

ARTICLES

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National Security Laws in India: The Unraveling of Constitutional Constraints

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INTRODUCTION

Since India gained independence in 1947, it has had in force “security laws” avowedly concerned not with commonplace crime, but with acts that ostensibly pose deeper, more enduring threats to ordinary life. Terrorism, organized crime, separatism, and public disorder are amongst the harms these laws seek to prevent and punish. In addition to national security laws, many Indian states¹ have state laws simultaneously regulating these harms. These “security laws” operate alongside India’s ordinary substantive and procedural criminal codes. Governments advocating security laws argue that ordinary criminal law cannot address certain dangers, and therefore these particularly serious dangers require a tailored response. This bespoke response is also a heightened response, giving the law and order machinery more power than ordinary criminal law allows.

In this Article, I examine significant security legislation in India and trace the ways in which it enhances the executive’s powers. I argue that the usual constitutional limits on the executive—electoral democracy, legislative scrutiny, judicial review, and constitutional rights—have failed to restrain the executive’s power and actions under security laws. I demonstrate that the Indian legislature and judiciary have endorsed executive powers in principle, and failed to regulate them in practice. Repeated endorsement and regulatory failure have, in turn, eroded constitutional constraints—in particular, constitutional rights—in significant ways. Finally, I consider what measures might feasibly make the executive more accountable and moderate its dominance.

While this inquiry is rooted in the particularities of the Indian context, it is relevant beyond India as well, particularly in a century that began with the United Nations Security Council exhorting Member States to pass counter terrorist legislation.² Very few countries in the developing world have been constitutional democracies for as long as

¹ India is a federal country, divided into 29 states and 7 union territories. Union territories are smaller geographical and administrative units than states and are governed by the national government exclusively, while each state has its own government. The Constitution of India lays down the Central Government’s areas of responsibility (subject areas in List I of the Seventh Schedule or the Central List), State Governments’ areas of responsibility (subject areas in List II of the Seventh Schedule or the State List) as well as areas or issues over which both levels of government have shared responsibility (subject areas in List III of the Seventh Schedule or the Concurrent List).

² See S.C. Res. 1373, (Sept. 28, 2001).

India has.³ Across South Asia, legislation and jurisprudence tend to draw heavily upon Indian precedent. The Indian experience with security laws might help us to understand the vulnerabilities of other post colonial, developing democracies, and guard against these vulnerabilities when crafting counter terrorist legislation.

In Part I of this Article, I trace the chronology of major security legislation since India gained independence in 1947. In Part II of the Article, I highlight features of these laws that depart from ordinary criminal law and grant extraordinary power to the executive. Then, I discuss in Part III the practical consequences of security laws. In Part IV, I reflect upon the legislature's role in passing security laws and, in Part V, upon the Indian Supreme Court's response when the constitutionality of security laws has been challenged. Finally, in Part VI, I consider directions for reform.

I

SECURITY LEGISLATION SINCE INDEPENDENCE: EXPANSION AND ENTRENCHMENT

The Indian Penal Code (IPC)⁴ criminalizes the standard array of violent crimes and property crimes. Those who kill or injure another person commit long established crimes, as do those who harm public or private property, for which they can be investigated, charged, and prosecuted. In addition, the IPC includes security and public order crimes,⁵ such as sedition,⁶ the offense of “promoting enmity between different groups” based upon identity, and “doing acts prejudicial to the maintenance of harmony.”⁷ Intentionally committing any of these forbidden acts is a criminal offense. It is also an offense under Indian law to help another person to commit them, encourage another person

³ India gained independence from British rule in August 15, 1947, adopted a national constitution on November 26, 1949, which came into force on January 26, 1950, and held its first national elections in 1951.

⁴ See PEN. CODE (1860) (India).

⁵ PEN. CODE §§ 121–130, 141–160 (1860).

⁶ PEN. CODE § 124A (1860).

⁷ PEN. CODE § 153A (1860).

to commit them,⁸ attempt unsuccessfully to commit them,⁹ or plan to commit them.¹⁰

Past and present security laws have operated alongside the IPC, which defines substantive offenses, and the Code of Criminal Procedure (CrPC), which lays down rules of criminal procedure. Below, I discuss how security laws were developed and expanded since India became independent in 1947.

A. Preventive Detention

The Preventive Detention Act¹¹ (PDA) was passed in 1950, soon after the Constitution of India came into force. This law authorized the government to detain individuals without charge for up to a year. Initially, the PDA was passed as a temporary, twelve-month measure to deal with the challenges of governing after the devastating violence and displacement that accompanied the partition of India.¹² When introducing this initial, twelve-month version of the PDA, the Minister of Home Affairs told Parliament that permanent preventive detention powers “required closer study” before more lasting legislation was passed.¹³ However, the Act was renewed repeatedly for almost two decades before finally being allowed to expire in 1969.

In 1971, two years after the Preventive Detention Act lapsed, the Maintenance of Internal Security Act¹⁴ (MISA) was passed, and it

⁸ PEN. CODE §§ 107–120 (1860).

⁹ The Indian Penal Code does not define what it means, in general, to attempt an offense. However, common law principles on liability for an attempt apply in India, and are reflected in the IPC. PEN. CODE § 511 (1860) lays down the general rule for punishment for attempting an imprisonable offense. In addition, the IPC creates some offenses of attempting to commit a particular offense, such as the offense of attempted murder and the controversial offense of attempted suicide. *See* PEN. CODE §§ 307–309 (1860). The IPC places some attempts on the same footing as the completed offense, and specifies the same sanction for the attempt as for the full offense. *See, e.g.*, PEN. CODE §§ 124–126 (1860).

¹⁰ PEN. CODE §§ 120A–120B (1860).

¹¹ The Preventive Detention Act, 1950, No. 4, Acts of Parliament, 1950 (India) [hereinafter PDA].

¹² Pradyumna K. Tripathi, *Preventive Detention: the Indian Experience*, 9 AM. J. COMP. L. 219, 222 (1960); Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 COLUM. J. ASIAN L. 93, 135 (2006).

¹³ A.G. Noorani, *Preventive Detention in India*, ECONOMIC AND POLITICAL WKLY., Oct. 5, 1991, at 2608 (quoting Vallabhbbhai Patel); Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 MICH. J. INT’L L. 311, 341–342 (2001). *See also* Kalhan, *supra* note 11.

¹⁴ The Maintenance of Internal Security Act, 1971, No. 26, Acts of Parliament, 1971 (India) [hereinafter MISA].

resurrected most of the preventive detention powers under the PDA. These powers were widened in 1975, when the government declared a state of national emergency, and procedural protections originally built into MISA were removed.¹⁵ Prime Minister Indira Gandhi's government used MISA aggressively against political opponents, trade unions, and civil society groups who challenged the government. In 1977, the government lifted its declaration of emergency and called national elections. The incumbent Prime Minister and her party were voted out of power, and the new national government, some of whose members had personally been preventively detained, repealed the now notorious MISA.

However, when proposing to repeal MISA, the Janata Party led government also proposed incorporating preventive detention powers into ordinary law.¹⁶ While this did not happen, two years later, the National Security Act of 1980¹⁷ (NSA) created preventive detention powers akin to those in the Preventive Detention Act and the Maintenance of Internal Security Act. The NSA continues to be in force.

B. Domestic Deployment of the Military

In addition to preventive detention laws, legislation granting the executive greater power to use force than is allowed under the CrPC was also passed fairly soon after independence. In September 1958, the Indian Parliament passed the Armed Forces (Special Powers) Act¹⁸ (AFSPA), which enhanced the domestic, civilian powers of the armed forces. AFSPA empowered the military to act alongside the police in designated "disturbed areas," while giving soldiers greater power to use

¹⁵ A state of emergency was formally declared on 25 June 1975 by the Indian President, Fakhruddin Ali Ahmed under Article 352 of the Constitution of India, on the request of the then Prime Minister Indira Gandhi. This period, described in India simply as "the Emergency," lasted from June 25, 1975, to March 21, 1977. During this time, constitutional rights were suspended, judicial review restricted, and the media heavily censored. For a historical account of "the Emergency," see RAMACHANDRA GUHA, *INDIA AFTER GANDHI: THE HISTORY OF THE WORLD'S LARGEST DEMOCRACY* at 488–521 (Picador 2007). For an anthropological account focusing on the experiences of ordinary citizens affected by forced sterilization and slum clearance programs, see EMMA TARLO, *UNSETTLING MEMORIES: NARRATIVES OF THE EMERGENCY IN DELHI* (Hurst & Co. 2003).

¹⁶ Kalhan, *supra* note 12, at 192.

¹⁷ The National Security Act, 1980, No. 65, Acts of Parliament, 1980 (India) [hereinafter NSA].

¹⁸ The Armed Forces (Assam and Manipur) Special Powers, 1958, No. 28, Acts of Parliament, 1958 (India) [hereinafter AFSPA].

force against civilians than the police were allowed to use. Originally, the national government enacted the AFSPA in response to separatist movements in Nagaland,¹⁹ a state in northeast India. By 1972, it was extended to all seven states in India's northeast.²⁰ From 1983 to 1997, the national government applied an iteration of the law to the state of Punjab,²¹ and in 1990, a similar iteration to the northern state of Jammu & Kashmir, where it continues to be in force.²²

C. Proscribing Organizations and Creating “Status Offenses”

In 1967, the national government supplemented its preventive detention powers when a new law, the Unlawful Activities (Prevention) Act²³ (UAPA) gave it the power to declare organizations “unlawful” and then limit their activities and scrutinize their members to a significant degree. Just as individuals could be designated as potentially dangerous and detained without a trial, organizations too could now be designated suspect, without the state having to prove those suspicions to a criminal standard of proof in a court of law. Once the government categorized an organization as unlawful, this designation was the foundation for criminalizing membership or support of the organization.

D. Anti-terrorism Laws

1. TADA

The Indian parliament passed the Terrorist Affected Areas (Special Courts) Act²⁴ in 1984, which allowed the national government to designate parts of the country as “terrorist affected” and to set up

¹⁹ HUMAN RIGHTS WATCH, GETTING AWAY WITH MURDER: 50 YEARS OF THE ARMED FORCES (SPECIAL POWERS) ACT (2008) at 13.

²⁰ These include the states of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, and Tripura.

²¹ The Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983, No. 34, Acts of Parliament, 1983 (India). This state-specific iteration has the same provisions as AFSPA 1958.

²² The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, No. 21, Acts of Parliament, 1990 (India). This state-specific iteration has the same provisions as AFSPA 1958.

²³ The Unlawful Activities (Prevention) Act, 1967, No. 37, Acts of Parliament, 1967 (India) [hereinafter UAPA].

²⁴ The Terrorist Affected Areas (Special Courts) Act, 1984, No. 61, Acts of Parliament, 1984 (India).

special courts in those areas to prosecute defendants accused of being terrorists. A year later, this law was incorporated into the Terrorist and Disruptive Activities (Prevention) Act²⁵ (TADA). TADA also created new criminal offenses related to terrorist activity, enhanced procedural powers for the police, and significantly reduced procedural protections for defendants.

TADA incorporated a sunset clause—Parliament had to review and renew the Act every two years.²⁶ Evidence of human rights abuses under TADA mounted over time²⁷ and TADA was allowed to lapse when it lost the support of opposition parties in Parliament in 1995. However, as when the notorious preventive detention law, MISA, was repealed in 1977, the government of the day proposed incorporating many of TADA's provisions into ordinary criminal law.²⁸ This proposal failed,²⁹ but in the wake of terrorist attacks on the World Trade Center in New York City on September 11, 2001, the ruling National Democratic Alliance proposed a new anti-terror law.

2. POTA

Citing international obligations and cross border terrorism as reasons,³⁰ the Indian government proposed a new anti-terrorism law in

²⁵ The Terrorist and Disruptive Activities (Prevention) Act, 1987, No. 28, Acts of Parliament, 1987 (India) [hereinafter TADA].

²⁶ TADA, *supra* note 25, § 1(4).

²⁷ SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, ALTERNATE REPORT AND COMMENTARY TO THE UNITED NATION HUMAN RIGHTS COMMITTEE ON INDIA'S THIRD PERIODIC REPORT UNDER ARTICLE 40 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1997), http://www.hrdc.net/sahrdc/resources/alternate_report.htm.

²⁸ The Criminal Law (Amendment) Bill was introduced in 1995, but was allowed to lapse.

²⁹ For a critical analysis of the Criminal Law (Amendment) Bill and its effects on the rights of the defense, see SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, SUPER TADA: UNDECLARED EMERGENCY THROUGH THE BACKDOOR (South Asia Human Rights Documentation Centre. 1999), <http://hrdc.net/sahrdc/hrfeatures/HRF12.htm>.

³⁰ The Ministry of Home Affairs, in its press briefing on the Prevention of Terrorism Ordinance, speaks of “an upsurge of terrorist activities, intensification of cross-border terrorism” and says “terrorism has now acquired global dimensions and become a challenge for the entire world.” Quoted in SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, PREVENTION OF TERRORISM ORDINANCE 2001: GOVERNMENT DECIDES TO PLAY JUDGE AND JURY (South Asia Human Rights Documentation Centre. 2001), at 16. Arguments for a new law drew strength from the international climate after 9/11. The United Nations Security Council passed a resolution urging states to pass anti-terror legislation, but omitted to caution states that such measures be designed to respect international law on human rights. *See* S.C. Res. 1373 (Sept. 28, 2001).

2001, the Prevention of Terrorism Act³¹ (POTA). POTA incorporated TADA's enhanced police powers, limits on the rights of the defense, and special courts, with many of POTA's provisions reproducing verbatim the equivalent provisions in TADA³². In addition, POTA enhanced the government's power to detain individuals and forfeit the proceeds of terrorism. Further, while TADA had a two-year sunset clause, the sunset clause in POTA was three years³³.

