

Impact of Anti-Terrorism Laws on the enjoyment of Human Rights in India

Executive Summary

India's human rights record will be considered by the Human Rights Council under the UPR process in March 2008.

India that claims to be the largest democracy in the world has in place a number of laws to deal with terrorism that have been used to proscribe the enjoyment of human rights. Some of these laws flow from India's colonial past. Others have been devised, in particular, from the 1980s, when India faced political discontent in the Punjab. This report presents the reality of the anti-terrorism laws and how these have led to abuse by governments and parties in power at the centre. India's human rights record cannot be discussed without a clear assessment of the deplorable impact of these draconian laws on people.

According to one political analyst these laws are regurgitated versions of one another¹. The Indian government seems to periodically revisit its legitimized mechanism of oppression in order to repeal one law and fortify it with yet another law, more draconian and heinous than its predecessor, all meant to quell "terrorism" and "threats to national unity"... with abysmal results.

The US State Department Report 2006 adds that Government officials have used special antiterrorism legislation to justify the excessive use of force while combating terrorism and active, violent insurgencies in Jammu and Kashmir and several northeastern states. Security force officials who committed human rights abuses generally enjoyed de facto impunity, although there were investigations into individual abuse cases as well as punishment of some perpetrators by the court system. Corruption was endemic in the government and police forces, and the government made little attempt to combat the problem, except for a few instances highlighted by the media.

Human Rights Council, in its consideration of India's anti terrorism laws must give clear guidance to the GOI to abolish its discriminatory and draconian laws and their equally draconian implementation in the country if it wishes to be considered among civilized nations and countries.

Anti-Terrorism Laws in India and their Implementation: India has had and continues to have a veritable spectrum of draconian laws that are supposedly aimed at stopping terrorism but are used effectively by state agents to abuse human rights. These laws include the Maintenance of Internal Security Act (MISA), Terrorist and Disruptive Activities (Prevention) Act (TADA), Prevention of Terrorism Act (POTA), the Disturbed Areas Act (DAA), and the Armed Forces Special Powers Act (AFSPA), the

¹ Sriram Ananthanarayanan, writing for SAMAR (South Asian Magazine for Action and Reflection, Issue 18- a web based magazine)

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Assam Preventive Detention Act, National Security Act, Essential Services Maintenance Act and the Armed Forces (Jammu and Kashmir) Special Powers Act (1990). While these laws are implemented all over India, they have the most deplorable effects on the human rights of minorities, vulnerable communities in areas where people have opposed these laws.

According to one political analyst these laws are regurgitated versions of one another². The Indian government seems to periodically revisit its legitimized mechanism of oppression in order to repeal one law and fortify it with yet another law, more draconian and heinous than its predecessor, all meant to quell "terrorism" and "threats to national unity"... with abysmal results. First there was the Preventive Detention Act passed by Parliament in 1950 in the bloody aftermath of Independence and Partition to curb activity that was perceived as a threat to national unity. This Act expired in 1969 and was quickly replaced by MISA in 1971, primarily used to curb the Naxalbari uprisings, which in effect meant persecuting and killing leftists, trade unionists and poor peasants. In 1958 the AFSPA was passed and remains un-repealed and very much in use in Kashmir and the Northeast. The AFSPA and MISA were soon followed by TADA in 1985, and despite both MISA and TADA being repealed, thousands of innocents have been detained under TADA and continue to await trial, facing malnutrition, torture and, many a time, custodial killings. After MISA and TADA came and went, 2002 signalled the arrival of the one act that could match the AFSPA in its lethality, and that was POTA" *and now the amended 1967 Unlawful Activities Prevention Act.*

These laws have helped extrajudicial killings of persons in custody, disappearances, torture and rape by police and security forces. There is a lack of accountability permeating the government and security forces, creating an atmosphere in which human rights violations often went unpunished. US State Department 2006 report on India states that although the country has numerous laws protecting human rights, enforcement was lax and convictions were rare. Poor prison conditions, lengthy pretrial detention without charge, and prolonged detentions while undergoing trial remained significant problems.

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India's antiterrorism laws raise significant human rights concerns. The Committee on International Human Rights of the Association of the Bar of New York carried out a study on security laws in India. It noted that while periodic efforts have been made to limit the use of these laws the overall effect since independence has been to maintain the pattern established by the British, which

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blurred the lines between these categories by periodically seeking to extend the extraordinary powers initially exercised during periods of emergency into non emergency periods. The net result of this pattern has been a tendency to institutionalize or routinize the use of extraordinary powers during non emergency periods. The study adds that Indian antiterrorism laws raise the following concerns:

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

Antiterrorism laws have been instituted by India and implemented in an extremely harsh manner. According to the Association of the Bar of New York's Committee on International Human Rights, enforcement of these laws has varied widely from state to state, facilitating arbitrary and selective enforcement on the basis of religion, caste, and tribal status; violations of protected speech and associational activities; prosecution of ordinary crimes as terrorism related offenses; and severe police misconduct and abuse, including torture, in most states, prolonged detention without charge or trial appears to have been the norm, rather than the limited exception.

