for abusing the Constitution. In *Thappur v. State of Madras*,⁴⁰ the Supreme Court of India clearly noted that “security of state” does not refer to ordinary breaches of public order, because they do not involve any danger to the State itself. The Constitution (First Amendment) Act of 1951 followed this rule, as preservation of public order became one of the grounds for imposing restrictions on the freedom of speech and expression.⁴¹

It needs to be noted that the word “sedition” does not appear anywhere in the Indian Constitution, even though it is an offense against the state as specified in the IPC. Democratic societies provide a means for the people to express their displeasure toward a particular policy or general administration of the government through non-violent methods. A democratic fabric in any free society, including India, exists because of this principle. While the word “sedition” would have had a different meaning a century ago, contemporary notions of freedom and liberty give people enough flexibility to exercise their democratic dissent, and even displeasure, in numerous ways. It is in this context that a law prohibiting certain forms of speech would inevitably be subject to constitutional scrutiny. The contemporary understanding of sedition in India includes all those practices, whether by word, deed, or writing, that are calculated to disturb the tranquility of the State and lead ignorant persons to subvert the government.⁴² Thus, the offense’s crucial elements happen to be inciting violence or creating public disorder.

The right to freedom of speech and expression includes protection for severely criticizing existing government structures, policies, and administrative systems, as well as protection for suggesting and proposing the development of a new system.⁴³ In the landmark case *Queen Empress v. Tilak*,⁴⁴ the Bombay High Court held that inciting feelings of enmity against the government is sufficient for a person to be held guilty under the sedition law.⁴⁵ However, in *Niharendu v. Emperor*,⁴⁶ the Federal Court interpreted section 124A more liberally and the Chief Justice reasoned that: “[T]he acts or words complained of must either incite disorder or must be such as to satisfy reasonable men that that is their intention or tendency.”⁴⁷ The court held that public disorder, or the reasonable anticipation or likelihood thereof, was the offense’s core element. The decision was progressive because it limited the sedition offense to acts inciting violence or some other form

40. *Thappur v. State of Madras*, A.I.R. 1950 S.C.R. 594).

41. SHUKLA, *supra* note 20, at 114.

42. *Id.* at 122 n.38 (citing *R. v. Sullivan*, (1968) 11 Cox Cases 55).

43. *Id.* at 122 n.39 (citing *Niharendu v. Emperor*, A.I.R. 1942 F.C.R. 22, 26).

44. GAUR, *supra* note 32, at 639 n.4 (citing *Queen Empress v. Bal Gangadhar Tilak*, I.L.R. 22 (Bom.) 112).

45. *Id.* at 640 (referring to RATANLAL & DHIRAJLAL, *THE LAW OF CRIMES* 415-22 (23d ed. 1991)).

46. SHUKLA, *supra* note 20, at 122 n.41 (citing *Niharendu*, A.I.R. 1942 F.C.R. 22).

47. *Id.*

of disorder and not to all forms of dissent and critical remarks made against the Government; consequently, the Privy Council rejected this liberal interpretation.

In *Emperor v. Narayan*,⁴⁸ the Privy Council overruled *Niharendu* and held that the expression "excite disaffection" in section 124A did not include "excite disorder"; thus, the reasoning adopted in *Niharendu* was an incorrect construction of the particular section.⁴⁹ In *Singh v. State of Bihar*,⁵⁰ the Supreme Court of India questioned the constitutional validity of IPC section 124A as applied to freedom of speech and expression. After a comprehensive review of sedition jurisprudence and the implications of sedition law on the freedoms guaranteed under Article 19 of the Constitution, the Supreme Court of India confirmed the *Niharendu* interpretation of section 124A, and held that it was not ultra vires the Constitution. The court held that:

[A]ny acts within the meaning of [section] 124A which have the effect of subverting the Government by bringing that Government into contempt or hatred, or creating disaffection against it, would be within the penal statute because the feeling of disloyalty to the Government established by law or enmity to it imports the idea or tendency to public disorder by the use of actual violence or incitement to violence.⁵¹

Further, the court took note of the three explanations to section 124A and said:

In other words, disloyalty to Government established by law is not the same thing as commenting in strong terms upon the measures or acts of Government, or its agencies, so as to ameliorate the condition of the people or to secure the cancellation or alteration of those acts or measures by lawful means, that is to say, without exciting those feelings of enmity and disloyalty which imply excitement to public disorder or the use of violence.⁵²

The court also observed that strong criticism of public measures would be within reasonable limits and would be consistent with the constitutionally guaranteed freedom of speech and expression.⁵³ Thus, the court helped shape the law on sedition in India by holding that criticism against actions of the Government, however harsh they may be, will not invite the attention of section 124A, unless also accompanied by incitement of public disorder or violence.

IV. LEGAL FRAMEWORK OF ANTI-TERRORISM LAWS IN INDIA AND THEIR IMPLICATIONS FOR HUMAN RIGHTS

Clearly, terrorism is a threat to national security; thus, laws formulated to combat terrorism would also come under the purview of protecting the security of the State. It is a right and duty of every State to take all steps within its means to

48. GAUR, *supra* note 32, at 641 n.7 (citing *Narayan*, A.I.R. 1947 P.C. 82).

49. *Id.* at 641.

50. SHUKLA, *supra* note 20, at 122 n.44 (citing *Singh*, A.I.R. 1962 S.C. 955).

51. GAUR, *supra* note 32, at 642.

52. *Id.*

53. *Id.* at 642-43.

protect its people and institutions from acts of terror. Nevertheless, it is necessary to examine what constitutes terrorism. There are many definitions of "terrorism" in both literature and law.⁵⁴ One of them is as follows: "[T]errorism is narrowly defined as the explicit and deliberate (as opposed to collateral) destruction or threat of destruction of non-military, non-governmental personnel in the course of political or other forms of warfare."⁵⁵ Terrorism is generally directed at innocent, non-combatant individuals.⁵⁶

In India, a number of factors have created a need for stringent national security laws. Mr. K.P.S. Gill, Former Director General of Police of the State of Punjab in India, has argued that: "[N]ational security legislation is not just a definition of crimes or new patterns of criminal conduct and the prescription of penalties. It relates to the entire system, institutional structures and processes that are required to prevent and [penalize] such crimes, to preserve order, and secure the sphere of governance."⁵⁷ On the urgent need for anti-terrorism laws in India, Gill has observed that "a comprehensive set of counter-terrorism laws, as well as laws to combat [organized] crime must be drafted and given a permanent place in our statute books."⁵⁸ However, this argument rests on particular state perceptions of threat, which are in turn primarily based upon law enforcement strategies, and does not consider the causes of terrorism or related threats. It is narrow in its approach because it focuses on only creating institutional and law enforcement apparatuses in order to tackle terrorism and other national security concerns.

The main focus of the above argument is that: (1) the existing legal framework is insufficient; and (2) more laws and more powers in these laws are necessary for law enforcement officials to effectively combat terrorism and other offenses relating to national security. It is ironic that there are consistent calls for more laws to protect Indian national security, even though there is already a plethora of laws in India addressing protection of national security, including general crime prevention legislation.⁵⁹ Domestic and international human rights non-governmental organizations (NGOs) and useful interventions by the Supreme

54. For an extensive discussion of the question as to what constitutes terrorism, see Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 U.C.L.A. J. INT'L L. & FOREIGN AFF. 89 (2001).