POTA had a fractious journey through Parliament, and soon sparked controversy. The ruling alliance at the time was led by the Bharatiya Janata Party, which espouses Hindu-majoritarian political positions. In 2002, this law was used to prosecute Muslims suspected of setting alight a train carriage carrying Hindu pilgrims but was not similarly used to prosecute Hindus suspected of participating in state supported mass violence that killed 2000 people, most of them Muslim.³⁴ POTA never managed to shed its association with a partisan political agenda. During the next general elections, the main opposition parties pledged to repeal the Act. It was, in fact, repealed in September 2004, after the NDA was ousted from power on the initiative of a newly elected government formed by a coalition of political parties called the United Progressive Alliance (UPA).

3. The Amended UAPA

A few years later, the UPA government recanted its rejection of a special anti-terrorism law after multiple, brutal terrorist attacks in Mumbai on November 26, 2008. Within a month of these attacks, the UPA led national government proposed and Parliament agreed to amend the Unlawful Activities (Prevention) Act of 1967 (UAPA)³⁵.

³¹ The Prevention of Terrorism Act, 2002, No. 15, Acts of Parliament, 2002 (India) [hereinafter POTA].

³² See the following provisions dealing with defining terrorism offenses and specifying punishment for these offenses: TADA § 1(2) and POTA § 1(2); TADA § 3(1) and POTA § 3(1)(a); TADA § 3(2) and POTA § 3(2); TADA § 3(3) and POTA § 3(3); TADA § 3(5) and POTA § 3(5); TADA § 6 and POTA § 5. See also the following provisions related to the operation of special courts: TADA §§ 9-10 and POTA §§ 23-24; TADA § 12 and POTA § 26; TADA § 13 and POTA § 28. See also the substantial overlap between the following provisions related to the admissibility of confessions made in police custody during trial: TADA § 15 and POTA § 32.

³³ POTA, *supra* note 31, § 1(6).

³⁴ Nitya Ramakrishnan, *Godhra: The Verdict Analysed*, ECONOMIC AND POLITICAL WKLY., Apr. 09, 2011.

³⁵ The Unlawful Activities (Prevention) Act, 1967, No. 37, Act of Parliament, 1967 (India) was amended by the Unlawful Activities (Prevention) Amendment Act (No. 35 of

This amendment inserted into the UAPA many provisions from POTA and TADA, with some addition, alteration, and dilution.³⁶ Parliament also passed the National Investigation Agency Act,³⁷ creating a federal agency that can investigate and prosecute terror related crime across the country without permission from the governments of individual states.

E. Expansion and Entrenchment

The remit of security laws—regulating dangers deemed exceptional—suggests that there would be very few security laws that would focus on narrow dangers and apply at times when these narrowly defined dangers are acute. In fact, multiple such laws have been enacted since India became independent in 1947. The Indian state has added different types of laws to its national security armory over time, from preventive detention laws to laws authorizing domestic use of the military to anti-terrorism laws. While the *types* of laws have expanded, the *content* of laws falling within any particular category has remained quite consistent.

Amendments to the UAPA in 2008 are a recent reminder that the core content of security legislation in India has been relatively stable, despite multiple repeals, amendments, and new laws. In 1985, POTA adopted the framework for proscribing organizations in the original UAPA 1967, but redesigned it to apply specifically to “terrorist organizations.”³⁸ After TADA was repealed, most of TADA’s provisions were incorporated into POTA. The amended UAPA, in turn, incorporates many provisions of POTA, even though POTA itself has been repealed; the amended Act contains powers to regulate “unlawful” organizations as well as powers to regulate “terrorist” organizations.³⁹

2008) (India), which was passed on 31 December 2008, soon after the terrorist attacks in Mumbai on November 26, 2008.

³⁶ For a critical analysis of the 2008 amendments to the UAPA, see SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, REPEATING THE MISTAKES OF THE PAST (South Asia Human Rights Documentation Centre 2009), <http://www.hrdc.net/sahrdc/hrfeatures/HRF191.htm#ftn5>; HUMAN RIGHTS WATCH, BACK TO THE FUTURE: INDIA’S 2008 COUNTERTERRORISM LAWS (2010). For a more favorable view of the UAPA, see Chandrika M. Kelso et al., *Unlawful Activities Prevention Act-UAPA (India) & U.S.-Patriot Act (USA): A Comparative Analysis*, 5 HOMELAND SECURITY REV. 2, 121 (2011).

³⁷ National Investigation Agency Act, No. 75 of 2008, INDIA CODE (2008), §§ 11–21, <http://indiacode.nic.in> [hereinafter NIAA].

³⁸ POTA, *supra* note 31, §§ 18–22.

³⁹ UAPA, *supra* note 23, §§ 2(1)(l) and 2(1)(m) (defining a terrorist organization and a terrorist gang) and UAPA Chapter VI on terrorist organizations (Chapter VI, comprising

The trajectory of anti-terrorism legislation echoes that of preventive detention legislation. The PDA of 1950 was substantially replicated in MISA in 1971. Despite MISA's notoriety, the NSA of 1980 incorporated similar, and many identical, provisions on preventive detention.

However, while newer laws incorporate content from repealed laws, this resuscitated content has become more firmly entrenched over time as sunset clauses in earlier laws have been discarded in subsequent legislation. The Preventive Detention Act of 1950 required annual review and renewal by Parliament. The National Security Act of 1980, which remains in force, does not have a sunset clause at all. TADA acknowledged its singularity by providing that Parliament would review it every two years. POTA provided for less frequent review but retained a sunset clause nevertheless. Unlike TADA and POTA, the UAPA has no sunset clause,⁴⁰ and therefore provides a particularly secure harbor for expansive executive powers to ban and limit organizations.

II

THE EXECUTIVE'S EXTRAORDINARY NATIONAL SECURITY POWERS

Thus, we see particular mechanisms and methods, and the attendant executive powers, being relayed from older laws to newer ones. Since the content of security laws has been relatively stable, it is possible to identify particular, recurring features in these laws that enhance the executive's powers. I discuss these features below. I draw primarily upon the following laws currently in force: the Armed Forces (Special Powers) Act, the Unlawful Activities (Prevention) Act (as amended in 2008), and the National Security Act. I also draw upon preventive detention and anti-terrorism laws such as the PDA, MISA, TADA, and POTA that have now been repealed. I do not discuss in detail the provisions of all these laws but concentrate instead on characteristics I consider distinctive.

sections 35 to 40, empowers the Indian government to designate an organization as "terrorist" and include it in a schedule of terrorist organizations, prescribes a procedure to review this designation, and creates criminal offenses related to belonging to, supporting or fundraising for a terrorist organization).

⁴⁰ SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 27.

A. *Ambiguous Scope*

Indian security laws aim to preserve, *inter alia*, national security, public order, public peace, and religious harmony. Past and current laws have tended to treat the meaning of their stated bedrock goals as self-evident, and failed to demarcate the scope or limits of these goals.

The NSA, for example, allows the central and state governments to detain an individual where this is considered necessary to prevent that person “acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order.”⁴¹ The Act defines neither “State security” nor “public order,” nor which actions may be prejudicial to either. It is difficult to discern the boundaries of such a sweeping provision that potentially catches a large swath of speech and writing that criticizes the government.

In addition to being vague, the scope of offenses under anti-terrorism laws is very broad. The UAPA, when it was amended in 2004 and 2008, incorporated wide and ambiguous definitions. The amended UAPA creates the offense of “committing a terrorist act,” and includes within the ambit of “terrorist acts” using force against a public official, using force against any individual in order to pressure the government, using violent means to kill, damage to property, or to “disrupt” “any supplies or services essential to the life of the community in India or in any foreign country.”⁴² Experts advise limiting the definition of terrorism to intentionally causing death or injury with the motive of intimidating the general public or pressuring a government or international body to act in particular ways.⁴³ Contrary to this view, the UAPA chooses to include not just death and injury, but also property damage and disruption of supplies, not just within India but in other countries too. While the *actus reus* of this offense is broad, it is the *mens rea* that makes the limits of the offense difficult to fathom. Someone committing a “terrorist act” must *intend* to “threaten the unity, integrity, security or sovereignty of India” or “strike terror in people” in India or “in any foreign country.”⁴⁴ However, it is also enough if an

⁴¹ NSA, *supra* note 17, § 3(2).

⁴² UAPA, *supra* note 23, § 15.

⁴³ Kent Roach, *Defining Terrorism: The Need for a Restrained Definition*, in THE HUMAN RIGHTS OF ANTI-TERRORISM 97–127 (Nicole LaViolette & Craig Forcese eds., 2008); HUMAN RIGHTS WATCH, *supra* note 36, at 5; UN COMMISSION ON HUMAN RIGHTS, REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WHILE COUNTERING TERRORISM, MARTIN SCHEININ, E/CN.4/2006/98, Dec. 28, 2005.

⁴⁴ UAPA, *supra* note 23, § 15.

individual's actions are "likely to" have these same effects.⁴⁵ The language of the Act leaves entirely unclear whether an individual needs to know about or be reckless as to likely consequences, and could be read as creating a strict liability offense.

In a state law promulgated recently, we see a similar lack of clarity. The Chhattisgarh Special Public Security Act of 2005⁴⁶ gives the Chhattisgarh government power to ban and prosecute organizations committing "unlawful activities." Unlawful activities are not restricted to actions that are offenses under existing criminal law. They include speech or actions that, *inter alia*, "constitute a danger or menace to public order, peace and tranquility"⁴⁷ or "encourage or preach disobedience to established law and its institutions"⁴⁸ or "interferes or tends to interfere with the administration of law."⁴⁹ These provisions gratuitously use synonyms ("danger or menace") and lower the threshold that tips something into being unlawful ("interferes or *tends* to interfere [emphasis added]").

Widely drafted provisions render *potentially* criminal many types of peaceful speech and activity that are critical of the government of the day or challenge nationalist views on history and politics. This allows the executive generous latitude to decide which actions *technically* falling within the ambit of a widely drafted offense it will *actually* prosecute. Individuals subject to these laws cannot confidently calibrate how to comply with loosely defined standards. By the same token, it is difficult to challenge an executive decision as being outside the scope of the executive's statutory authority under a particular legal provision if that provision is so widely drafted that its boundaries are difficult to determine.

B. Special Security Measures in Demarcated Zones

The Armed Forces (Special Powers) Act (AFSPA) allows national and state governments to designate parts of India as "disturbed." Once an area is declared "disturbed," AFSPA authorizes the military to use force in that area far in excess of what ordinary criminal law authorizes,

⁴⁵ UAPA, *supra* note 23, § 15 (emphasis added).

⁴⁶ Chhattisgarh Special Public Security Act, 2006, No. 14, Acts of Parliament, 2006 [hereinafter CSPA].

⁴⁷ *Id.* § 2(e)(i).

⁴⁸ *Id.* § 2(e)(vi).

⁴⁹ *Id.* § 2(e)(iii).

without being invited to do so by the civil administration.⁵⁰ AFSPA also lowers the threshold for using lethal force on citizens, forgoing any requirement that force should be proportionate to the threat at hand.⁵¹ It also dispenses with limits on holding people in pretrial custody.⁵²

The declaratory mechanism first seen in AFSPA has since been included in other laws. The now repealed Terrorist Affected Areas (Special Courts) Act 1984 allowed the national government to designate parts of the country as “terrorist affected,” which triggered special criminal procedures in that area.⁵³ A state law, the Jammu & Kashmir Public Safety Act of 1978⁵⁴ similarly allows the government of the northern state of Jammu and Kashmir to designate areas where the police have enhanced powers to stop, search, use force, and preventively detain individuals.

In all these laws, current and past, the executive’s decision to designate an area as unusually dangerous or volatile is unconstrained by threshold conditions or even guiding criteria. For example, AFSPA requires only that the deciding authority be “of the opinion” that the area in question is “in such a disturbed or dangerous condition that the

⁵⁰ Section 3 of AFSPA allows the central government or the state government to declare the whole or any part of that state disturbed. Once such a declaration is in force, members of the armed forces have the power under Section 4 of AFSPA to arrest, search, use force against and seize property from persons living in the disturbed area, for the duration that the area has the official status of being disturbed. In any part of India other than an area declared “disturbed” under AFSPA, the armed forces’ role in maintaining public order is regulated by the provisions of the Code of Criminal Procedure. Section 130 of the Code allows senior civil servants within a district to ask the armed forces for assistance in controlling specific incidents of public disorder, only after civilian police efforts to control such disorder have been inadequate. However, the armed forces cannot act of their own volition—they can intervene only after specific order by the civilian administration at the district level.

⁵¹ Section 4(a) of AFSPA provides that a member of the armed forces can, after giving “such due warning as he may consider necessary . . . fire upon or otherwise use force, even to the causing of death” against any person who is contravening a law or an executive order related to public gatherings of over 5 people or carrying weapons,” if he feels such force is needed to maintain public order. By contrast, section 130 of the CrPC, which regulates armed forces intervention to maintain public order in areas that are not declared “disturbed,” requires the armed forces to use “as little force, and do as little injury to person and property, as may be consistent with dispersing the [unlawful] assembly.”

⁵² Section 5 of AFSPA requires the armed forces to hand an arrested person to the police “with the least possible delay,” but does not actually specify a limit on how long a person arrested by a soldier can be held in armed forces custody before being handed into police custody.

⁵³ Terrorist Affected Areas (Special Courts) Act, *supra* note 24, §§ 3–4.