Terrorist and Disruptive Activities (Prevention) Act 1985 (TADA): TADA which was in effect until 1995, and whose remnants continue to remain in place, defined a series of new, substantive terrorism related offenses of general applicability, which could be prosecuted by state governments throughout the country without any central government designation that the area in which the offence took place was "terrorist affected".

The procedural rules under TADA departed from the ordinary rules and criminal procedure in several respects. TADA provided that confessions to police officers could be admitted as substantive evidence. Considerable evidence suggests that TADA's sweeping power enabled pervasive detention and a variety of the abuses by the police, including extortion and torture especially in the Punjab. Police often committed abuses. Gujarat is one such case in point.

Prevention of Terrorism Act (POTA) of 2002 & Unlawful Activities Prevention Act (UAPA): TADA was replaced by the Prevention of Terrorism Act (POTA) of 2002. POTA had a number of controversial elements of TADA. In 2004 the government repealed the Prevention of Terrorism Act (POTA) and replaced it with the strengthened 1967 Unlawful Activities Prevention Act (UAPA).

POTA contained a sunset feature, which gave the central POTA review committee one year to review all existing POTA cases. The government established three central review committees to review the cases registered under POTA. The committees were required to review all cases registered under POTA by September 2005, but at year's end, numerous cases had not been reviewed and at least 400

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persons remained under detention, according to AI. The sunset provisions also allowed the government to make new arrests under POTA, despite its repeal, if the arrests were tied to an existing POTA case. The government could issue a new indictment on a case opened five years earlier under POTA, even if the government was never associated with the case. It can also extend the one-year limit for reviews; however, at year's end, it had not done so. The law provided that the review committees constituted by the government shall review all cases registered under POTA by September 20, 2005. In June 2005 the POTA review committee reported that there were 11,384 persons wrongfully charged under POTA who instead should be charged under the regular law. UAPA and provisions of POTA continue to be used to hold people in jail for extended periods prior to the filing of formal charges. Human rights groups reported that the revised UAPA contained important improvements over the POTA. For example, it does not allow coerced confessions to be admitted as evidence in court.

In February 2005 the National Human Rights Commission announced comprehensive guidelines regarding arrest, which included establishing reasonable proof of guilt; avoiding detention if bail is an option; protecting the dignity of those arrested; not allowing public display or parading, and allowing access to a lawyer during interrogation. Police often ignored these guidelines.

According to US State Department, Police routinely resorted to arbitrary and incommunicado detention, denied detainees access to lawyers and medical attention, and used torture or ill treatment to extract confessions. Human rights experts claimed that discrimination and custodial torture of those too poor to afford legal assistance was common. During the 2004 year the media reported that lower-caste individuals were more likely to be illegally detained than others. Human rights activists maintained that the government increasingly avoided prosecuting security officers involved in illegal conduct, by providing financial compensation to victims' families in lieu of punishment. In some instances victims or their families who distrusted the military judicial system petitioned to have their cases transferred to a civil court. The NHRC has no jurisdiction over any courts, including military courts.

Through December 2005, 217 persons were arrested and remained in custody in Gujarat under POTA in connection with the 2003 killing of former Gujarat chief minister Haren Pandya, the 2003 Akshardham temple bombing, the 2002 Godhra train arson case, and the 2002 Tiffin bomb case.

Concerns have been raised that extraordinary laws such as TADA and POTA have been used to target political opponents, human rights defenders, religious minorities, Dalits (so-called "untouchables") and other "lower caste" individuals, tribal communities, the landless, and other poor and disadvantaged people. POTA was used by the government, writes Human Rights Watch, "against political opponents, religious minorities, Dalits [or ex-untouchables], tribals and even children".

Yet, POTA's formal repeal was largely cosmetic. The repressive and arbitrary powers POTA granted to state and security forces in the name of fighting terrorism remain intact. UAPA does not even include POTA's minimal safeguards concerning interception of telephone calls and electronic transmission.