55. Alberto R. Coll, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 AM. SOC'Y INT'L L. PROC. 297, 297-98 (1987).

56. *Id.*

57. K.P.S. Gill, *The Imperatives of National Security Legislation in India*, at <http://www.india-seminar.com/2002/512/512%20k.p.s.%20gill.htm> (last visited Aug. 30, 2004).

58. *Id.*

59. Examples of existing laws relevant to national security in India as referred to by the NHRC in its opinion are the Indian Penal Code of 1860; the Arms Act of 1959; the Explosives Act; the Explosive Substances Act; the Armed Forces (Special) Powers Act of 1958; the Unlawful Activities (Prevention) Act of 1967; and the Suppression of Unlawful Activities against the Safety of Civil Aviation Act of 1982. THAKUR, *supra* note 8, at 258. Additionally, the Union of India enacted four at least four Preventive Detention Acts currently in force: the National Security Act of 1980; the Prevention of Black Marketing and Maintenance of Supplies Act of 1980; the Prevention of Narcotic Drugs and Psychotropic Substances Act of 1988; and the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act of 1974. *Id.*

Court of India, various High Courts, the National Human Rights Commission (NHRC), and the State Human Rights Commissions have documented human rights abuses committed by law enforcement officials.⁶⁰ The human rights violations committed by the state and its institutions have been brought to the forefront by both the judiciary and the NHRC. These violations were redressed by compensating the victims of crime and abuse, and in certain cases, by pursuing disciplinary actions against errant officials.

However, both the central and state governments have not attempted to comprehensively address the abuse of power issue, notwithstanding the fact that abuse of power by law enforcement officials is rampant. According to the NHRC's annual reports, deaths in police custody increased from 136 in 1996 to 188 in 1997, and from 188 in 1997 to 193 in 1998.⁶¹ In 1999, the NHRC reported that 183 people died while in police custody.⁶² From April to August 2002, 79 people died in police custody, while 580 died in judicial custody.⁶³ Even the news of these deaths has not persuaded the Indian government to pause and evaluate the need for another draconian law meant to combat terrorism; this lack of evaluation is particularly surprising because the new law's predecessor was notorious for its human rights violations.⁶⁴ The Government of India attempted to introduce the Prevention of Terrorism Bill as drafted by the Law Commission of India even after

60. Fali S. Nariman, *Why I Voted against POTA*, HINDU, Mar. 24, 2002, available at <http://www.hinduonnet.com/thehindu/2002/03/24/stories/2002032402140800.htm> (last visited May 2, 2005).

61. 1996-1997 N'TAL HUM. RIGHTS COMM'N ANN. REP. § 3.24, available at http://nhrc.nic.in/ar96_97.htm (last visited May 2, 2005); 1997-1998 N'TAL HUM. RIGHTS COMM'N ANN. REP. § 3.8, available at http://nhrc.nic.in/ar97_98.htm (last visited May 2, 2005).

62. 1998-1999 N'TAL HUM. RIGHTS COMM'N ANN. REP. § 3.17, available at http://www.nhrc.nic.in/ar98_99.htm (last visited May 2, 2005).

63. 2000-2001 N'TAL HUM. RIGHTS COMM'N ANN. REP. § 4.27, available at <http://www.nhrc.nic.in/documents/AR01-02e.pdf> (last visited May 2, 2005). For the Supreme Court of India's assessment of torture practice in India, see Justice A. S. Anand's opinion in *Basu v. State of West Bengal*, (1997) 1 S.C.C. 416:

However, in spite of the constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, growing incidence of torture and deaths in police custody had been a disturbing factor. Experience shows that [the] worst violations of human rights take place during the course of investigation, when the police with a view to secure evidence or confession often resorts to third degree methods including torture and adopts techniques of screening arrest by either not recording the arrest or describing the deprivation of liberty merely as a prolonged interrogation. A reading of the morning newspapers, almost everyday carrying reports of dehumanising torture, assault, rape and death in custody of police or other governmental agencies is indeed depressing. The increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the creditability of the Rule of Law and the administration of criminal justice system. The community rightly feels perturbed. Society's cry for justice becomes louder.

Basu, 1997 1 S.C.C. 416.

64. Before the Union of India passed the Prevention of Terrorism Act of 2002 (POTA), the Terrorist and Disruptive Activities (Prevention) Act of 1987 (TADA) was in force; because it was not renewed, TADA lapsed in May 1995. Nariman, *supra* note 60. Out of the 74,000 persons detained under TADA between 1984 and 1994, only 1,000 were ultimately convicted. *Id.*

the NHRC stated: “[T]here was no need for enactment of the Prevention of Terrorism Bill [of] 2000 or similar law and that the existing laws were sufficient to deal with any eventuality, including terrorism.”⁶⁵ The NHRC further observed: “[T]he real need is to strengthen the machinery for implementation and enforcement of the existing laws and further for this purpose, the working of the criminal justice system requires to be strengthened.”⁶⁶ This author fully agrees with the NHRC’s opinion of POTA. New and more stringent laws cannot remedy the weaknesses of implementing existing laws. The greater the discretion provided law enforcement officials, the higher the chances their discretion will be abused.

Before the Indian government passed the POTA, anti-terrorism legislation known as the Terrorist and Disruptive Activities (Prevention) Act of 1987 (TADA), existed in Indian statute books.⁶⁷ An evaluation of TADA demonstrates how the Indian executive can misuse stringent anti-terrorism laws. This misuse is the case notwithstanding the fact that India has the constitutional safeguards necessary to protect human rights as well as an independent judiciary, an independent and forthright media—which, in India, is by and large politically neutral—and a vibrant civil society. The problem with TADA, like other national security laws, is that it gave exceptional powers to law enforcement officials, which subsequently resulted in widespread torture, arbitrary detention, and harassment of mostly innocent citizens.⁶⁸ In fact, TADA became a tool for Indian politicians to settle political scores against people considered to be dissenters or members of groups that practiced different political ideologies. The South Asia Human Rights Documentation Centre (SAHRDC) has commented that: “[T]he Government of India invoked TADA’s special powers to target and [terrorize] minorities, political opponents, union leaders, and other disempowered groups; laws like TADA, as a consequence, undermine confidence in public security and the rule of law.”⁶⁹

SAHRDC’s above critique was shared by the Supreme Court of India in one of the most important decisions concerning TADA, where Justice Pandian warned: “If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”⁷⁰ In *Kartar Singh’s* case, the Supreme Court examined TADA’s provisions and its conformity with constitutional safeguards.⁷¹ Even though the Supreme Court upheld the constitutional validity of the Act, it struck down some provisions and imposed additional safeguards necessary to ensure that the fundamental rights provisions of the Constitution were duly protected. However, the United Nations Human Rights

65. SAHRDC, *supra* note 16, at 13.

66. *Id.* at 13 n.4.