⁵⁴ The Jammu & Kashmir Public Safety Act, No. 6 of 1978, (Jammu & Kashmir, India) [hereinafter JKPSA].

use of armed forces in aid of civil power is necessary.”⁵⁵ These spatial designations have serious consequences for individuals within the area so designated. Despite this, the decision maker is not required to publicize the reasons behind the decision, or justify it by reference to empirical conditions. The AFSPA did not even require that a declaration be time bound, but as will be discussed in Part IV below, the Indian Supreme Court read a time limit into the law.

If the Indian government declared a part of India to be in a state of emergency under Article 356 of the Constitution, it would have to specify how long the emergency will last, and Parliament would review any declaration of emergency.⁵⁶ By contrast, when an area is designated as “disturbed” under AFSPA, this need not be reviewed by central or state legislatures. Such declarations can be, and have been, renewed by the executive repeatedly, effectively persisting for years at a stretch.⁵⁷ As a result, some human rights groups have argued that laws like the AFSPA allow the Indian government to constrain rights in the way it could if it declared a constitutional emergency, while evading the constitutional checks that regulate a decision of such gravity.⁵⁸

Spatially limited laws also have the potential to reinforce or validate racial and ethnic prejudice against those who live in “disturbed” parts of the country. They can map easily on to regional or religious differences between the majority of the country where they do not apply and the areas where they do. When an area is designated as “disturbed,” this might more easily allow law enforcement authorities to perceive its residents with a broad brush, conflating the peaceful majority with the minority of people who have adopted violent means for political ends.

C. Preventive Detention Powers

The Indian Constitution empowers national and state legislatures to enact preventive detention laws—one of the few democratic Constitutions to do so.⁵⁹ Preventive detention laws can be passed not

⁵⁵ AFSPA, *supra* note 18, § 3.

⁵⁶ INDIA CONST. art. 356.

⁵⁷ AFSPA has applied to all or part of the states of Assam and Manipur since 1958.

⁵⁸ SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE [hereinafter SAHRDC], ARMED FORCES SPECIAL POWERS ACT: A STUDY IN NATIONAL SECURITY TYRANNY (1995); HUMAN RIGHTS WATCH, *supra* note 36.

⁵⁹ SAHRDC argues that the Indian Constitution is the only constitution in a democratic country to expressly authorize preventive detention. *See* SAHRDC, *supra* note 27, at 100.

only for national or state security, but also for maintaining public order or for maintaining “supplies and services essential to the community.”⁶⁰ An Indian citizen can be preventively detained not just because he is considered a threat to security or order, but also to prevent nonviolent crimes, such as hoarding supplies and fiscal crimes.⁶¹

Individuals in preventive detention are not accorded the due process rights that the Indian Constitution recognizes for individuals arrested and tried under ordinary criminal law.⁶² Instead, the Constitution grants such individuals a limited, modified set of procedural rights. Preventive detention is subject to administrative review by an advisory board.⁶³ No one can be detained for more than three months unless the advisory board authorizes longer detention.⁶⁴ The detainee must be told the grounds of detention “as soon as possible,” and be given “the earliest opportunity” to “make a representation,” i.e., to submit reasons he should not be detained.⁶⁵ However, the Constitution does not set concrete deadlines within which a detainee must be told the grounds on which he is being detained or be allowed to challenge his detention. By contrast, someone arrested under the Criminal Procedure Code must be presented before a court within 24 hours, according to Article 22 of the Constitution.⁶⁶ The government also has a large measure of discretion over what it will disclose to a detainee. Information the government considers “against the public interest” need not be disclosed.⁶⁷

Thus, the Constitution unambiguously renders legitimate detention that is not mediated by the rules of criminal procedure and evidence.

⁶⁰ INDIA CONST. List III, Entry 3.

⁶¹ A number of other national and state laws create some measure of preventive detention powers. These include, *inter alia*, the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980, the Conservation of Foreign Exchange and Prevention of Smuggling Act, 1974, the Orissa Prevention of Dangerous Activities of Communal Offenders Act, 1993; the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act 1996; the Maharashtra Control of Organised Crime Act 1999; the Andhra Pradesh Control of Organised Crime Act, 2001.

⁶² Articles 22(1) and (2) of the Constitution provide that on arrest, an individual has the right to know “as soon as may be” the grounds for arrest. He has the right to consult and be represented by a lawyer of his choosing. The police must produce an arrested individual before a judicial magistrate within twenty-four hours of his arrest. Unless the magistrate orders longer detention, an arrested individual cannot be detained for more than twenty-four hours. *See* INDIA CONST. art. 22, §§ 1–2.

⁶³ INDIA CONST. art. 22, § 4.

⁶⁴ *Id.* § 5.

⁶⁵ *Id.*

⁶⁶ INDIA CONST. art. 22, § 2.

⁶⁷ INDIA CONST. art. 22, § 6.

National and state governments have not shied away from using this constitutional leeway. The Constitution sets the floor on preventive detention powers; it does not require full due process rights for detainees, but does not prohibit such rights either. However, the NSA, like MISA and the PDA before it, grants detainees only the bare bones procedural rights listed in the Constitution. Under current preventive detention laws, detainees are not entitled to disclosure of the evidence against them, access to legal representation, or a public hearing.⁶⁸

D. “Status Offenses” and the Power to Proscribe Organizations

Traditionally, criminal law creates an offense by defining the actions that constitute the substance of the offense, and the state of mind that must accompany the act to render the actor culpable. Criminal liability rests upon the prosecution proving beyond reasonable doubt that an individual carried out the wrongful act with the necessary state of mind.⁶⁹ Indian security laws, by contrast, create several “status offenses,” where criminal liability rests upon belonging to a formal or informal group with an agenda that is deemed a threat to public order or security. The UAPA allows the government to label groups as being “terrorist organizations” or “unlawful associations.”⁷⁰ POTA, now repealed, similarly allowed the government to designate groups as “terrorist organizations.” The recent Chhattisgarh Special Public Safety Act also allows the state government to declare a group unlawful.⁷¹ The meanings of “terrorist” and “unlawful” have a wide and unclear scope under all these laws, extending, in the CSPSA as far as, *inter alia*, “encouraging . . . disobedience to established law and its institutions.”⁷² These laws create “status offenses,” such that once a group is banned, membership in and of itself constitutes a crime. In addition, a host of direct and indirect dealings with a banned group are rendered criminal. For example, under the UAPA, membership in a terrorist organization or gang that is “involved in” a terrorist act can attract life imprisonment,

⁶⁸ NSA, *supra* note 17, § 8(2), 11; JKPSA, *supra* note 54, §§ 13, 16.

⁶⁹ Indian Evidence Act, Act No. 1 of 1872 (India) §§ 101–102 and CODE CRIM. PROC. § 225–235. The standard of proof to prove a criminal offense under Indian law is beyond reasonable doubt. *See, e.g.*, State of Kerala v Bahuleyam (1986) 3 CRIM. L.J. 1579 (1581).

⁷⁰ UAPA, *supra* note 23, § 3 (which empowers the national government to declare an organization unlawful) and § 35 (which empowers the national government to designate an organization as terrorist) of the UAPA.

⁷¹ CSPSA, *supra* note 46, § 3.

⁷² CSPSA, *supra* note 46, § 2(c)(vi).

regardless of whether the individual member was involved in any way with the terrorist act.⁷³

As Roach argues, status offenses such as these muddy the distinction between intelligence and evidence.⁷⁴ Security agencies collect information about possible threats to security, and monitor suspicious individuals and groups in different ways. The quality of security intelligence is evaluated internally, but is not put to the test of cross-examination, or criminal standards of proof. When intelligence is used as conclusive grounds for rendering an individual's connection to a group criminal, the accused's right to a fair hearing is compromised.

Under the UAPA, associations are allowed administrative review of the government's decision to label and ban them. However, the government need not disclose its grounds for a ban. In addition, groups designated as "terrorist organizations" cannot present new evidence or witnesses before the review board.⁷⁵ The government need not wait for the results of administrative review; its declaration has immediate force and suspected members of terrorist organizations can be arrested and prosecuted before there is any finding on whether the government's evidence for banning the group in question was adequate.⁷⁶

E. Enhanced Powers to Investigate and Prosecute

Security laws such as the AFSPA and the UAPA enhance the state's powers of search, seizure, and arrest. At the same time, the UAPA, like TADA and POTA before it, significantly diminishes the procedural rights of the accused as compared to the Criminal Procedure Code of 1967.

If we look at powers of search, seizure, and arrest, the UAPA allows "any officer of a Designated Authority" to search any person or property, and seize any property or arrest any person, where they have "reason to believe from personal knowledge or information given by any person and taken in writing . . . or from any document" or from "any other thing" that an offense has been committed.⁷⁷ The Code of Criminal Procedure, by contrast, requires the police to have "credible

⁷³ UAPA, *supra* note 23, § 20.

⁷⁴ Kent Roach, *The Eroding Distinction Between Intelligence and Evidence*, in COUNTER-TERRORISM AND BEYOND: THE CULTURE OF LAW AND JUSTICE AFTER 9/11 48 (Andrew Lynch et al. eds., 2010).

⁷⁵ UAPA, *supra* note 23, §§ 36(4), 37.

⁷⁶ UAPA, *supra* note 23, §§ 35–36.

⁷⁷ UAPA, *supra* note 23, § 43A.

information” or “reasonable suspicion” before arresting someone without a warrant.⁷⁸ Similarly, the CrPC authorizes a search without a warrant only where a police officer has “reasonable grounds” to believe that something essential to an investigation could not be obtained in any other way without unreasonable delay.⁷⁹

Under ordinary law, an arrested person must be informed “forthwith” of the “full particulars of the [suspected] offense.”⁸⁰ Under the UAPA’s lower standards, the police only have to inform an arrested person of the grounds of arrest “as soon as may be.”⁸¹ As Human Rights Watch points out, this would permit the police to keep arrested individuals in the dark, and limit their wherewithal to respond to the suspicions against them.⁸²

A person arrested under the CrPC cannot be held in custody for more than 24 hours without being charged of an offense.⁸³ In sharp contrast, the UAPA, following POTA, allows suspects to be detained without charge for up to 180 days.⁸⁴ Thirty days out of the permissible 180 can be in police custody, where the accused would be particularly vulnerable to torture and forced confessions.⁸⁵ Courts can authorize the first ninety days of detention without any special grounds.⁸⁶ To extend detention after ninety days, the prosecution needs to demonstrate only that investigation has made some progress.⁸⁷ This extended pre charge detention has the potential to operate as *de facto* preventive detention.

The amended UAPA, like its anti-terrorism forebears, TADA and POTA, shifts the law on bail. Traditionally, the law on bail rests on the principle that limiting a person’s liberty is a serious step⁸⁸ Accordingly, until guilt has been proven, a judge will consider whether that individual’s liberty should be preserved, weighing in the balance the

⁷⁸ CODE CRIM. PROC. § 41 (1974).

⁷⁹ CODE CRIM. PROC. §§ 41, 165 (1974).

⁸⁰ CODE CRIM. PROC. § 50(1) (1974).

⁸¹ UAPA, *supra* note 23, § 43B (inserted by Unlawful Activities (Prevention) Amendment Act, Act No. 35 of 2008 (India)), § 12.

⁸² HUMAN RIGHTS WATCH, *supra* note 36, at 12.

⁸³ CODE CRIM. PROC. § 57 (1974).

⁸⁴ UAPA, *supra* note 23, § 43D(2).

⁸⁵ HUMAN RIGHTS WATCH, *supra* note 36, at 13.

⁸⁶ UAPA, *supra* note 23, § 43D(2).

⁸⁷ *Id.*

⁸⁸ *See, e.g., Babu Singh v State of Uttar Pradesh* (1978) 1 SCC 579 (India); *State of Rajasthan v Balchand* (1977) 4 SCC 308 (India).

possible risks of release.⁸⁹ Bail is usually subject to conditions and limits, which are typically more onerous when the alleged offense is more serious or the potential risks of release relatively high.⁹⁰ Under India's anti-terrorism laws, however, rather than weighing the risk that the accused might commit an offense or abscond or intimidate witnesses if released, the court must consider whether there are reasonable grounds for believing that the accusations against the accused are *prima facie* true.⁹¹ The bail hearing becomes an abridged, premature trial, where the applicant is unlikely to meet the high threshold of disproving his guilt. His resulting remand in custody might indirectly prejudice his trial because it will be difficult for the trial judge to discount a colleague's early assessment of guilt.

Once trials are underway, these security laws also allow the court to presume guilt based upon certain kinds of inculpatory evidence, freeing the prosecution from demonstrating that the accused acted with the requisite criminal intent.⁹² The burden of proof shifts to the defense if, for example, the accused person's fingerprints are found at the site of a terrorist offense or on "anything" used in connection with the offense, or if the accused person is found with arms or explosives that might have been used in a terrorist offense.⁹³ TADA and POTA allowed confessions made to the police as evidence during trial, reversing the bar against using custodial confessions during trial imposed by the Indian Evidence Act,⁹⁴ without explicitly barring statements extracted by threatening or inflicting torture.⁹⁵ While the UAPA does not go quite as far as allowing courts to rely on confessions made in police custody, the various procedural departures that it does permit (including presumptions of guilt) considerably erode the right to a fair trial.⁹⁶

⁸⁹ *Id.*

⁹⁰ *See* CODE CRIM. PROC. §§ 436–437(1)–(2) (Section 2 of the Code of Criminal Procedure divides offenses into those that are "bailable," which are less serious, and those that are "non-bailable," which are more serious. Section 436 of the Code provides a right to bail for persons accused of bailable offenses. Section 437 provides a right to bail compulsorily subject to conditions for persons accused of non-bailable offenses punishable with 7 years or more of imprisonment, but far more restrictive access to bail for persons abused of offenses punishable with death or life-imprisonment.).