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National Security Act (NSA): NSA permits police to detain persons considered security risks anywhere in the country--except for Jammu and Kashmir--without charge or trial for as long as one year on loosely defined security reasons. State governments must confirm the detention order, which is then reviewed by an advisory board of three high court judges within seven weeks of the arrest. NSA detainees were permitted visits by family members and lawyers, and must be informed of the grounds of their detention within five days (10 to 15 days in exceptional circumstances). On January 12, Lucknow authorities arrested a doctor from the King George Medical University in Uttar Pradesh, and charged him with arson and violence. After the state's chief minister, Mulayam Singh Yadav, warned that "trouble-makers" at the university would be punished, authorities charged the doctor on January 19 under the NSA.

The PSA, which applies only in Jammu and Kashmir, permits state authorities to detain persons without charge and judicial review for up to two years. During this time, detainees do not have access to family members or legal counsel. According to the Office of Director General of Jammu and Kashmir Police, 473 persons in 2005 and 420 during the year were arrested under PSA. According to the ACHR, there were 140 foreign nationals in prisons in Jammu and Kashmir under the PSA.

Special Public Protection Act (SPPA): In March 2005, the Chhattisgarh State Government, for example, enacted the Special Public Protection Act (SPPA), which HRW deemed "a vague and overly broad law that allows detention of up to three years for unlawful activities." Human Rights Watch asserted that the law loosely defines what "unlawful activities" entails and threatens the fundamental freedoms and protections set forth in the constitution. The Public Union for Civil Liberties in India filed suit, alleging that the ordinance is "amenable to gross abuse and misuse, arbitrariness and partiality" and "can result in harsh and drastic punishment to innocent persons without hearing or remedy."

Armed Forces (Special Powers) act 1958 (AFSPA): The Armed Forces Special Powers Act (AFSPA) remains in effect in Nagaland, Manipur, Assam, and parts of Tripura, and a version of the law was in effect in Jammu and Kashmir. Forty eight years have passed since AFSPA was enforced in North-East India and sixteen years have passed since it was imposed on Jammu and Kashmir. For decades, human rights activists in India have called for a repeal of the AFSPA and expressed opposition to human rights abuses in areas where it is in force. Calls for repeal continue.

Sriram Ananthanarayanan, writing for SAMAR recalls that the wording of the AFSPA enacted by Parliament in 1958 is indeed blood curdling to even read let alone act out. The Act states that any commissioned officer, warrant officer, non-commissioned officer or person of equivalent rank in a disturbed area may fire upon or use force even to the point of causing death if he is of the opinion that it needs to be done to maintain public order. He may arrest, without a warrant, any person against whom a reasonable suspicion exists and may use the above mentioned force to effect the arrest, as well as enter and search without warrant any premises to make any such arrest if reasonable suspicion exists. Any person arrested under this Act is to be taken to the nearest police station and placed in custody without any delay. If this weren't enough, the Act gives sweeping immunity to anyone acting under it. It states verbatim "Protection to Persona acting under Act: No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act."

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Ananthanarayanan adds that the very wording of the Act itself begets heinous misuse. When one considers it in tandem with a corrupt state and police machinery, as is the case in many parts of India, the human rights violations skyrocket upwards. AFSPA's provisions enable security forces to arrest people and enter property without a warrant, and to shoot to kill even in circumstances where they are not at imminent risk. It is widely believed that the AFSPA has facilitated grave human rights abuses, including extrajudicial execution, "disappearance", rape and torture.

"There is more indiscriminate violence now than when the Act was initially introduced," says Colin Gonsalves and adds that in Kashmir, it is widely believed that some 40,000 people have died since the rise of militancy in 1989. "The civilian population want law and order but the facts that the army and paramilitary forces are used to tackle a law and order situation means that the police and the legal system are bypassed".

Under the AFSPA no one can start legal action against any member of the armed forces for alleged abuses under the AFSPA without the permission of the central government. Some action have been taken in recent years to bring those guilty of human rights violations to justice, but government approval to prosecute those accused of abuses is very rarely given. Amnesty International had remained concerned that the AFSPA has enabled many perpetrators to escape punishment.

In the case of the 32-year old young woman Thangjam Manorama who on 10 July 2004 was taken from her home by a team of Assam Rifles personnel and found raped and murdered later. The Assam Rifles removed an unspecified number of soldiers against whom a court of inquiry was ordered to probe the death. Findings from courts of inquiries of this nature are almost never made available to the public or human rights groups representing the aggrieved parties.

The law provides a person in detention the right to a prompt trial; however, due to a severe backlog, this was not the case in practice. Human rights organizations reported that 60 to 75 percent of all detainees were in jail awaiting trial, drastically contributing to overcrowding. Human rights organizations asserted that approximately 65 percent of those detained were found innocent. Due to persistent inefficiencies in the judicial system, there were numerous instances in which detainees spent more time in jail under pretrial detention than they would have if found guilty and sentenced to the longest possible term.

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