67. The Terrorist and Disruptive Activities (Prevention) Act, 1987, no. 28 (India), available at <http://www.satp.org/satporgtp/countries/india/document/actandordinances/Tada.htm> (last visited May 2, 2005); see also SAHRDC, *supra* note 16, at 13.

68. SAHRDC, *supra* note 16, at 31-32. For further reading, see C. Raj Kumar, *State Torture in India: Strategies for Resistance and Reparation*, 5 AUSTL. J. ASIAN L. 160 (2003).

69. SAHRDC, *supra* note 16, at 32.

70. *Id.* at 34 n.22 (citing *Singh v State of Punjab*, (1994) 3 S.C.C. 569, 719-20).

71. *Id.*

Committee (UNHRC) still found the safeguards provided under TADA insufficient, notwithstanding the Supreme Court judgment.⁷² The UNHRC welcomed the demise of TADA in 1995, while giving its final comments on India's submission, and observed that legislation like TADA is inconsistent with international human rights law.

The Supreme Court of India had accepted three petitions challenging the constitutionality of the Prevention of Terrorism Act (POTA).⁷³ The Peoples' Union for Civil Liberties (PUCL) and journalist and Member of Parliament, Mr. Kuldip Nayar, jointly filed these petitions. The petitioners' main argument in this case was that POTA lacked legislative competence and violated Articles 14, 19, 20, 21 and 22 of the Indian Constitution.⁷⁴ The petitioners argued that POTA fell, in its pith and substance, under Entry 1 of List-II (the States' List); that is, POTA falls under "Public Order," upon which only the state governments, but not the central government, is competent to legislate.⁷⁵ The petition also alleged that the Supreme Court's decision in the *Singh* case was in error because it concluded that Parliament was competent to enact TADA.⁷⁶ The Supreme Court of India in December 2003 upheld the constitutional validity of POTA and observed that, "terrorism is affecting the security and sovereignty of the nation. It is not State-specific but trans-national".⁷⁷ Discussing the competence of the law-making bodies in India, the court while upholding this legislation held that Parliament and not the state legislature are competent to enact such a law to counter terrorism. The court further held that, "[i]t is a matter of policy. Once legislation is passed, the Government has an obligation to exercise all available options to prevent terrorism within the bounds of the Constitution."⁷⁸ In an editorial published in one of India's leading national dailies, it was noted that:

While upholding the constitutional validity of the Prevention of Terrorism Act (POTA), the Supreme Court has sanitized what is easily the most contentious and loosely worded Section in this controversial piece of legislation. In doing so, the Court has tempered the disappointment that might have arisen out of its disinclination to review the provisions of this draconian law in a more comprehensive manner. It has been clear for some time now that Section 21 of POTA, which deals with offences relating to the support given to terrorist organisations, is cast in a manner that virtually invites gross abuse. On a plain reading, the Section makes no distinction between mere expressions of

72. *Concluding Observations of the United Nations Human Rights Committee: India*, U.N. International Covenant on Civil and Political Rights, 60th Sess., U.N. Doc. CCPR/C/79/Add.81 (Aug. 4, 1997).

73. V. Venkatesan, *POTA under Challenge*, FRONTLINE, Feb. 1, 2003, available at <http://www.flonnet.com/fl2003/stories/20030214004102600.htm> (last visited May 2, 2005).

74. *Id.*

75. *Singh*, (1994) 3 S.C.C. 569, 627-36.

76. *Id.* at 635.

77. *Supreme Court Upholds POTA, Vaiko May Get Some Relief*, THE HINDU, Dec. 17, 2003, available at <http://www.thehindu.com/2003/12/17/stories/2003121704620100.htm> (last visited May 2, 2005).

78. *Id.*

sympathy or verbal support for terrorist organisations and acting with the intent of inviting support for them or their activities. . . . The Supreme Court's task was to consider the constitutionality of this extraordinary legislation and not, as it observed, to examine whether the country really needs it. And here lies the rub. The Court's upholding of POTA does nothing to detract from the argument that—for reasons moral, political and commonsensical—POTA must go.”⁷⁹

The court has imposed certain additional safeguards on the executive in the enforcement of POTA and, in particular, that section 21 of POTA will be applied only in cases where there is a criminal intention to further or encourage terrorist activity and not mere expressions of sympathy or verbal support for terrorist organizations. But this author has not been persuaded by the court's observations that the Parliament had explored the possibility of employing the existing laws to tackle terrorism and came to a decision that they were not capable of effectively dealing with the menace. Further, the court noted that Parliament had enacted POTA after taking all aspects into account, but there are no sufficient facts to back up this observation.

It is interesting to note that the opinion of the National Human Rights Commission, and indeed the wider public opinion reflected in the civil society and in the opinions expressed by the NGOs in India, was clearly against the passing of POTA. While the POTA passed the test of constitutional validity as the Supreme Court of India upheld it, it could not pass the test of democratic legitimacy in a true sense. The new government that came to power in May 2004 promulgated an ordinance, The Prevention of Terrorism (Repeal) Ordinance, 2004 to repeal POTA. However, the repeal of POTA provides only a limited degree of comfort that draconian legislation like POTA, at the end of the day cannot exist when it has in the first place not gathered sufficient support of the people. Positive reactions to the repeal of POTA by the new government was seriously overshadowed by the fact that there have been provisions in the Unlawful Activities (Prevention) Act, 1967 Ordinance 2004 (UAPA), serving as amendments to the existing criminal law legislation, the effect of which is to retain some of the draconian provisions of POTA.⁸⁰ These developments once again underline the fragility of the delicate balance that is needed in protecting human rights and preserving national security. The fact that national security laws have come into the statute books in India in a different guise has reinforced the need for constant vigilance against their abuse. The courts, the human rights commissions, the media, and civil society need to be conscious of the fact that anti-terrorism legislation has been abused by the law enforcement machinery in India in the past. The exercise of these powers under the UAPA should also be put under human rights scrutiny.

79. *POTA Reinterpreted*, THE HINDU, Dec. 18, 2003, available at <http://www.thehindu.com/2003/12/18/stories/2003121800901000.htm> (last visited May 2, 2005).

80. Rajinder Sachar, *Prevention of Terrorism Act (POTA) Repeal Ordinance – Myth and Reality*, in *Human Rights in South Asia (specific focus India)*, South Asia Citizens Web (SACW), Oct. 7, 2004, <http://www.sacw.net/hrights/RSachar07102004.html> (last visited May 2, 2005).