⁹¹ UAPA, *supra* note 23, § 43D(5).

⁹² UAPA, *supra* note 23, § 43E.

⁹³ UAPA, *supra* note 23, § 43E.

⁹⁴ Indian Evidence Act, No. 1 of 1872, INDIA CODE (1872), § 25, <http://indiacode.nic.in>.

⁹⁵ POTA, *supra* note 31, § 32; TADA, *supra* note 25, § 15.

⁹⁶ Article 21 of the Constitution of India protects the right to life and liberty. The Supreme Court has read into the right to liberty the right to a fair trial (*see, e.g.*, *Police Commissioner, Delhi v. Registrar Delhi High Court*, (1996) 6 SCC 323 (India)), the right to fair procedure

F. Power to Create Special Courts

These disadvantages faced by the defense are compounded by the fact that trials under anti-terrorism laws are held in special courts. TADA and POTA gave central and state governments the power to establish special courts to try offenses under these acts.⁹⁷ The National Investigation Agency Act of 2008 similarly authorizes the creation of special courts to try a range of security offenses including, *inter alia*, offenses under the UAPA.⁹⁸ India's constitution gives the high court of each state the authority to regulate trial courts.⁹⁹ Where special courts are concerned, however, security laws oust the High Court's supervisory powers and vest the executive with authority to appoint judges and determine the jurisdiction of special courts.¹⁰⁰ Experience indicates that since special courts for security offenses were first established in 1984, governments have tended to choose judges who favor the prosecution.¹⁰¹

In special courts, procedural rules are modified to dilute the rights of the defense. The NIAA, like POTA before it, empowers special courts to hold proceedings "at any place" when it is "expedient or desirable" to do so.¹⁰² This could mean, for example, holding court hearings inside a prison facility, which might intimidate the defendant. Such proceedings are open in theory but effectively hidden from view. Special courts are also empowered if they "so desire"¹⁰³ to hold closed, or *in camera*, proceedings. The NIAA even allows a special court to try

(*see Maneka Gandhi v. India*, (1978) 1 SCC 248 (India)), and the right to natural justice (*see, e.g., Sunil Batra v. Delhi*, (1978) 4 SCC 494 (India)). The Supreme Court has also clarified that Article 21 protects particular elements of a fair trial, such as the right to a public trial (*see Vineet Narain v. India*, (1998) 1 SCC 266 (India)), the right to a speedy trial (*see Hussainara Khatoon v. Bihar*, (1980) 1 SCC 81 (India)), and the right to legal aid in criminal proceedings (*see Hussainara Khatoon v. Bihar*, (1980) 1 SCC 108 (India)). Article 20 of the Constitution of India recognizes the right against self-incrimination, the right against conviction for a retroactive offense, and the right against double jeopardy. Article 22 of the Constitution of India recognizes certain procedural rights for an individual under arrest. In addition, India is party to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (ICCPR), which recognizes the right to a fair trial and fair procedures in Articles 14, 15, and 16.

⁹⁷ POTA, *supra* note 31, § 23; TADA, *supra* note 25, § 9.

⁹⁸ NIAA, *supra* note 37, §§ 11–21.

⁹⁹ INDIA CONST. art. 235.

¹⁰⁰ NIAA, *supra* note 37, § 11.

¹⁰¹ Kalhan, et al., *supra* note 12, at 165.

¹⁰² NIAA, *supra* note 37, § 12.

¹⁰³ NIAA, *supra* note 37, § 17(1).

the accused in his absence “if it thinks fit,” something that the Code of Criminal Procedure does not allow.¹⁰⁴

Judicial powers such as these that result, formally or informally, in closed trials are troubling given the executive’s strong role in appointing judges to special courts. Concealed proceedings are particularly worrisome in relation to the politically freighted crimes that are tried in special courts, as fears about terrorism might make the prosecution and the court more prone to miscarriages of justice.

G. Limits on Judicial Review

Clearly, Indian security laws give the executive large doses of discretionary power. They compound this by simultaneously restricting judicial review over these expansive powers. These laws are designed so that they assign decision-making authority to government officials at a certain level of seniority, but do not specify any criteria for decision making. As long as the decision maker is of the right rank, his or her subjective satisfaction on the issue at hand suffices. For example, as discussed above, a declaration under AFSPA that an area is “disturbed” cannot be substantively reviewed, unless it can be shown that the central or state government made the decision in bad faith and was not genuinely “of the opinion” that civil authority needed to be supplemented with military force.¹⁰⁵ Similarly, the decision to preventively detain someone without charge cannot be reviewed on substance. The NSA only allows judicial review on whether the decision maker complied with the necessary procedure.¹⁰⁶

Not only is the scope of judicial review limited to procedural questions, some security laws set up *administrative* review mechanisms that an applicant must traverse before approaching the courts for *judicial* review. Administrative review under older security

¹⁰⁴ NIAA, *supra* note 37, § 16 (5); POTA, *supra* note 31, §§ 29(5), 30.

¹⁰⁵ AFSPA, *supra* note 18, § 3. Requires only that the central government or the relevant state government be “of the opinion” that an area is “disturbed” to an extent that requires the involvement of the armed forces. Since this provision does not lay down any criteria for forming such an opinion, courts are limited to checking whether the government’s opinion was put on record in the appropriate way.

¹⁰⁶ NSA, *supra* note 17, § 3. Allows governments to preventively detain an individual if “satisfied” that it is necessary to detain that individual to prevent him or her from acting “in any manner” prejudicial to, *inter alia*, national security or public order. Since the NSA, like AFSPA, does not lay down any criteria for concluding someone threatens security or order, courts are restricted to reviewing whether the decision to preventively detain was procedurally appropriate. For a discussion of this “subjective satisfaction” standard affects judicial review, see Jinks, *supra* note 13, at 331–34.

laws, including the NSA and the UAPA, is designed to oversee each decision the government makes on a particular issue. For example, every preventive detention order under the NSA has to be placed before an advisory board that confirms the order or recommends revocation.¹⁰⁷ Similarly, every declaration under the UAPA that an organization is “unlawful” must be placed before a review committee.¹⁰⁸ Laws passed after 1980 adopt a different mechanism, under which an individual or organization can challenge a decision before the administrative review body, but the executive is not obliged to submit its decisions for review as a matter of course. For example, when an organization was declared a “terrorist organization” under POTA, or is declared as such under the UAPA, that declaration could be challenged before a review committee.¹⁰⁹ But, the burden is on the affected individual or group to initiate review. Thus, more recent laws have diluted the scrutiny provided by administrative review, while preserving the hurdle it creates for an applicant seeking judicial review.

Administrative review proceedings are weighted against the applicant. Proceedings before all these administrative bodies are closed to the public.¹¹⁰ Preventive detention laws expressly bar the detainee from having legal representation.¹¹¹ Furthermore, the relevant government has the discretion to withhold information from affected parties on the reasons for the order against them. None of the current administrative review mechanisms provide for *amicus curiae* or special legal counsel who have security clearance to review classified evidence and advise on its strengths and weaknesses.

These attenuated procedural rights are accompanied by limits on the independence of administrative review mechanisms. The government of the day appoints members to sit on these bodies.¹¹² While the chairperson of an advisory boards under the NSA and review committee under the UAPA has to be a retired or sitting judge of the

¹⁰⁷ NSA, *supra* note 17, § 10.

¹⁰⁸ UAPA, *supra* note 23, § 4.

¹⁰⁹ *See* UAPA, *supra* note 23, § 36. Allows organizations that are designated as terrorist to apply for administrative review of this decision, and UAPA, *supra* note 23, § 37 requires the central government to established a review committee to hear this kind of challenge, but the UAPA does not requires that every decision designating an organization as terrorist be reviewed as a matter of course.

¹¹⁰ NSA, *supra* note 17, § 11(4).

¹¹¹ NSA, *supra* note 17, § 11(4).

¹¹² NSA, *supra* note 17, § 9; UAPA, *supra* note 23, §§ 5, 37.

High Court,¹¹³ there are no statutory guidelines for choosing other members. Under current laws, review mechanisms are not “standing” bodies—the government has the option of creating them as needed.¹¹⁴ The inherent conflict in the Ministry of Home Affairs appointing the committee that reviews its decisions only becomes deeper when such a committee is appointed *ad hoc* to review a specific decision.

Decisions by the administrative review bodies bind the government. But government orders on preventive detention or proscribing organizations take effect immediately and remain effective until and unless the review committee disagrees with the government.¹¹⁵ Detainees or banned organizations can turn to the High Court if administrative review goes against them, as it generally does¹¹⁶ However, it is worth noting that the relevant laws themselves do not grant the High Court *appellate* jurisdiction over administrative review decisions. Jurisdiction flows instead from the Court’s constitutional power (and duty) to hear citizens’ petitions seeking to enforce fundamental rights.¹¹⁷ In order to petition the courts, the applicant has to demonstrate a *prima facie* violation of a constitutional right.

III CONSEQUENCES OF SECURITY LAWS: EXCESS, OVERLAP, AND ABUSE

Some observers argue that ordinary criminal law, in the form of the Criminal Procedure Code and Indian Penal Code, gives governments

¹¹³ NSA, *supra* note 17, § 9(3); UAPA, *supra* note 23, § 37(3).

¹¹⁴ *See* NSA, *supra* note 17, § 9(1) (empowering the Central Government and each state government to constitute an advisory board “whenever necessary”). *See also* UAPA, *supra* note 23, § 5(1) (similarly empowering central and state governments to constitute an administrative tribunal “as and when necessary”).

¹¹⁵ *See* NSA, *supra* note 17, § 10. Requires that detention orders be placed before a review committee within three weeks of the person actually being detained, rather than before a person is detained.

¹¹⁶ *See, e.g.*, AMNESTY INT’L, A ‘LAWLESS’ LAW: DETENTIONS UNDER THE JAMMU & KASHMIR PUBLIC SAFETY ACT (Amnesty Int’l, 2011), at 18–19; Niloufer Bhagwat, *Institutionalising Detention without Trial*, 13(11) ECON. & POL. WKLY. 512 (1978). Since the administrative review boards can only review whether the government’s decision was made using the appropriate procedure, rather than whether the decision was substantively sound, it is rare for a decision to be overturned.

¹¹⁷ *See* INDIA CONST. art. 32. Grants citizens the right to approach the Supreme Court for enforcement of fundamental rights recognized in the Constitution and empowers the Supreme Court, in turn, to grant a range of remedies to enforce such rights. *See also* INDIA CONST. art. 226, § 1. Similarly empowers state High Courts to issue directions, orders, and writs within its jurisdiction.

adequate tools to control and prosecute terrorist and separatist violence,¹¹⁸ and that special security legislation is unnecessary. This counterfactual stance is difficult to evaluate, given that security laws have been a consistent part of independent India's legal landscape, with new security laws drawing heavily upon their predecessors. We can, however, trace the consequences of security laws. As discussed in Part II above, India's security laws enlarge the executive's power to use force, detain, investigate, arrest, and try individuals. These procedural powers rest upon loosely drafted criteria, and accompany sprawling substantive offenses of indeterminate scope. Laws are designed to shield government actors from criminal or civil suit, and to dilute judicial review. Below, I discuss in more detail the consequences that flow from the distinctive features that have been reproduced in successive generations of security laws.

A. Human Rights Abuses

Human rights groups argue that India's security laws are incompatible with international human rights law and the Indian Constitution.¹¹⁹ They point out that security laws currently in force place excessive, unnecessary restrictions on the rights to a fair trial, freedom of association, freedom of speech, and freedom of movement, as guaranteed by the International Convention on Civil and Political Rights, to which India is a party.¹²⁰ They also argue that AFSPA, which bestows generous "shoot-to-kill" powers on the military in "disturbed" areas, disproportionately restricts the right to life.¹²¹

Expansive executive discretion created by legal provisions that fall far short of human rights standards creates ample room for abuse of power. Over the years, journalists, academics, and human rights groups have documented a multitude of serious human rights abuses committed by state functionaries using powers granted by security

¹¹⁸ SAHRDC, *supra* note 30, at 17–19.

¹¹⁹ *See, e.g.*, SAHRDC, *supra* note 58; HUMAN RIGHTS WATCH, *supra* note 36; HUMAN RIGHTS WATCH, *supra* note 19; AMNESTY INT'L, *supra* note 116; PEOPLE'S UNION OF DEMOCRATIC RIGHTS, NOT ANOTHER TERRORIST LAW PLEASE: A CRITIQUE OF THE PROPOSED CRIMINAL LAW AMENDMENT BILL (People's Union of Democratic Rights, 2000); PEOPLE'S UNION OF DEMOCRATIC RIGHTS, THROUGH THE LENS OF NATIONAL SECURITY (People's Union of Democratic Rights, 2008); PEOPLE'S UNION OF DEMOCRATIC RIGHTS, THE TERROR OF LAW: UAPA AND THE MYTH OF NATIONAL SECURITY (People's Union of Democratic Rights, 2012).

¹²⁰ SAHRDC, *supra* note 58; HUMAN RIGHTS WATCH, *supra* note 19.