V. HUMAN RIGHTS CONSEQUENCES OF EMERGENCY PROVISIONS UNDER THE INDIAN CONSTITUTION⁸¹

In Chapter XVII, Articles 352 through 360,⁸² the Constitution of India outlines the emergency powers vested in the Indian executive. These articles grant specific powers under different types of emergency situations. In numerous cases, the Supreme Court of India has discussed the impact of the Constitution's emergency provisions on fundamental rights. In *Tarsikka v. State of Punjab*, the court held that despite the issuance of a Proclamation of Emergency and Presidential Order, a citizen could not be deprived of his right to move the appropriate forum for a writ of habeas corpus on the ground that the detention was ordered with mala fide intention.⁸³ The question of the writ's suspension during an Article 352 emergency period came up before the Supreme Court of India in *Jabalpur v Shukla*.⁸⁴ In 1975, the President, on the Prime Minister's advice, declared Emergency under Article 352 on the ground that internal disturbances threatened the security of India. The President issued an order under Article 359 of the Indian Constitution, which in turn suspended Articles 21, 22, and 14.⁸⁵ Further, Parliament amended the Maintenance of Internal Security Act of 1971 (MISA)⁸⁶ and granted the government the extraordinary power to detain a person without trial. The legal issue was whether the writ of habeas corpus under Article 226 could be issued to release a detained person on the ground that his detention was inconsistent with the provisions of MISA or was made with mala fide intention.⁸⁷

The Supreme Court held that the Presidential Order precluded standing for any writ petition under Article 226 before a High Court for habeas corpus relief, for any other writ or motion to enforce any right of personal liberty, and for any

81. For an excellent article on the issue of human rights protection in India during emergencies, see Fali S. Nariman, *Protection of Human Rights During Emergencies*, INT'L COMM'N JURISTS REV., Dec. 1996.

82. As drafted, Article 352 enabled the President to make a declaration of grave emergency when the security of India or any part thereof was threatened "by war or external aggression or internal disturbance." INDIA CONSTIT. pt. XVIII, art. 352. Such declaration of emergency brought in its wake an automatic suspension of Article 19—the rights to freedom of speech and the press, of forming association, of movement, of property, of trade, business and profession—in Article 358. *Id.* pt. XVIII, art. 358. The President was also empowered after declaring an emergency to suspend the right to move Court for enforcement of any other Fundamental right in the Fundamental Rights Chapter. Venkatesan, *supra* note 73.

83. *Tarsikka v. State of Punjab*, (1964) 4 S.C.R. 932, 941.

84. *Shukla*, (1976) 1 S.C.R. 172, 174.

85. INDIA CONSTIT. pt. XVIII, art. 359. Part III of the Indian Constitution contemplates fundamental rights. *Id.* pt. III. Specifically, Article 14 contemplates equality before the law, *Id.* pt. III, art. 14; Article 21 protects life and personal liberty, *Id.* pt. III, art. 21; and Article 22 protects against arrest and detention, *Id.* pt. III, art. 22. The Indian Constitution is available at <http://www.constitution.org/cons/India/p18352.html> (last visited May 2, 2005).

86. The MISA is no longer in the Indian statute books. In Mid-1977, after the Janata Party came to power, it took more than a year to repeal MISA and delete it from the Ninth Schedule of the Constitution of India. SAHRDC, *supra* note 16, at 103. However, as soon as the Congress Party came to power in the Centre in 1980, it passed the National Security Act of 1980. *Id.*

87. SHUKLA, *supra* note 20, at 854.

individual detained under the Act.⁸⁸ The court gave constitutional legitimacy to suspending the writ of habeas corpus during an emergency period based on national security concerns. Singh has observed that Justice H.R. Khanna's lone dissent brought the "rule of law" into focus as an underlying philosophy of the Constitution, independent of Articles 21 and 359 and the judiciary's role in upholding it.⁸⁹ Justice Khanna's dissent took the view that even in the absence of Article 21, the State has no power to deprive a person of his life and liberty without the authority of law.⁹⁰ According to him, this principle is the essential postulate and basic assumption of the rule of law. The rule of law originated from this concept and was intended to be the standard in balancing individual liberty and public order; in his view, the independent judiciary was supposed to ensure this concept.⁹¹

The Supreme Court of India's decision in the *Shukla* case was entirely overruled by the Forty-fourth Amendment of the Constitution and other judicial decisions, and is no longer the law.⁹² The present law on this issue is that the enforcement of Articles 20 and 21 cannot be suspended in any situation, and the court has further held that Article 21 binds the executive as well as the legislature.⁹³ This result effectively accepts Justice Khanna's dissent in the *Shukla* case, where he held that suspending enforcement of Article 21 relieves the legislature of Article 21's constraints but not the executive—which can never deprive a person of his life or liberty without the authority of law.⁹⁴ These developments further reinforce the argument that it is not wise to entirely trust the legislature, executive, or even the judiciary to protect the people's rights. Protection of human rights during emergency situations, albeit a settled issue in India, illustrates the problems the citizenry confronts in the process of enforcing these rights. Significantly, the Government of India has attempted to strengthen national security legislation through "anti-terrorism" laws, even during non-emergency situations.

VI. BALANCING HUMAN RIGHTS AND NATIONAL SECURITY AGAINST PREVENTIVE DETENTION LAWS IN INDIA

Clauses four through seven of Article 22 of the Constitution of India provide for certain safeguards in connection with the use of preventive detention laws. The term "preventive detention" has not been defined under Indian law, but the expression originated in the language used by English Law Lords when delineating the nature of detention under Regulation 14-B, the [Defense] of Realm Act of

88. SAHRDC, *supra* note 16, at 103.

89. SHUKLA, *supra* note 20, at 854.

90. Gopal Subramaniam, *Emergency Powers under the Indian Constitution*, in KIRPAL, *supra* note 13, at 134, 141-42.

91. *Id.*

92. SHUKLA, *supra* note 20, at 855.

93. *Id.*

94. *Shukla*, (1976) 1 S.C.R. 172, 246; see also SHUKLA, *supra* note 20, at 855; *Gandhi v. Union of India*, (1978) 2 S.C.R. 621.

1914, which was passed after the First World War.⁹⁵ To quote Lord Finlay in *The King v. Halliday*: "The measure is not punitive[,] but precautionary."⁹⁶ The objective of such laws is to take precautions so that suspected persons will not commit an offense. Obviously, the executive determines: (1) the justification for the detention; (2) the circumstances under which the suspicion arises; and (3) the reasonable and probable causes of the impending act. The Constitution legalized preventive detention because the Constitution's framers had foreseen that "there may arise occasions in the life of the nation when the need to prevent citizens from acting in ways which unlawfully subvert or disrupt the bases of an established order may outweigh the claims of personal liberty."⁹⁷

However, codifying preventive detention laws within the Constitution has continuously raised serious human rights dilemmas. Preventive detention was always justified on grounds of national security. The Constituent Assembly of India formulated provisions to allow for passage of preventive detention laws as an integral part of the Constitution.⁹⁸ Entry 9 of List I and Entry 3 of List III, in conjunction with Article 246, conferred this power on Parliament and State Legislatures. Deemed a necessary evil, the basic purpose in conferring the power to pass such legislation was to protect the country's national security. However, this power conferral was more than a half-century ago and significant developments which seriously question the legal and human rights validity of these provisions have occurred in international human rights law. The Indian legislature included preventive detention provisions in all acts intended to protect national security. Besides the National Security Act of 1980 (NSA),⁹⁹ the other central legislations providing for preventive detention are: (1) the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act of 1974;¹⁰⁰ (2) the Prevention of Black-Marketing and Maintenance of Supplies of Essential Commodities Act of 1980;¹⁰¹ (3) the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act of 1988;¹⁰² and (4) the Terrorist and Disruptive Activities (Prevention) Act of 1987, which lapsed in May 1995.¹⁰³

95. SHUKLA, *supra* note 20, at 186.

96. 1917 A.C. 260, 269 (Finlay, L.C.). *Halliday* was appealed from the King's Bench, 1 K.B. 738 (1916), to the Court of Appeal, Civil Division.

97. *Rajbhar v. State of West Bengal*, (1975) 3 S.C.R. 63, 70; see also SHUKLA, *supra* note 20, at 187 n.32.

98. SAHRDC, *supra* note 16, at 100.

99. The National Security Act, 1980, no. 65 (India), available at <http://164.100.10.12/cgi/nph-bwcgi/BASIS/indweb/all/secretr/SDW?M=1&W=actid='198065'> (last visited May 2, 2005).

100. The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, no. 52 (India), available at <http://www.geocities.com/indiancustoms/act/cofefposa.htm> (last visited May 2, 2005).

101. The Prevention of Black-Marketing and Maintenance of Supplies of Essential Commodities Act, 1980, no. 7 (India), available at <http://ahara.kar.nic.in/blackecact.htm> (last visited May 2, 2005).

102. The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, no. 46 (India), available at http://www.unodc.org/unodc/en/legal_library/in/legal_library_1989-10-20_1989-9.html (last visited May 2, 2005).

103. The Terrorist and Disruptive Activities (Prevention) Act, 1987, no. 28 (India) available at <http://www.satp.org/satporgtp/countries/india/document/actandordinances/Tada.htm> (last visited May

The legislature enacted NSA to prevent individuals from acting against the interests of the state, including acts that threaten the “security of India,” or the “security of the State Government,” or are “prejudicial to the maintenance of public order.”¹⁰⁴ The NSA has minimal procedural safeguards and it allows the government to detain any individual if the State thinks the detention will prevent the person from committing acts prejudicial to the order and security of India.¹⁰⁵ The law allows detention of individuals in order to prevent acts threatening “public order” and “national security.” However, neither the Constitution nor the NSA defines these words, and there is zero guidance as to what actions would constitute a threat to public order or national security in any given case.¹⁰⁶ In *Lohia v State of Bihar*, the Supreme Court tried to distinguish between the concepts “security of State,” “public order,” and “law and order.”¹⁰⁷ Justice Hidayathullah held that only the most severe acts would warrant use of preventive detention:

One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State.¹⁰⁸

Roy v. Union of India challenged the NSA’s constitutionality, but the Supreme Court held that the Act did not violate the Constitution.¹⁰⁹ Nonetheless, the court insisted that the extraordinary power of preventive detention be narrowly construed.¹¹⁰ These cases clearly demonstrate the fact that although Indian courts are unwilling to declare preventive detention laws unconstitutional, they are attempting to ensure that appropriate restrictions are imposed on the use of such laws. Arguably, “preventive detention” as defined in these laws is “inconsistent with well-settled international human rights standards.”¹¹¹ The Preamble to the Constitution of India manifests the framers’ basic objective of building a new socio-economic order where every person is guaranteed social, economic and political justice, equality of status, and opportunity.¹¹² This basic objective

2, 2005); see also Nariman, *supra* note 60.

104. The National Security Act, 1980, no. 65, § 3 (India), available at <http://164.100.10.12/cgi/nph-bwgcgi/BASIS/indweb/all/secret/SDW?M=1&W=actid=198065> (last visited May 2, 2005).

105. SAHRDC, *supra* note 16, at 103-04.

106. Derek P. Jinks, *The Anatomy of an Institutionalised Emergency: Preventive Detention and Personal Liberty in India*, 22 MICH. J. OF INT’L L. 311, 330 (2001).

107. *Lohia v. State of Bihar*, (1966) 1 S.C.R. 709.

108. *Id.* at 746.

109. *Roy v. Union of India*, (1982) 2 S.C.R. 272.

110. *Id.* at 275.

111. SAHRDC, *supra* note 16, at 100.

112. Specifically, the Preamble reads:

We, the people of India, having solemnly resolved to constitute India into a sovereign socialist secular democratic republic and to secure to all its citizens: Justice, social economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity; and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation; In Our Constituent Assembly, this twenty-sixth day of November, 1949, do Hereby Adopt,

mandates that every State institution, including the Executive, Legislature and Judiciary, work together harmoniously in order to realize the objectives enshrined in the Fundamental Rights and the Directive Principles of State Policy.¹¹³

The judiciary played a central role in strengthening the human rights framework by interpreting constitutional provisions. The Constitution assigns the task of enforcing Fundamental Rights to the Supreme and High Courts; the right to move the Supreme Court for enforcement of Fundamental Rights has been elevated to the status of a Fundamental Right under Article 32 of the Constitution.¹¹⁴ From 1979 to 1980, local authorities in Bhagalpur, an Indian town in the Bihar state, blinded thirty-three detainees in order to coerce their confessions.¹¹⁵ A newspaper journalist wrote a commentary exposing this incident, and a lawyer sent the article to the Supreme Court of India. Justice P.N. Bhagwati, who received the article, treated it as a petition by the sender,¹¹⁶ and the Supreme Court obtained what later came to be known as "epistolary jurisdiction"¹¹⁷ over this case. The attorney-petitioner sought to enforce the due process guarantees of the Constitution of India.¹¹⁸ Remarkably, over the course of the next few years, the Supreme Court of India ordered the State of Bihar to provide medical treatment for the detainees and pensions for the detainees' families; in subsequent hearings, the court monitored the victims' rehabilitation.¹¹⁹ This highly innovative grant of

Enact and Give to Ourselves this Constitution.

INDIA CONSTIT. pmb. See also SHUKLA, *supra* note 20.

113. N.R. Madhava Menon, *Public Interest Litigation: A Major Breakthrough in the Delivery of Social Justice*, 9 J. BAR COUNCIL INDIA 150 (1982).

114. Chief Justice A.S. Anand, *Public Interest Litigation as Aid to Protection of Human Rights*, M.C. Bhandari Memorial Lecture (2001), in (2001) 7 S.C.C. (Jour) 1, available at <http://www.ebc-india.com/lawyer/articles/2001v7a1.htm> (last visited May 2, 2005).

115. AMNESTY INT'L, INDIA: TORTURE, RAPE AND DEATHS IN CUSTODY 50 (1992).

116. *Khatri v. State of Bihar*, (1981) 1 S.C.C. 623 ("*Khatri I*"). *Khatri I* and its companion cases, *Khatri v. State of Bihar*, (1981) 2 S.C.R. 408 ("*Khatri II*"), and *Khatri v. State of Bihar*, (1981) 1 S.C.C. 635 ("*Khatri III*"), are collectively known as the *Bhagalpur Blinding Cases*.

117. See generally UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* (2002) ("decipher[ing] the future of social action assembled, by convention, under a portal named human rights . . . [and] . . . problematic[ing] the very notion of human rights, the standard narratives of their origin, the ensemble of ideologies animating their modes of production, and the wayward circumstances of their enunciation"). Epistolary jurisdiction is a procedure by "which judges [take] the initiative to respond proactively to grievances brought to their attention by third parties, letters, or newspaper accounts." Marc Galanter & Jayanth K. Krishnan, "*Bread for the Poor*": *Access to Justice and the Rights of the Needy in India*, 55 HASTINGS L.J. 789, 795 (2004).