¹²¹ SAHRDC, *supra* note 58; HUMAN RIGHTS WATCH, *supra* note 19, at 6.

laws. Credible accounts abound of torture in custody and coerced confessions.¹²² Defendants charged with crimes under TADA and POTA have received unfair trials.¹²³ The military has used gravely, often fatal, disproportionate force against civilians in “disturbed” areas under the Armed Forces Special Powers Act.¹²⁴ Arbitrary detention and extrajudicial execution are frequent, and persist despite criticism from United Nations human rights mechanisms.¹²⁵ A recent petition before the Supreme Court claimed that, in one small northeastern state alone, an estimated 1528 people have been extrajudicially killed by security forces since May 1979.¹²⁶ Women have faced sexual violence from state actors using security powers, particularly in areas where the military has powers under AFSPA,¹²⁷ but also in other Indian states

¹²² See, e.g., Asian Ctr. for Human Rights, *Need for a National Law for Prevention of Torture* (June 25, 2007), <http://www.achrweb.org/ncpt/ncpt0107.pdf>; Asian Centre for Human Rights, *Torture in India 2011* (Nov. 21, 2011), <http://www.achrweb.org/reports/india/torture2011.pdf>.

¹²³ AMNESTY INT’L, THE TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT: THE LACK OF “SCRUPULOUS CARE” (Amnesty Int’l, 1994); PEOPLE’S UNION OF DEMOCRATIC RIGHTS, TRIAL OF ERRORS: A CRITIQUE OF THE POTA COURT JUDGMENT ON THE 13 DECEMBER CASE (People’s Union of Democratic Rights, 2003); PEOPLE’S UNION OF DEMOCRATIC RIGHTS, JUDICIAL TERROR: DEATH PENALTY, TADA AND THE RAJIV GANDHI ASSASSINATION CASE (People’s Union of Democratic Rights, 1998); SAHRDC, *supra* note 27.

¹²⁴ See CIVIL SOCIETY COALITION ON HUMAN RIGHTS IN MANIPUR AND THE UN, MANIPUR: A MEMORANDUM OF EXTRAJUDICIAL, ARBITRARY OR SUMMARY EXECUTIONS (2012) (submitted to Christof Heyns, United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions).

¹²⁵ CIVIL SOCIETY COALITION ON HUMAN RIGHTS IN MANIPUR AND THE UN, *supra* note 124; Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Human Rights Council, *Report on mission to India*, U.N. Doc A/HRC/23/47/Add.1 (Apr. 26, 2013) (by Christof Heyns); Special Rapporteur on the Situation of Human Rights Defenders, *Report on Mission to India* (Jan. 21, 2012), Human Rights Council, U.N. Doc Mission to India A/HRC/19/55/Add.1 (Feb. 6, 2012) (by Margaret Sekaggya); Dolly Kikon, *The Predicament of Justice: Fifty Years of Armed Forces Special Powers Act in India*, 17 CONTEMP. S. ASIA 271 (2009).

¹²⁶ Extra-judicial Execution Victim Families Association (EEVFAM) v India, 2013 (2) SCC (India); Extra-judicial Execution Victim Families Association (EEVFAM) v India, Writ Petition (Crim) No. 129 of 2012 (on file with author); Meenakshi Ganguly, *Extrajudicial Killings Corrode Democracy in India*, N.Y. TIMES, July 15, 2013, <http://india.blogs.nytimes.com/2013/07/15/extrajudicial-killings-corrode-democracy-in-india/>; Sandeep Joshi, *Court-appointed Panel Highlights Misuse of AFSPA in Manipur*, THE HINDU, July 17, 2013, <http://www.thehindu.com/news/national/other-states/court-appointed-panel-highlights-misuse-of-afspa-in-manipur/article4921637.ece>.

¹²⁷ MANDY TURNER & BINALAKSHMI NEPRAM, THE IMPACT OF ARMED VIOLENCE IN NORTHEAST INDIA (Univ. of Bradford 2004); Namrata Gaikwad, *Revolting bodies, hysterical state: Women protesting the Armed Forces Special Powers Act (1958)*, 17 Contemp. S. ASIA 299 (2009); Surabhi Chopra, *Dealing with Dangerous Women: Sexual*

such as Jharkhand and Chhattisgarh¹²⁸ Gendered violence against women by the police and military is often neglected, but the limited documentation that exists should cause serious disquiet.¹²⁹ A less visible effect of such laws is on the families of individuals who are detained or prosecuted. Past experience has shown that trials can last a long time, as can preventive detention, with detention orders being renewed year after year. Families of detainees and defendants lose an earning member, while having to defray lawyers' fees and navigate the legal system. This would strain most families, but be potentially ruinous for those who are poor.

B. Insulation from Accountability

It is highly likely that we do not have the full measure of abuses committed by government actors or agents using security laws. Enhanced powers to detain and interrogate are, by their nature, wielded behind closed doors. Targets of torture and inhumane treatment in custody might conceal abuse entirely. Victims of sexual violence in custody—both men and women—might hide such abuse. Affected individuals might speak out within their families, wider communities, or to civil society groups, but may not be willing to file a formal complaint. This is particularly likely in remote areas where the official who would investigate the complaint might work closely with the officials who are the subject of the complaint. Individuals willing to seek redress have to persuade the police and prosecution to pursue their complaint, who in turn need special permission from the central

Assault Under Cover of National Security Laws in India, 34(2) B.U. INTL. L.J. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2654538.

¹²⁸ Chopra, *supra* note 127.

¹²⁹ *Id.*

government to press criminal charges.¹³⁰ The limited information available suggests that permission has rarely been granted.¹³¹

Even where victims would like to seek redress, they may not know that the government's actions can be formally challenged, or *how* to pursue such a challenge, because it requires more than a complaint to

the police. As an example, AFSPA has applied to Assam and Manipur continuously since 1958, and to the other five northeastern states since 1972, but there are very few reported habeas corpus cases in the relevant High Court until 1981, after which the High Court was petitioned more frequently by individuals alleging arbitrary detention, torture, or the unlawful killing of a loved one.¹³² It is possible that abuses by the armed forces were rare in the first two decades of

¹³⁰ CODE CRIM. PROC. § 197. Provides that government officials belonging to a government service administered by Central Government cannot be criminally prosecuted unless the Ministry of Home Affairs permits such prosecution. *Id.* § 45. Members of the armed forces are shielded from arrest for actions performed as a part of their official duties. AFSPA, *supra* note 18, § 6. Bars any legal proceedings, criminal or civil, against members of the armed forces without prior permission from the Central Government. For a discussion of jurisprudence on CODE CRIM. PROC. § 197, see Surabhi Chopra, *Holding Public Officials Accountable*, in ON THEIR WATCH: MASS VIOLENCE AND STATE APATHY IN INDIA—EXAMINING THE RECORD (Surabhi Chopra & Prita Jha eds., Three Essays Collective 2014) at 298–301. For critical commentary on CODE CRIM. PROC. § 197, see Tarunabh Khaitan, *Parties Should Be Asked to Repeal Impunity Provisions*, THE HINDU, 2009, <http://www.hindu.com/2009/03/23/stories/2009032351230900.htm>.

¹³¹ There are no publicly available statistics on the number of applications for permission to prosecute government officials, civil or military. A report by SAHRDC on AFSPA states that, as of 1995, no individual from the northeast states had applied for permission to file a civil suit or writ petition against the armed forces. See SAHRDC, *supra* note 58. A research study that used India's Right to Information Act of 2005 to seek information about applications and permission to prosecute under CODE CRIM. PROC. § 197 in relation to mass violence recorded that the Ministry of Home Affairs refused multiple requests to disclose the information requested. See Chopra, *supra* note 130.

¹³² There is no comprehensive review of writ petitions by individuals challenging abuses by the armed forces in states where AFSPA applies. However, published judicial decisions suggest that such petitions began to appear in the early 1980s, increased in frequency in the 1990s and continue to be used by individuals in states where AFSPA applies. India's northeastern states (where AFSPA applies) come under the jurisdiction of the Gauhati High Court. Legal databases indicate that the Gauhati High Court made final decisions in response to one writ petition about AFSPA-related abuse in 1982 (*Basi Singh v. State of Assam & Ors.*, 1982 CRIM. L.J. 229), one in 1983 (*Naosam Ningol Chandam Ongbi Nungshitombi Devi v. Rishang Keishing, Chief Minister of Manipur and Ors.*, 1983 CRIM L.J. 574), five such petitions between 1984 and 1989, eighteen petitions between 1990 and 1999, and seventeen petitions between 2000 and 2013. It is worth noting firstly that High Court decisions are not comprehensively reported, and secondly that these numbers reflect final disposal by the court, not the number of petitions filed by individuals. Nevertheless, these numbers suggest that individuals began actively petitioning courts after suffering abuse in the 1980s and did so in greater numbers from the early 1990s onwards.

AFSPA's existence. But it is also quite likely that victims of abuse simply lacked the information and experience to seek redress.

C. Discriminatory and Partisan Use of the Law

The Indian experience so far suggests that once security laws create expansive executive power, empowered governments are not cautious about using that power. In 1985, TADA gave every state in India the power to prosecute terrorist offenses in special courts. Over time, human rights groups documented that the highest number of TADA cases was registered not in states with a history of violent insurgency, but in Gujarat, a state that saw little terrorist or separatist activity during the time TADA was in force.¹³³ As discussed in Part II, expansive security offenses *potentially* render criminal a wide sweep of nonviolent speech and activity that criticizes the government or challenges existing security policies, even though it does not on any reasonable assessment actually endanger public order or national security.

Security laws have lent themselves to religious and ethnic discrimination. Singh traces how POTA prosecutions relied heavily upon religious profiling, and describes the Act as “creating suspect communities.”¹³⁴ Individuals who are Muslim, Sikh, or from India's northeastern states have been disproportionately investigated, detained and prosecuted under security laws.¹³⁵ The government of Jharkhand used POTA very heavily in parts of the state that are poor and have a high proportion of people from tribal groups.¹³⁶ Violent far left groups were active in these areas, but rather than targeted investigation, human rights reports record scatter shot violence, and wholesale arrest and detention of people from particular tribal communities.¹³⁷

Security laws have also been used by those in political office against opponents and critics. As mentioned in Part II, Indira Gandhi deployed

¹³³ SAHRDC, *supra* note 30, at 33.

¹³⁴ UJJWAL KUMAR SINGH, *THE STATE, DEMOCRACY, AND ANTI-TERROR LAWS IN INDIA* 165–219. (Routledge 2007).

¹³⁵ SAHRDC, *supra* note 27.

¹³⁶ SINGH, *supra* note 134, at 195–203.

¹³⁷ *See, e.g.*, SABRANG COMM'NS, *PEOPLE'S TRIBUNAL ON THE PREVENTION OF TERRORISM ACT (POTA): BACKGROUND DOCUMENT* (Sabrang Communications 2004) at 3 and 20, <http://www.sabrang.com/pota.pdf>. *See generally* PREETI VERMA, *THE TERROR OF POTA AND OTHER SEC. LEGISLATION: A REPORT ON THE PEOPLE'S TRIBUNAL ON THE PREVENTION OF TERRORISM ACT AND OTHER SEC. LEGISLATION* (Sabrang Commc'ns 2004).

MISA aggressively against political opponents during the Emergency. More recently, the Chief Minister of the state of Tamil Nadu used POTA against an uncooperative member of the state legislature, as did the Chief Minister of Uttar Pradesh.¹³⁸ In 2007, the UAPA was used to prosecute a senior member of a national civil liberties organization who criticized civilian militias organized by the state government of Chhattisgarh to counter insurgent groups.¹³⁹ Media reports revealed that these individuals posed no threat to the nation, and publicized the state's lack of cogent grounds for acting against them. However, in a technical sense, it is arguable that arrests and prosecution in these instances fell squarely within the ambit of widely defined POTA and UAPA offenses. While legal action against public figures has garnered headlines and drawn criticism, it illustrates the likelihood of similar action, free of media scrutiny, against individuals who are not politically influential.

D. Security Laws as a Crutch and Cover

Publicly available official statistics on security laws are scant. India's National Crime Records Bureau used to report arrests and convictions under TADA annually, but has not released similar information related to POTA or the UAPA. The national government reports the number of individuals in preventive detention, but does not break this down by state, or report reasons why or for how long people have been detained.¹⁴⁰

The limited statistics that are available seem to validate documentation by human rights groups and journalists. The national government's information suggests that security laws are used excessively, without due care and sufficient justification. Statistics reported by the government in October 1993 showed that since TADA came into force, central and state governments arrested and detained 52,268 individuals under the law, but only 0.81 % of these individuals

¹³⁸ SINGH, *supra* note 134, at 220–60; Manoj Mate & Adnan Naseemullah, *State Security and Elite Capture: The Implementation of Antiterrorist Legislation in India*, 9 J. HUM. RTS. 262 (2010).

¹³⁹ See Frontline Defenders, *Binayak Sen*, http://www.frontlinedefenders.org/Binayak_Sen (last visited Oct. 17, 2015). See also Malavika Vyawahare, *A Conversation With: Human Rights Activist Binayak Sen*, N.Y. TIMES (Dec. 10, 2012).