118. The guarantees are found in: (1) Article 14 of the Indian Constitution: "Equality before law. - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India," INDIA CONSTIT. pt. III, art. 14; and (2) Article 21: "Protection of life and personal liberty. - "No person shall be deprived of his life or personal liberty except according to procedure established by law," *Id.* pt. III, art. 21. The basis for jurisdiction was Article 32(1): "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed." *Id.* pt. III, art. 32(1). The Supreme Court's power is broad; for example, Article 32(2) reads: "The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part." *Id.* pt. III, art. 32(2).

119. *Khatri I*, (1981) 1 S.C.C. 623; *Khatri II*, (1981) 2 S.C.R. 408; *Khatri III*, (1981) 1 S.C.C. 635;

bystander standing¹²⁰ in the *Bhagalpur Blinding* case occurred in the same year that several bar associations successfully sought expansion of the standing doctrine in the highly politicized *Judges' Transfer* case.¹²¹

VII. PRESERVING NATIONAL SECURITY THROUGH ANTI-TERRORISM LAWS WHILE PROMOTING HUMAN RIGHTS - INTERNATIONAL DEVELOPMENTS

Several countries face the problem of balancing the two seemingly competing interests of preserving national security and protecting human rights. At the United Nations and international human rights NGOs, there are serious global efforts to articulate the human rights concerns underlying states' processes in formulating national security policies. The U.N. Secretary General submitted a report entitled *Protecting Human Rights and Fundamental Freedoms while Countering Terrorism* to the Commission on Human Rights during its fifty-ninth session pursuant to the December 18, 2002 U.N. General Assembly Resolution 57/219.¹²² Resolution 57/219 emphatically asserted the importance of protecting human rights, even while pursuing all efforts to counter terrorism in order to preserve national security. The resolution affirmed that: "States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law . . ." ¹²³

During the sixty-second meeting of the Commission on Human Rights on April 25, 2003, it adopted resolution 2003/68, which reiterated that the elimination of the practice and threat of terrorism should go hand-in-hand with the protection of human rights and fundamental freedoms.¹²⁴ Human Rights Watch, the New York-based NGO, submitted a well-argued briefing paper on this subject for the fifty-ninth session of the U.N. Commission on Human Rights.¹²⁵ The paper commented that it was important for national and international counter-terrorism initiatives to be within the human rights framework and observed: "Protecting human rights during counter-terrorist efforts is more than a legal requirement. It is integral to the success of the campaign against terrorism itself. Terrorism will not be defeated solely by military or security means... Combating terrorism requires a reaffirmation of human rights values, not their rejection."¹²⁶ The paper also noted

Khatri v. State of Bihar, (1981) 2 S.C.C. 493 ("*Khatri IV*").

120. For a comprehensive discussion of standing and bystander standing, see William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988).

121. *Gupta v. Union of India*, A.I.R. 1982 S.C. 149 (popularly known as the *Judges' Transfer* case).

122. *Protecting Human Rights and Fundamental Freedoms while Countering Terrorism: Report of the Secretary-General on Implementation of General Assembly Resolution 57/219*, U.N. ESCOR, 59th Sess., Agenda Item 11, U.N. Doc. E/CN.4/2003/120 (2003).

123. *Id.* ¶ 2.

124. *Protection of Human Rights and Fundamental Freedoms while Countering Terrorism: Commission on Human Rights Resolution 2003/68*, U.N. ESCOR, 62nd mtg., U.N. Doc. E/CN.4/2003/RES/2003/68 (2003). This resolution was adopted without a vote. *Id.*

125. HUMAN RIGHTS WATCH, IN THE NAME OF COUNTER-TERRORISM: HUMAN RIGHTS ABUSES WORLDWIDE (2003), available at <http://www.hrw.org/un/chr59/counter-terrorism-bck.pdf> (last visited May 2, 2005).

126. *Id.* at 3.

the U.N. Secretary General's remarks during a debate of the Security Council's Counter Terrorism Committee in October 2002 when he observed: "[T]o pursue security at the expense of human rights is short-sighted, self-contradictory, and, in the long run, self-defeating."¹²⁷

The numerous institutional mechanisms in the U.N. system have all recognized the possible human rights violations that can occur as a result of state efforts to combat terrorism. In fact, even before September 11, 2001, the UNHRC formulated parameters upon which states responding to a national security threat could justifiably derogate from their legal commitment to protect human rights.¹²⁸ In this regard, the UNHRC observed that, even in armed conflicts, states must show that the situation threatens the life of the nation and that the measures derogating from the international covenants are necessary, legitimate, and "limited to the extent strictly required by the exigencies of the situation."¹²⁹ The proportionality requirement, in the UNHRC's opinion, "relates to the duration, geographical coverage and materials scope of the state emergency and any measures of derogation."¹³⁰

In its November 2001 statement, the Committee against Torture (CAT) reminded state parties that most of their legal obligations were non-derogable, and asked the States to ensure that their counter-terrorism responses conformed to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹³¹ The Committee on Elimination of Racial Discrimination (CERD) also adopted a statement on racial discrimination and measures to combat terrorism.¹³² The CERD postulated that counter-terrorism measures should be in accordance with international human rights and humanitarian law; further, the prohibition of racial discrimination was a peremptory norm from which no derogation was allowed.¹³³ Thus, the policy formulation and statement adoption by U.N. human rights mechanisms and the efforts of human rights NGOs undertaken both before and after September 11, 2001 demonstrate the need for a balance between the interest in protecting a state's national security from terrorist threats and the importance in protecting an individual's human rights and civil liberties.

VIII. THE WAY FORWARD – TRANSITION FROM PROTECTING NATIONAL SECURITY TO PROMOTING HUMAN SECURITY

The State must be protected from both national and international threats. National security strategies are increasingly designed with the belief that passing stringent laws that grant the executive, including law enforcement authorities, punishment and greater discretionary powers will help thwart terrorists and other

127. *Id.*

128. *Id.* at 5-6.

129. Human Rights Committee, States of Emergency (article 4): CCPR General Comment 29. (General Comments), U.N. Doc. CCPR/C/21/Rev.1/Add.11, 31/08/2001, ¶ 4.

130. *Id.*

131. HUMAN RIGHTS WATCH, *supra* note 125, at 6.

132. *Statement on Racial Discrimination and Measures to Combat Terrorism*, U.N. Committee on the Elimination of Racial Discrimination, 61st Sess., U.N. Doc. A/57/18 (Chapter XI)(C) (2002).

133. *Id.* ¶¶ 3-4.

internal and external threats. India has passed anti-terrorism laws with the intention of preserving the security of the State from its own people and external threats. It is ironic that the Constitution of India, which is similar to many other countries' constitutions, along with the Bill of Rights provisions in several other constitutions and other national and international human rights laws, were intended to protect the citizens from the State. However, the contemporary worldwide efforts that focus on protecting the State from its citizens are indeed a significant development, especially when these developments affect peoples' human rights and civil liberties.

There is little controversy regarding the need for States to pass laws protecting national security, and it is accepted that doing so is a legitimate and important public policy and governance mechanism vested in the State. Nevertheless, states should be careful to ensure that these laws are not abused or ineffectively implemented, as in India. The abuse of national security laws and their resulting ineffectiveness threatens the rule of law and attacks the polity's democratic foundation upon which the State exists. It is in this context that States facing national and international terrorist threats and other problems must seriously examine their entire government system, particularly the impact of its domestic and foreign policies on its own people and people of other states. This consideration has recently implicated a broader notion of human security.

In its Final Report, the Commission on Human Security (CHS) observed that human security supplements state security while enhancing human rights and strengthening human development.¹³⁴ The purpose of human security is to protect people against a broad range of individual and community threats. It also empowers the citizenry to act for themselves.¹³⁵ The goal is to bring the human security elements to the forefront while moving state security, which is based on laws protecting national security, toward an expansion of rights and development of social and economic policies promoting human security.¹³⁶ The CHS defines human security as:

[Aiming] to protect the vital core of all human lives in ways that enhance human freedoms and human fulfillment. Human security means protecting fundamental freedoms—freedoms that are the essence of life. It means protecting people from critical (severe) and pervasive (widespread) threats and situations. It means using processes that build on people's strengths and aspirations. It means creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity.¹³⁷

134. COMMISSION ON HUMAN SECURITY, HUMAN SECURITY NOW 2-17 (2003), available at <http://www.humansecurity-chs.org/finalreport/chapter1.pdf> (last visited May 2, 2005).

135. *Id.*

136. See Sadako Ogata, From State Security to Human Security, Brown University Ogden Lecture (May 16, 2002), available at http://www.humansecurity-chs.org/activities/outreach/ogata_ogden.pdf (last visited May 2, 2005).

137. COMMISSION ON HUMAN SECURITY, *supra* note 134, at 4.

The CHS's definition of human security is useful to comprehend the need to shift the paradigm towards promotion of security in order to empower people and protect them from all threats. Thus, under the human security paradigm, the national security needs of a State will not be based solely on conventional notions of internal and external sources of terrorist threats. It is necessary to understand that preserving peace, stability, and order in an increasingly inter-dependent world has to be based upon states recognizing that both national and international government processes need to be based upon upholding human rights.¹³⁸ The national security policy, whether by state legislation, rule, regulation, or policy, needs to be accompanied by an inclusive and equitable set of development policies that foster greater understanding of, and respect for, the dignity and equality of the world's people.¹³⁹

The U.N. Secretary General had recently submitted a report to the U.N. General Assembly entitled: *In Larger Freedom: Towards Development, Security and Human Rights for All*, in which he has emphasized the need for understanding security from a holistic perspective and most importantly to appreciate freedom from human rights and development perspectives. He has argued that: "Not only are development, security and human rights all imperative; they also reinforce each other. This relationship has only been strengthened in our era of rapid technological advances, increasing economic interdependence, globalization and dramatic geopolitical change". Discussing the relationship of terrorism to other problems that affect humanity, he has observed that, "While poverty and denial of human rights may not be said to "cause" civil war, terrorism or organized crime, they all greatly increase the risk of instability and violence. Similarly, war and atrocities are far from the only reasons that countries are trapped in poverty, but they undoubtedly set back development. Again, catastrophic terrorism on one side of the globe, for example an attack against a major financial centre in a rich country, could affect the development prospects of millions on the other by causing a major economic downturn and plunging millions into poverty. And countries which are well governed and respect the human rights of their citizens are better placed to avoid the horrors of conflict and to overcome obstacles to development."¹⁴⁰

The report further underlines that, "Accordingly, we will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights. Unless all these causes are advanced, none will succeed. In this new millennium, the work of the United Nations must move our world closer to the day when all people have the freedom to choose the kind of lives they would like to live, the access to the resources that would make those choices meaningful and the security to ensure that

138. *Id.* at 5.

139. See e.g., C. Raj Kumar, *War on Terror a Threat to Academic Freedom*, S. CHINA MORNING POST, Nov. 22, 2002, at 16 (arguing that because greater understanding can be achieved through academic discourse, attempts to thwart such discourse under the pretext of pursuing terrorists or protecting national security should not be trusted).

140. *Larger Freedom*, *supra* note 15.

they can be enjoyed in peace”.¹⁴¹ The report is indeed a positive development in providing a thematic framework for understanding security in a much wider context. However, it is not clear how the report can provide a meaningful challenge to the existing discourse on the “war on terror”, which seems to undermine human rights and, at times, international law for achieving certain national security objectives. In this regard, it is useful to refer to the earlier observations of the U.N. Secretary General, Mr. Kofi Annan, that the Iraq war is “illegal” and is not in conformity with the U.N. Charter. This has raised some very important questions relating to the future of international law and the United Nations. Even though Mr. Kofi Annan has been critical of the Iraq war from the very beginning, the fact that he chose to call it “illegal” is truly significant.¹⁴² This only reinforces the view held by many independent international lawyers and non-governmental organisations that the Iraq war violated the U.N. Charter. It may be remembered that even before the illegal intervention that took place in Iraq, the global public opinion was against the war in Iraq. The protests were very strong even in countries like the United States and United Kingdom, which were key proponents of the war. The transnational civil society, in the form of human rights NGOs in different parts of the world, had made representations to the governments in the United States and the United Kingdom not to go ahead with the war.

Human rights in all its ramifications have acquired social and political legitimacy in the contemporary world. While nations have made efforts to protect and promote human rights, there have been numerous challenges that confront the enforcement of human rights. Terrorism is probably the greatest danger to human rights one can think of, but unwise reactions and responses to it can itself lead to human rights violations. Mahatma Gandhi said, “*Any eye for an eye only end up making the whole world blind.*”¹⁴³ Terrorism violates human rights and attacks the peace and stability of nations and its people. Responses to terrorism and possible human rights violations that occur due to the implementation of anti-terrorism laws demonstrate the perpetual conflict between public protection (national security) and individual rights. What should be done when enforcement of human rights appear to clash with the enforcement of national security measures is the key issue facing the post-September 11 world. There is a need for states recognizing that international law and domestic constitutional law are necessary to ensure that the fight against terrorism does not violate human rights so that national security can be achieved without violating civil liberties. There is a delicate balance between ensuring national security and protecting human rights, which should be preserved.

IX. THE INDIAN EXPERIENCE IN PROTECTING HUMAN RIGHTS

The debates regarding the necessity of strengthening national security legislation and formulating laws relating to anti-terrorism is of contemporary significance in many parts of the world. There are some important Indian lessons

141. *Id.*

142. *Iraq War Illegal, Says Annan*, BBC News UK Edition, Sept. 16, 2004, available at http://news.bbc.co.uk/1/hi/world/middle_east/3661134.stm (last visited May 2, 2005).