¹⁴⁰ The National Crime Records Bureau, Ministry of Home Affairs reports the number of individuals in preventive detention on an annual basis. National Crime Records Bureau, <https://ncrb.gov.in> (last visited Oct. 17, 2015).

were eventually convicted of any offense.¹⁴¹ In Punjab, only 0.37 % of the 14,557 individuals detained under TADA had been convicted.¹⁴² Central government figures from 1994 show that of 67,059 people detained under TADA since its enactment, only 8,000 people—less than 12% of those arrested and held in custody—were put on trial.¹⁴³ Of these 8000, 725 people—less than 1% of total TADA detainees—were eventually convicted.¹⁴⁴

These statistics suggest that people arrested under TADA were held for long periods and eventually released without charge, or charged and tried, but acquitted after protracted trials. Low rates of indictment indicate arrests based on weak evidence and poor investigation. High rates of acquittal despite the pro-prosecution tilt of special courts, in turn, suggest trials founded on scant evidence and lackadaisical prosecution. It seems that security laws—even those that create criminal offenses—serve largely to preventively detain individuals and proscribe organizations based upon suspicion rather than proof to the criminal standard. Kalhan *et al.* point to structural weaknesses in India's criminal justice system to explain this phenomenon.¹⁴⁵ They argue that poorly trained police personnel and strained, inefficient courts cannot meet the actual demands of investigating and prosecuting serious crime; security laws help governments to paper over these weaknesses.¹⁴⁶

On this view, security laws have enduring appeal not because they make it easier to investigate and punish terrorist and separatist violence, but because they allow the state to pull individuals and groups out of circulation without having to prove wrongdoing beyond reasonable doubt. Security laws that create terrorist offenses and special courts add to the state's preventive powers by allowing easier arrests and long periods on remand. In addition, overlap and intersections between preventive detention and anti-terror laws, as well as between security

¹⁴¹ Government of India, *Ministry of Home Affairs, Memorandum to the Full Commission of National Human Rights Commission, Annexure I*, 19 December 1994, cited in RAM NARAYAN KUMAR, ET. AL., *REDUCED TO ASHES: THE INSURGENCY AND HUMAN RIGHTS IN PUNJAB: FINAL REPORT: VOLUME I*, 99 (South Asia Forum for Human Rights, 2003).

¹⁴² *Id.* at 99.

¹⁴³ SAHRDC, *supra* note 27, citing a statement by the Minister for Internal Security when speaking to the Press Trust of India on 28 August 1994.

¹⁴⁴ SAHRDC, *supra* note 27; RAM NARAYAN KUMAR ET. AL., *supra* note 141, at 100.

¹⁴⁵ Anil Kalhan, et al., *supra* note 12.

¹⁴⁶ *Id.* at 192–96.

law and ordinary criminal law, can be used in concert to further enhance the state's preventive and procedural powers. For example, prosecutors can charge the same individual with crimes under security laws and under the IPC, and place evidence before the court that under ordinary evidential standards would be tainted or inadmissible.¹⁴⁷ Human rights reports as well as court decisions show that preventive detention laws are used to detain people before they are prosecuted for a crime, and detainees are arrested as criminal suspects as soon as they are released from administrative detention.¹⁴⁸

Thus, expansive security powers can, and evidently have, facilitated human rights abuses. The limited official data on criminal justice strongly indicates that security laws are used wantonly as a matter of course. In addition, the enhanced ability to arrest, detain, prosecute, and use force has allowed serious abuses by official actors to proliferate. Considerable room for maneuver, reproduced in one law after another, accompanied by official tolerance for the police, prosecution, and military abusing such power can shift institutional culture so that disproportionate force or harsh interrogation become routine rather than exceptional. The occupation of Oinam village, Manipur by paramilitaries in July 1987, is one of several infamous examples of extreme abuse.¹⁴⁹ The Assam Rifles launched a combing operation in Oinam after a separatist group raided one of their posts, and over a period of four months were brutally violent towards residents of the village. The Assam Rifles hung people upside down, administered electric shocks, and buried people alive in order to extract information from them. Women were subjected to sexual assault and rape.¹⁵⁰ The Rifles allegedly forced two women who went into labor to give birth in front of the soldiers.¹⁵¹ They used force not to control an actual or perceived threat, but to humiliate or subdue people subject to such force. While the events in Oinam in 1987 were particularly serious, they lie on a spectrum of state abuse aided by security powers, and

¹⁴⁷ See earlier discussion in Part II.E.

¹⁴⁸ AMNESTY INT'L, *supra* note 116, at 61–62. Several decisions by the High Court of Jammu & Kashmir on writ petitions challenging detention under the Jammu & Kashmir Preventive Detention Act reveal that petitioners were in prison on remand or on bail when an order of preventive detention was passed against them. See, e.g., Vijay Kumar v. Jammu & Kashmir (1981) AIR 1982 SC 1023 (India), Mohd. Iqbal Sheikh v. Jammu & Kashmir (2003) 3 J.K.J. 534 (India) and Zakir Hussain v. Jammu & Kashmir (2006) 2 J.K.J. 672 (India).

¹⁴⁹ MANDY TURNER & BINALAKSHMI NEPRAM, *supra* note 127, at 28–29.

¹⁵⁰ Manipur Baptist Convention and Anr. v. Union of India, (1988) 1 G.L.R. 433 (India).

¹⁵¹ MANDY TURNER & BINALAKSHMI NEPRAM, *supra* note 127, at 28–29.

remind us that security laws can render the individual citizen insecure.¹⁵²

IV

EXECUTIVE-LED LEGISLATION, PARLIAMENTARY ENDORSEMENT

By this point, there exists years' worth of credible documentation demonstrating how sweeping security powers foster serious violations of human rights.¹⁵³ However, the content of security laws has shifted little in response. In this Part, I show how India's national legislature follows the executive's lead on security legislation, and argue that the legislature's repeated acquiescence flows both from institutional structure, as well as substantive agreement with the executive's proposals.

A. Structural Advantage

India is a parliamentary democracy. The political party that wins the maximum number of parliamentary seats in periodic national elections forms the government. As a result, the government of the day has substantial sway over Parliament's legislative agenda. While individual members of India's legislature have frequently proposed bills, or draft laws, government bills have conventionally garnered greater time and priority in Parliament.¹⁵⁴ Clearly, the government authoring a bill makes the first move in shaping the content of the resulting law. Bills proposed by the government typically secure a majority in Parliament,

¹⁵² Asad challenges the "good versus evil" rhetoric that accompanies most national security measures, and argues that terrorist violence and the state's use of force to prevent such violence share a kinship that emotive, moralized language can obscure. *See* Talal Asad, *Thinking About Terrorism and Just War*, 23 *CAMBRIDGE REV. INT'L. AFF.* 3 (2009); Donohue similarly reflects on the potential for counter-terror measures to mirror terrorist violence. She argues further that states blur the difference between their counter-terrorist actions and terrorist acts when such measures are violent, intended to induce fear, directed at a wider audience than the immediate physical target, and borne by people who are "non-combatants." *See* Laura Donohue, *Terrorism and Counter-Terrorist Discourse*, in *GLOBAL ANTI-TERRORISM L. & POL'Y* (V Ramraj et al. eds., 2005).

¹⁵³ *See supra* note 119.

¹⁵⁴ During the fourteenth Lok Sabha, or lower house, of Parliament, which lasted from 17 May 2004 to 18 May 2009, 328 private members bills were introduced, but only 14 were discussed. During the thirteenth Lok Sabha, which lasted from 10 October 1999 to 6 February 2004, 343 private members bills were introduced, but only 17 were discussed. PRS LEGISLATIVE RESEARCH, VITAL STATS: PRIVATE MEMBERS BILLS IN LOK SABHA, <http://www.prsindia.org/parliamenttrack/vital-stats/private-members-bills-in-lok-sabha-2010-1011/> (last visited Oct. 2, 2013).

often aided by whips issued by the ruling party corralling its members to support the party's position. The vast majority of bills passed by the Indian Parliament since it first began functioning have been government bills.¹⁵⁵ Thus, India's national government has an embedded structural advantage in shaping and passing legislation in general.

B. Pressing Home the Executive's Advantage

Where security laws are concerned, this general structural advantage has been converted by the government into substantial control over the legislative process. To achieve this, the executive has used with a free hand constitutional powers that are meant to be used sparingly.

Article 123 of the Constitution empowers the Indian President to pass ordinances, which have the same effect as laws passed by Parliament.¹⁵⁶ The President can pass an ordinance when he or she perceives a critical need, and Parliament is not in session. The Constitution allows the President to legislate on any subject upon which the Indian Parliament could legislate, but balances this by insisting upon the soonest viable Parliamentary scrutiny. Accordingly, executive ordinances have to be placed before Parliament the next time it is in session, where they undergo the usual process of legislative review, debate, and voting¹⁵⁷

Most major national security laws in India were first passed as executive ordinances. The PDA was preceded by an executive ordinance in 1950, as was the original UAPA in 1967. Ordinances also preceded MISA, AFSPA, the NSA, the Terrorist Affected Areas (Special Courts) Act, TADA, POTA, and amendments to the UAPA in 2004, i.e., all the laws discussed in Part I above.¹⁵⁸ Interestingly, most

¹⁵⁵ Only 14 private members bills have been passed by the Indian Parliament since 1950. No private members bills have been passed since 1970. Table 33: Private Members Bills Passed by Parliament since 1952 so far. GOVERNMENT OF INDIA, STATISTICAL HANDBOOK, 101 (Ministry of Parliamentary Affairs ed., June 27, 2012), <http://mpa.nic.in/Statbook12.pdf>; PRS LEGISLATIVE RESEARCH, *supra* note 154.

¹⁵⁶ On ordinance making power under the Indian constitution and ways to limit it, *see generally* Shubhankar Dam, *Constitutional Fiats: Presidential Legislation in India's Parliamentary Democracy*, 24 COLUM. J. ASIAN L. 96 (2010).

¹⁵⁷ INDIA CONST. art. 123, § 2.

¹⁵⁸ *See* Preventive Detention (Amendment) Ordinance, 1950, No. 19, Central Ordinances, Ministry of Law, 1950 (India); Armed Forces (Assam-Manipur) Special Powers Ordinance, 1958, No. 26, Central Ordinances, Ministry of Law, 1958 (India); The Unlawful Activities (Prevention) Ordinance 1966, No. 6, Central Ordinances, Ministry of Law, 1966 (India); Maintenance of Internal Security Ordinance, 1971, No. 5, Central

of these ordinances were issued a few weeks—in many instances less than a month—after a session of Parliament ended, or a few weeks before a session began.¹⁵⁹ On all these occasions, the national government could have placed a bill before Parliament, rather than introducing an executive ordinance, by acting just slightly faster or waiting slightly longer, which suggests that such executive measures were a strategic choice rather than an absolute necessity.

The power to pass ordinances sits uneasily with the principle of separation of powers, which is enshrined in the Indian Constitution.¹⁶⁰

Ordinances, Ministry of Law, 1971 (India); The National Security Ordinance, 1980, No. 11, Central Ordinances, Ministry of Law, 1980 (India); The Armed Forces (Punjab and Chandigarh) Special Powers Ordinance, 1983, No. 9, Central Ordinances, Ministry of Law, 1983 (India); The Terrorist Affected Areas (Special Courts) Ordinance, 1984, No. 9, Central Ordinances, Ministry of Law, 1984 (India); The Terrorist and Disruptive Activities (Prevention) Ordinance, 1987, No. 2, Central Ordinances, Ministry of Law, 1987 (India); The Armed Forces (Jammu and Kashmir) Special Powers Ordinance, 1990, No. 3, Central Ordinances, Ministry of Law, 1990 (India); The Prevention of Terrorism Ordinance, 2001, No. 9, Central Ordinances, Ministry of Law, 2001 (India); The Prevention of Terrorism (Second) Ordinance, 2001, No. 12, Central Ordinances, Ministry of Law, 2001 (India); The Unlawful Activities (Prevention) Amendment Ordinance, 2004, No. 2, Central Ordinances, Ministry of Law, 2004 (India).

¹⁵⁹ The Armed Forces (Assam-Manipur) Special Powers Ordinance was passed on 22 May 1958, 12 days after the preceding session of the lower house of Parliament, the Lok Sabha, ended on 10 May 1958. The Unlawful Activities (Prevention) Ordinance, 1966 was passed on 17 June 1966, less than a month after the preceding session of the lower house of Parliament ended on 20 May 1966. The Maintenance of Internal Security Ordinance, 1971 was passed on 7 May 1971, 17 days before the next session of the Lok Sabha began on 24 May 1971. The National Security Ordinance, 1980 was passed on 22 September 1980, a few weeks after the preceding session of the Lok Sabha ended on 12 August 1980. The Terrorist Affected Areas (Special Courts) Ordinance, 1984 was passed on 14 July 1984, 9 days before the next session of the Lok Sabha began on 23 July 1984. The Terrorist and Disruptive Activities (Prevention) Amendment Ordinance, 1985 was passed on 5 June 1985, 15 days after the previous session of the Lok Sabha ended on 20 May 1985. The Prevention of Terrorism Ordinance, 2001 was passed on 24 October 2001, less than a month before the next session of the Lok Sabha began on 19 November 2001. The Prevention of Terrorism (Second) Ordinance, 2001 was passed on 30 December 2001, 9 days after the previous session of the Lok Sabha ended on 21 December 2001. The Unlawful Activities (Prevention) Amendment Ordinance, 2004 was passed on 21 September 2004, 3 weeks after the previous session of Parliament ended on 30 August 2004.

¹⁶⁰ India is a federal country with a parliamentary system of government. The national legislature or parliament is elected through periodic national elections based upon universal adult franchise, and the legislatures of India's 29 states are similarly elected through periodic elections in each state. The political party or coalition with a majority in the legislature forms the government. Legislation proposed by the executive branch must secure a majority in the legislature to become law. India has an independent judiciary with the power to, *inter alia*, review laws and executive action and policies for compatibility with the constitution. See INDIA CONST. Part V, Chapters I and II for the structure and powers of the national executive and legislature; INDIA CONST. Part V, Chapter IV for the structure and powers of the

Implicit in this unusual power, which encroaches on the legislature's domain, is the expectation that the executive will exercise it cautiously. Security ordinances, with their departures from domestic and international legal standards, are a very bold exercise of executive lawmaking power, and arguably against the spirit of Article 123 of the Indian Constitution. Taking the AFSPA as an example, granting extra powers to the armed forces affects an important precept of India's constitutional design as well as democratic governance more generally: civilian control of the military. It is striking, therefore, that the national government chose to pass an ordinance that engages this core principle at all, rather than acknowledging that issues this controversial should be left to the popularly elected legislature to debate. The executive's lack of moderation seems particularly pronounced because it passed the Armed Forces (Assam & Manipur) Special Powers Ordinance only twelve days after a session of Parliament had been adjourned.¹⁶¹

A strategically timed executive ordinance gives the government of the day an advantage when the ordinance is eventually placed before Parliament to convert into legislation or to reject. By this point, the new law is a fact on the ground rather than a possibility. The government may already have established new institutional mechanisms, such as special courts or executive review boards, or be working towards implementing them. Because the ordinance will only be in place for a few weeks or months, concerns that the law will allow violations of individual rights can be dismissed as hypothetical, because there isn't a substantial empirical record on the effects of the ordinance at that point. Opponents of the law thus face the prospect of dismantling something already in place, and the accusation of being lenient about the country's security. As a result, the price of opposition will be higher, and the resulting debate in Parliament is likely to be muted. It is certainly the case that, so far, the legislature has endorsed security ordinances, and converted them into laws, with relative ease.

More recently, the national government has used security ordinances even more overtly to force a particular result in Parliament. In 2001, the POTA was preceded by not one but two executive ordinances.¹⁶² The second of these ordinances was promulgated *after* the opposition

Supreme Court; INDIA CONST. Part VI, Chapters II and III for the structure and powers of state executives and legislatures; INDIA CONST. Part VI, Chapter V for the structure and powers of state High Courts.

¹⁶¹ See *supra* note 159.

¹⁶² The Prevention of Terrorism Ordinance, Ord. 9 of 2001 (India) and the Prevention of Terrorism (Second) Ordinance, Ord. No. 9 of 2001 (India).

in the lower house of Parliament had made clear it was voting against the Act, and the ruling alliance was unsure about whether it would get the majority it needed to pass the bill into law.¹⁶³ The second Prevention of Terrorism Ordinance was an imposition of the national government's will, preempting the evolving Parliamentary debate.

On occasion, the national government has used tactics even more aggressive than the strategic use of ordinances. When Parliament was considering POTA in 2002, government complicity in mass sectarian violence in Gujarat concentrated attention on the ways that expansive executive powers could be abused.¹⁶⁴ Opposition to POTA gained momentum in Parliament as a result. In response, the ruling National Democratic Alliance called a joint session of Parliament, where the lower and upper houses vote as a single body.¹⁶⁵ Joint sessions are allowed by the Indian Constitution, but are meant to be exceptional measures, and have very rarely been used.¹⁶⁶ The NDA used its

¹⁶³ The Congress party, which led the Opposition in Parliament at the time, made public its intention to vote against the proposed law. (Indian Express, 'Congress readies for POTO burial', 17 November 2001, discussed in UJJWAL KUMAR SINGH, *supra* note 134 at 44). A few political parties within the ruling National Democratic Alliance expressed some reservations about the draft law as well. See *SAD to Oppose POTO if Press Freedom Hit*, THE TRIBUNE, Nov. 5, 2001, <http://www.tribuneindia.com/2001/20011105/punjab1.htm>. For a discussion of negotiations about POTA between different political parties, see UJJWAL KUMAR SINGH, *supra* note 134, at 40–49.

¹⁶⁴ *Discussion regarding Godhra killings and subsequent violence in Gujarat*, THIRTEENTH LOK SABHA, NINTH SESSION DEBATES, Mar. 11, 2002, <http://164.100.47.132/LssNew/psearch/Result13.aspx?dbsl=3645> (regarding the state and national government's failure to respond to attacks on Muslims); *Regarding violence in Gujarat on 19 March, 2002*, THIRTEENTH LOK SABHA, NINTH SESSION DEBATES, Mar. 20, 2002, <http://164.100.47.132/LssNew/psearch/Result13.aspx?dbsl=3769> (regarding failure to assist Muslims facing violence, failure to arrest perpetrators of violence, and failure to use the Prevention of Terrorism Ordinance against perpetrators); *Discussion on the Prevention of Terrorism Bill, 2002, moved by Shri L.K. Advani. (Bill Passed)*, THIRTEENTH LOK SABHA, NINTH SESSION DEBATES, Mar. 26, 2002, <http://164.100.47.132/LssNew/psearch/Result13.aspx?dbsl=3795> (debating whether to pass the POTA, members of Parliament who opposed the draft law highlighted how the Prevention of Terrorism Ordinance had been discriminatorily used in Gujarat against Muslims (speeches by Sonia Gandhi, Somnath Chatterjee, H.D. Deva Gowda, Kapil Sibal, N.K. Premachandran, P.D. Elangovan, E. Ahamed)).

¹⁶⁵ *Regarding the President's notification for summoning Joint Sitting of the Rajya Sabha and the Lok Sabha for the purpose of consideration and voting on the Prevention of Terrorism Bill, 2002*, THIRTEENTH LOK SABHA DEBATES, Mar. 22, 2002, <http://164.100.47.132/LssNew/psearch/Result13.aspx?dbsl=3817>. The summons from the President of India to members of both the lower and upper houses of Parliament for a joint session.

¹⁶⁶ Joint Sessions of the Indian Parliament have been called twice before 2002, once to consider the Dowry Prohibition Bill in April 1961 and once to consider the Banking Service Commission (Repeal) Bill in December 1977. See UJJWAL KUMAR SINGH, *supra* note 134, at 90.

cumulative numbers in both houses to get an easy majority in the joint session and pass POTA. In doing so, it circumvented a likely defeat in the upper house of Parliament and thwarted the usual balancing role of the upper house in legislative debate and scrutiny.

C. Diluted Debate and Scrutiny

Thus, the executive has repeatedly commandeered legislative power over security laws. As discussed above, the use of ordinances weakens debate when the legislature is considering laws that mirror those ordinances, and raises the stakes of opposing elements of the ordinance that are already being implemented. While the debate that should accompany the passage of a law has been diluted, the legislature's power to review these laws after they have been passed has also eroded over time. Past security laws, such as the PDA, TADA and POTA, included sunset clauses. Such sunset clauses were a mechanism to acknowledge the extraordinary—and therefore temporary—nature of the powers under these laws, and to review these powers periodically and renew them only if a majority of Parliament decided they were still required.

It is telling, however, that the interval between legislative reviews increased from earlier laws to later ones, until such reviews were abandoned altogether. The PDA provided for annual review by Parliament. From 1951 onwards, Parliament renewed the PDA every year until 1968, rendering preventive detention powers *de facto* routine and permanent. The PDA's current successor, the National Security Act, 1980 formalized this *de facto* permanence, and dispensed entirely with a sunset clause. Laws creating terrorist offenses followed a similar trajectory. TADA provided for review every two years, and POTA for review every three years. However, when POTA's provisions were incorporated into the UAPA, these amendments made no provision for legislative review.

It is possible to argue that repeated legislation demonstrates deep political support in Parliament for the recurrent, and problematic, features of these laws that were highlighted in Part II. However, the executive branch has so dominated the legislative process, that this seeming consensus may very likely have resulted from a lack of sufficient Parliamentary scrutiny and engagement with the problematic, rights restricting features of these laws, rather than reasoned, substantive support for them. Exploring this question empirically is beyond the scope of this Article, but some features of the political context are worth considering in this regard.

As discussed in Part III, security laws in their current form seem to serve as both a crutch and cover in the face of a poorly functioning criminal justice system. It is not surprising that security laws have appealed to the national government despite changes in political dispensation, if they help to avert and distract from the arduous reform that the criminal justice system needs.

When executive ordinances come to be debated in Parliament, the extent as well as the content of debate is influenced by the fact that the harmful consequences of security laws can easily be perceived as a minority issue. Human rights abuses by state functionaries using security powers might affect a large *number* of individuals, but in the Indian context they will only ever affect a tiny *proportion* of people. Many who fall within this numerical minority will also be overtly different from the norm (or the perceived norm), in their religious beliefs, ethnicity, language or regional affiliation. Electoral democracy, and the legislative priorities that result, skew away from issues that affect minorities, however seriously. Even though the Indian legislature includes representatives from a range of political parties, their electoral incentives do not favor scrutinizing security legislation in depth, particularly where the government of the day is arguing that executive powers within a security law are essential for the security of the majority.

This incentive to acquiesce rather than question has shifted on occasion, when a particular law has become strongly associated with partisan, abusive policing and been heavily criticized in the popular press. For example, in the 1970s, the Indian government deployed MISA not just against human rights activists perceived as being on the fringe, but also against members of large trade unions, student unions, and mainstream political parties.¹⁶⁷ Similarly, in 2002 when the government of Gujarat used the Prevention of Terrorism Ordinance heavily against Muslims but not against Hindus in the fraught aftermath of sectarian violence, a few legislators from constituencies with a high proportion of Muslim voters argued against POTA in Parliament.¹⁶⁸

The Indian Parliament is structured to give the government of the day a strong role in *proposing* legislation and an advantage in *passing* it. Where security laws are concerned, this structural advantage has

¹⁶⁷ PAUL R. BRASS, *THE POLITICS OF INDIA SINCE INDEP.* (Cambridge Univ. Press 1994), at 40–43; GUHA, *supra* note 15, at 493–500.

¹⁶⁸ See *supra* note 164. Parliamentary debates on passing POTA. See also UJJWAL KUMAR SINGH, *supra* note 134, at 40–49, 167–70.

calcified over time into executive dominance over the entire legislative process. Parliament passes the executive's proposed bills, or as has happened more often, endorses the executive's ordinances that have already been implemented before they are considered by the legislature. The executive's aggressive use of its constitutional power has limited the thorough debate that security laws warrant. As a result, the crucial checking and balancing function that Parliamentary debate and scrutiny should play has little purchase over security legislation. A change of government in New Delhi has sometimes meant that the outgoing government's flagship security law is jettisoned. But such repeal has aimed more to reject the taint of a particular law rather than genuinely debate and discard those of its features that created room for abuses to proliferate.

V

JUDICIAL APPROVAL

Within a democratic constitutional order, independent courts of law play, in theory, a rights protective, countermajoritarian role.¹⁶⁹ Judges do not have to face the electorate, so they should be more willing to protect the rights of minorities, even very small or unpopular ones.¹⁷⁰ The Indian judiciary is well placed to scrutinize, check and balance executive power. The Indian Constitution grants the Supreme Court the power to review whether legislation is constitutional.¹⁷¹ The Supreme Court and High Courts can receive petitions directly from citizens seeking to enforce their constitutional rights,¹⁷² and exercise strong remedial powers in response.¹⁷³

¹⁶⁹ Walter F. Murphy, *Civil Law, Common Law, and Constitutional Democracy*, 52 LA. L. REV. 91 (1992).

¹⁷⁰ For a discussion of instances when courts in Western common-law jurisdictions have protected minority rights in national security cases, see Kent Roach, *Judicial Review of the State's Anti-Terrorism Activities: The Post 9/11 Experience and Normative Justifications for Judicial Review*, 3 INDIAN J. CONST. 138, 156–58 (2009).

¹⁷¹ INDIA CONST. art. 13. lays down that any law that is inconsistent with or derogates from fundamental rights is unconstitutional.

¹⁷² INDIA CONST. art. 32. empowers individuals to move the Supreme Court in order to enforce their fundamental rights, and empowers the Supreme Court to issue directions or orders or writs, including writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari, in order to enforce fundamental rights recognized in the Constitution. INDIA CONST. art. 226 similarly empowers High Courts to issue writs of habeas corpus, mandamus, prohibitions, quo warranto and certiorari in order to enforce fundamental rights.

¹⁷³ INDIA CONST. art. 142. Provides, inter alia, that the Supreme Court “may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable

Since the early 1980s, the judiciary has wielded its robust constitutional powers rather forcefully. In long running public interest litigation, the Supreme Court and many High Courts have issued detailed directions to governments, shaping policies, monitoring compliance,¹⁷⁴ and sometimes going as far as to create *de facto* legislation.¹⁷⁵ However, in contrast to its activist stance in a range of cases alleging large-scale violations of constitutional rights, India's higher judiciary has been far more cautious when considering national security matters. In this Part, I look at how the Indian Supreme Court has responded when the constitutionality of security laws has been challenged. I consider in particular four Supreme Court decisions since 1980.¹⁷⁶ The four decisions include the Court's 1982 decision in *A.K.*

throughout the territory of India." INDIA CONST. art. 144 obligates "all authorities, civil and judicial" to "act in aid of the Supreme Court." For a more detailed discussion of remedial powers under the Constitution of India, see Christine M. Forster & Vedna Jivan, *Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience*, 3 ASIAN J. COMP. L. 1, 4–6 (2008).

¹⁷⁴ See Christine M. Forster & Vedna Jivan, *supra* note 173; see also SANGEETA AHUJA, PEOPLE, LAW AND JUSTICE: A CASE-BOOK ON PUBLIC-INTEREST LITIGATION (Orient Longman 1997).

¹⁷⁵ See *Vishaka & Ors. v. Rajasthan*, (1997) 6 S.C.C. 253 (India). The "Vishaka case", in which the Supreme Court defined sexual harassment in the workplace and pending legislation on the issue, gave detailed guidelines on prevention and redress. See also Surabhi Chopra, *Holding the State Accountable for Hunger*, ECONOMIC AND POLITICAL WKLY., 8 (Aug. 5, 2009) (discussing long-running litigation on the right to food where the Supreme Court made a series of far-reaching orders on provision of food for the destitute).