143. This quote is attributed to Mahatma Gandhi and is available at <http://www.popartuk.com/general/gandhi-gn0097-poster.asp> (last visited May 2, 2005).

that would help other countries currently in the process of passing anti-terrorism laws. It may be useful to bear in mind the Indian experience while structuring the debates concerning national security legislation. The Indian government was successful in passing anti-terrorism legislation, and the statute books still list traditional offenses, like sedition and treason, relating to national security. However, the laws relating to traditional national security matters have been thoroughly interpreted. The anti-terrorism laws have taken more prominence in India because they applied to national security offenses. There are four important factors to serve as checks and balances in the potential abuse of anti-terrorism laws. However, the effectiveness of these checks and balances has been seriously questioned recently.

A. Human Rights Protected under the Constitution & Other Legislation.

The Indian Constitutional framework, as examined earlier, protects the people's rights and guarantees constitutional remedies for fundamental rights violations. In other jurisdictions, it would be useful to have a similar constitutional or human rights framework as the basis for ensuring that the people's rights are protected. Further, any national security legislation or other anti-terrorism legislation ultimately passed must satisfy constitutional and human rights scrutiny under the country's respective laws. These laws should also be consonant with the particular nation's international human rights law and treaty obligations.

B. Role of the Judiciary in Protecting and Promoting Human Rights.

The Indian judiciary has been an independent and vibrant forum for human rights discourse in Indian society. While the enforcement of human rights and the effectiveness of judicial institutions in India are far from perfect, the courts'—particularly the Supreme Court of India and various state High Courts—scrutiny of human rights under the Indian Constitution has been fairly effective. That is, the executive must ensure that the particular national security legislation and its enforcement mechanisms are constitutionally valid. This requirement has always been an important check on executive power; instead of possibly abusing the laws, the executive must ensure that the laws satisfy constitutional protection of human rights, as well as the human rights guarantees developed by Indian courts' jurisprudence. The judiciary in various nations must play a similar role in questioning the constitutional validity of the proposed national security legislation and ensuring that law enforcement does not result in any violations of constitutional rights or ICCPR obligations. These very valuable mechanisms place useful checks on the exercise of executive power with regard to national security and various offenses thereof.

*C. Role of the National Human Rights Commission in Protecting Civil Liberties.*¹⁴⁴

The Protection of Human Rights Act of 1993 established India's National Human Rights Commission (NHRC). The NHRC is empowered to receive complaints broadly relating to any human rights violations.¹⁴⁵ Over the years, the NHRC has developed a good reputation both nationally and internationally with regard to intervention on human rights matters. NHRC's opinions on numerous matters are inconsistent with the Indian government's position. The NHRC also engages state governments on various human rights and law reform matters, the most important of which is ensuring that legislation conforms to the human rights obligations in the Indian Constitution and other laws. The NHRC's moral legitimacy is based on its members' impartiality and integrity, and not on its institutional independence or its guaranteed powers in the Protection of Human Rights Act of 1993.

While it is difficult to evaluate whether the NHRC has successfully reduced human rights violations, it has certainly attempted to develop a human rights culture in India. In addition, there have been serious attempts to create accountability mechanisms for human rights violations in different levels of the Indian government to help ensure that human rights remain the central focus of Indian political and government discourse. The NHRC remains a forum in which people can seek justice for human rights violations. The United Nations has encouraged the formation of national human rights institutions worldwide to promote institutionalization of human rights. However, it is important to recognize that the NHRCs should function in an independent and autonomous manner for them to be truly effective institutions in the protection and promotion of human rights.

X. CONCLUSION

Before and after September 11, 2001, national security and counter-terrorism concerns drove, and are still driving, nation states to introduce draconian laws and amendments curtailing or restricting citizens' fundamental rights in democracies. India, which has been afflicted with secessionist violence and terrorism in several of its states, passed POTA. This article defends the Indian NHRC's position that POTA was unnecessary. It proposes that the problem with anti-terrorist laws in India is not that they are lacking or less in number, but rather, that they are ineffectively implemented. Most forms of terrorist threats in India are effectively contemplated by already existing laws. Yet, just as in the case of the U.S. Patriot Acts,¹⁴⁶ the Indian executive and Parliament enacted POTA without adequately

144. For a critical perspective on NHRCs, see C. Raj Kumar, *National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights*, 19 AM. U. INT'L L. REV. 259 (2003).

145. For further reading, see C. Raj Kumar, *Role and Contribution of National Human Rights Commissions in Promoting National and International Human Rights Norms in the National Context*, 47 IND. J. PUB. ADMIN. 222 (2001).

146. For further reading on the Patriot Act, see Shirin Sinnar, *Patriotic or Unconstitutional? The Mandatory Detention of Aliens Under The USA Patriot Act*, 55 STAN. L. REV. 1419 (2003).

assessing its necessity and potential impact on constitutional safeguards and other international human rights standards. Later developments, like the Supreme Court of India upholding the constitutional validity of POTA, while providing certain checks and balances in the enforcement of POTA and the new UPA government that came to power in India in May 2004 repealing POTA, have not changed the context of the debate. In fact the need for protecting human rights while preserving national security needs to be underlined as the government of India has unfortunately passed an ordinance amending certain provisions of an existing criminal legislation in the form of Unlawful Activities (Prevention) Act (UAPA). Some of the provisions of this legislation are as draconian as the provisions of the POTA and hence, the human rights resistance in India needs to continue. This article gives a broad historical overview of the Indian legislation limiting human rights and highlights problematic aspects.

A balance between countering terrorism and promoting human rights is attainable as long as the "reasonable" constitutional provision is developed and Indian law evolves in conjunction with the efforts of the inter-governmental and non-governmental organizations in protecting civil liberties while combating terrorism.¹⁴⁷ The best human rights defense regarding national security laws is the prevention of abuse and erosion by improper and unwarranted government action. The test of any historical theory is its capability to interpret past events in ways that illuminate the present and help us see the path ahead. For example, in India, the executive abused both TADA and POTA, which were in many ways the UAPA's earlier equivalents. The voices that cry for vengeance urge us to renounce our commitments to protect human rights at all times, including the times when we are beset with terrorism and national insecurity of the gravest kind. It is during these challenging times that we need to rise to the occasion and not forget the past.

We need to underline the fact that through valuing human rights and promoting civil liberties, deliberative democracies like India and other countries create a place for meaningful dialogue, debate, and dissent within civil and political society. Terrorism defies all established norms of dignity, decency, and decorum—mandatory for peaceful existence in any society. As a society, we must condemn terrorism of all kinds and should never accept it as a method of achieving any goals, however noble they may be. At the same time, as Benjamin Cardozo said: "We are what we believe we are";¹⁴⁸ thus, we should be careful to fashion our response to terrorism—after all, posterity will judge our responses. We must take care not to deviate from the universal values of human rights and fundamental freedoms in our zeal to preserve national security.

147. See C. Raj Kumar, *War on Terror Must Start with Respect for Human Rights*, S. CHINA MORNING POST, Oct. 4, 2002, at 16.

148. This quote is attributed to Benjamin Nathan Cardozo and is available at http://www.happyotter.com/hoquote/Quote_1Page12.html (last visited May 2, 2005).