¹⁷⁶ The early 1980s, after the end of the Emergency, are seen as the beginning of a new assertiveness by the Indian Supreme Court, after the Court's support for the executive during the Emergency. For a discussion of the Emergency generally, see GUHA, *supra* note 15. On July 22, 1975, the Constitution of India was amended to bar judicial review of the declaration of Emergency and the legality of the election of the Prime Minister. The government suspended the enforcement of fundamental rights to equality under Article 14, life and personal liberty under Article 21 and due process during arrest and detention under Article 22. During the 18-month period of constitutional Emergency, the Supreme Court upheld the Prime Minister's stark violations of law. In a notorious decision, *A.D.M. Jabalpur v Shivakant Shukla*, (1976) 2 SCC 521 (India), the Court overruled High Courts that had issued writs of habeas corpus in response to petitions challenging preventive detention. The Supreme Court ruled that the judiciary did not have the jurisdiction to review preventive detention orders under MISA even if these orders went beyond the legal power given to the executive or were issued in bad faith. For a discussion of these cases, see Mrinal Satish & Aparna Chandra, *Of Maternal State and Minimalist Judiciary: The Indian Supreme Court's Approach to Terror-Related Adjudication*, 21 NAT'L L. SCH. INDIA REV. 51 (2009). After the Emergency, the higher judiciary's assertiveness, particularly in reviewing the enforcement of constitutional rights, is widely understood as a bid to rebuild credibility and public trust. On this point, see Christine M. Forster & Vedna Jivan, *supra* note 173, at 4.

*Roy v. Union of India*¹⁷⁷ (*AK Roy*) which dealt with the constitutionality of the National Security Act, *Kartar Singh v. State of Punjab*¹⁷⁸ (*Kartar Singh*) in 1994 which addressed the constitutionality of TADA, *Naga People's Movement of Human Rights v. Union of India*¹⁷⁹ (*Naga People's Movement*) in 1998 which considered AFSPA's constitutionality, and *People's Union of Civil Liberties v Union of India*¹⁸⁰ (*PUCL*) in 2004 which decided on the constitutionality of POTA.

Each of these four cases was elaborate. In three out of the four cases, the petitioners argued that the national legislature did not have the authority to pass the law *as a whole*. In all four, petitioners argued that several *individual provisions* of the law infringed provisions in the Constitution. And on each occasion, the Supreme Court ruled very substantially in favor of the state.

A. Challenges to Parliament's Legislative Authority

Petitioners' arguments about legislative competence rested upon the Constitution's division of legislative authority between the national legislature and state legislatures.¹⁸¹ The petitioners argued in each case that state legislatures have exclusive authority to legislate on "public order,"¹⁸² and therefore the national legislature was not constitutionally competent to pass the law in question. This argument was dismissed without much ado every time. The Court maintained that security laws deal with threats more elevated than public disorder, and the national legislature, which is constitutionally empowered to legislate on matters

¹⁷⁷ A.K. Roy v. India, (1982) 1 SCC 271 (India) [hereinafter A.K. Roy].

¹⁷⁸ Kartar Singh v. Punjab, (1994) 3 SCC 569 (India) [hereinafter Kartar Singh].

¹⁷⁹ Naga People's Movement of Human Rights v. India, AIR 1998 SC 432 (India) [hereinafter Naga People's Movement].

¹⁸⁰ People's Union of Civil Liberties v. India, (2004) 9 SCC 580 (India) [hereinafter PUCL].

¹⁸¹ The Indian Constitution grants the national legislature exclusive power to legislate on matters in List I or the Union List in the Seventh Schedule to the Constitution. The Constitution grants state legislatures exclusive power to legislate on matters in List II or the State List. Both national and state legislatures have authority to legislate on matters in List III or the Concurrent List. See INDIA CONST. art. 246 and List I, List II, and List III of the Seventh Schedule.

¹⁸² "Public order" falls within the state legislature's exclusive legislative authority. INDIA CONST. List II, Entry 1.

concerning the “defense of India,” has clear authority to pass these laws.¹⁸³

This result was hardly surprising. The Constitution expressly allows preventive detention by national and state governments, and by implication allows the national government to pass legislation regulating such detention.¹⁸⁴ While the Constitution does not directly address terrorism and separatist movements, the national government argued persuasively that these issues concern national defense and therefore the national legislature had the authority to pass anti-terrorism laws and AFSPA.¹⁸⁵ Even if the Constitution had been unclear, the Supreme Court would not have resolved such ambiguity by divesting the national legislature of legislative authority on terrorism and armed insurgency. To do so would have implied that India’s twenty state governments with their varying capacities, jurisdictions and resources could draft laws on the nation’s security, but the national government could not.

B. Challenges to Expansive Executive Powers

While the petitioners might have overreached in challenging Parliament’s authority to legislate on security in *general*, their challenges to *particular* provisions of the NSA, TADA, POTA, and AFSPA respectively were rigorous and persuasive on the whole. All four petitions concentrated on the ways in which the laws at issue departed from ordinary criminal law. They elucidated how these departures were incompatible with a range of constitutional rights. The Court rejected most of these arguments. Below, I discuss some of the main strands of argument by the petitioners, as well as the Supreme Court’s response. I concentrate on challenges to the characteristics of security laws and the corresponding executive powers highlighted in Part II.

1. Ambiguous Scope

In *A.K. Roy*, which challenged the NSA, the petitioners argued that the grounds for preventive detention were too wide, having been transposed from the Constitution into ordinary law without any attempt

¹⁸³ Kartar Singh, *supra* note 178; Naga People’s Movement, *supra* note 179; PUCL, *supra* note 180.

¹⁸⁴ See discussion *supra* Part II.C.

¹⁸⁵ See Kartar Singh, *supra* note 178, ¶ 54; PUCL, *supra* note 180, ¶ 3.

at precise statutory definition.¹⁸⁶ The Court responded by ruing the “imperfections of language,”¹⁸⁷ but insisting that “a certain amount of minimal latitude” was necessary in order to make preventive detention laws effective.¹⁸⁸ Arguments in *Kartar Singh* about broadly drafted powers in TADA to declare an area “terrorist affected” and establish special courts within it received similar treatment from the Court.¹⁸⁹ While the Supreme Court dismissed arguments that government powers should be clearer and narrower, challenges to ambiguity in the *mens rea* requirement of criminal offenses received a more favorable response. In *Kartar Singh*, the Court read a *mens rea* requirement into the offense of abetment, holding that imprecision could render a legal provision arbitrary and “void for vagueness.”¹⁹⁰ It followed this precedent in *PUCL* and clarified that the offense of abetment required intention and the offense of unauthorized possession of arms required knowledge of possession.¹⁹¹

2. *Special Security Measures in Demarcated Zones*

In *Naga People’s Movement*, the Court held that the power to declare an area “disturbed” was neither arbitrary nor unguided,¹⁹² even though AFSPA lays down no guiding criteria for such a declaration. The court also rejected any suggestion that the military’s extensive powers to search, seize property, arrest people and use force against them were excessive.¹⁹³ In *Kartar Singh*, the Court responded in similar ways to arguments against the executive’s power to constitute special courts in a “terrorist affected area.” It held that the TADA implicitly required that terrorist or “disruptive” activities were of a scale and seriousness that warranted special measures.¹⁹⁴

The Supreme Court did inject one important limit into the executive’s power under AFSPA to create a zone where the military has generous leeway to use force. The Court held that the words of AFSPA implied a time bound declaration, and therefore, a declaration that an area is “disturbed” cannot take effect for more than six months

¹⁸⁶ A.K. Roy, *supra* note 177, ¶ 63.

¹⁸⁷ A.K. Roy, *supra* note 177, ¶ 67.

¹⁸⁸ A.K. Roy, *supra* note 177, ¶ 66.

¹⁸⁹ *Kartar Singh*, *supra* note 178, ¶ 137.

¹⁹⁰ *Id.* ¶¶ 127, 130–133.

¹⁹¹ *PUCL*, *supra* note 180, ¶¶ 25, 27.

¹⁹² *Naga People’s Movement*, *supra* note 179, ¶ 41.

¹⁹³ *Id.* ¶¶ 47–55.

¹⁹⁴ *Kartar Singh*, *supra* note 178, ¶ 138.

at a time.¹⁹⁵ While this does not prevent national or state governments from renewing declarations repeatedly, it does force a formal reconsideration every six months.

3. Preventive Detention Powers

Preventive detention is constitutionally authorized, so it follows that a law cannot be invalid for allowing such detention per se. In *A.K. Roy*, the petitioners did not question the legality of preventive detention in and of itself, but argued that the procedure established by the NSA violates the rules of natural justice because it bars legal representation for detainees as well as cross-examination in hearings before the advisory board—the administrative review mechanism established by the NSA. The Supreme Court reminded the petitioners that the Constitution did not extend the right to legal representation to individuals who are preventively detained.¹⁹⁶ However, the Court failed to consider that while the Constitution does not *grant* the right to legal representation to detainees, it does not expressly *bar* this right either. Therefore, it was possible to draw upon common law principles on fair procedure to read in such a right while still respecting the Constitution. The Court went further and upheld statutory provisions on which the Constitution is silent, such as the NSA's ban on cross-examination during advisory board hearings, and the government's unrestricted power to determine conditions of detention and punish infractions by detainees.¹⁹⁷

To justify these conclusions, the Court elaborated that the NSA could attenuate procedural rights for advisory board hearings because detention depends upon the decision maker's subjective satisfaction rather than a judge's decision at trial.¹⁹⁸ The Court's position was that procedural rights under criminal law were meant to apply specifically during criminal trials, and therefore, it was entirely permissible to remove these rights, and have far lower procedural protection, during a different type of proceedings.

The implications of the Court's reasoning are disturbing. During criminal proceedings, the rights of the defense are meant to guard against miscarriages of justice. A law on preventive detention that allows the state to restrict an individual's liberty without having to

¹⁹⁵ Naga People's Movement *supra* note 179, ¶ 43.

¹⁹⁶ *A.K. Roy*, *supra* note 177, ¶ 92.

¹⁹⁷ *Id.* ¶ 114.

¹⁹⁸ *Id.* ¶ 105.

prove guilt before a court, carries a greater risk of arbitrary or unreasoned decisions. Therefore, individuals who are preventively detained should have correspondingly higher procedural protection and more liberal conditions of detention than individuals undergoing criminal trials. However, the Supreme Court did not address this pressing question of principle, nor did it justify why attenuated procedural rights were necessary in the particular context of security related administrative detention. Instead, the Court's position places little weight on long-standing common law principles such as the right to a fair hearing and allows the government to dispense with basic procedural protections simply by creating a forum technically distinct from a criminal trial.

4. "Status Offenses" and the Power to Proscribe Organizations

The Supreme Court staunchly upheld executive power to tag organizations as "unlawful" or "terrorist," as well as the power to prosecute terrorist offenses in special courts. It upheld the procedure for banning organizations laid down in the UAPA, TADA, and POTA. The Supreme Court dismissed petitioners' arguments in *PUCL* that expansive powers under POTA to declare associations as "terrorist" violated the constitutional right to freedom of association.¹⁹⁹ It held that creating the status offenses at issue was permissible, particularly given the magnitude of terrorism and the goals of the challenged legislation,²⁰⁰ and pointed out that the challenged powers were valid because the Constitution allows restrictions on freedom of association.²⁰¹ However, simply because a right is not absolute and can be restricted should not be enough, in and of itself, to validate an individual restriction, particularly an onerous one.²⁰² The Court did not

¹⁹⁹ *PUCL*, *supra* note 180, ¶ 41.

²⁰⁰ *Id.* ¶ 42.

²⁰¹ *Id.*

²⁰² INDIA CONST. art. 19, § 4 permits "reasonable restrictions" on the right to form associations or unions, "in the interests of the sovereignty and integrity of India or public order or morality." While some rights under Chapter III of the Indian Constitution are absolute rights, such as the right against forced labor recognized in INDIA CONST. art. 23, most rights are expressly or impliedly qualified. *See generally* South Asia Human Rights Documentation Centre, *Human Rights in the Indian Constitutional Framework*, HUMAN RIGHTS AND HUMANITARIAN LAW: DEVELOPMENTS IN INDIA AND INTERNATIONAL LAW, 205–94 (2008). The manner in which rights are recognized and framed in the Indian Constitution is similar to the way civil and political rights are structured under the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (ICCPR), even though the catalogue of civil and political rights recognized in the Indian Constitution overlaps with but is not identical to the rights recognized in the ICCPR. Most

consider how far freedom of association could be limited, and whether these particular governmental powers restricted it too far.

5. Enhanced Powers to Investigate and Prosecute

Procedural innovations in TADA and POTA that disadvantaged the defense were also upheld in *Kartar Singh* and *PUCCL* respectively. The Supreme Court stated that defendants under TADA and POTA fell within a “distinct class of persons,” and approved of this distinct class being subject to provisions allowing 180-day pre-charge detention and a prima facie assessment of innocence as a precondition for bail. Some provisions did divide opinion. Justice Sahai dissented vehemently in *Kartar Singh* against the admissibility of confessions to police officers as evidence during trial.²⁰³ However, the majority in *Kartar Singh* held that allowing custodial confessions as evidence was neither “unjust” nor “oppressive”, merely recommending that judges be vigilant about detecting impropriety by the police.²⁰⁴ Parliament’s legitimate authority to pass the laws in question, as well as “the gravity of terrorism unleashed by . . . terrorists”²⁰⁵ swayed the majority on custodial confessions. Only one provision of TADA—allowing identification based on photographs—was unanimously struck down as unconstitutional.²⁰⁶ Since POTA incorporated so many provisions from TADA, the precedent set by *Kartar Singh* on these provisions disposed

rights enumerated in the ICCPR are qualified rights. An individual’s exercise of a qualified right can be limited in light of the rights of others or the larger public interest. A few rights are absolute rights, in that these rights cannot legitimately be subject to legal limits. Examples of absolute rights include, *inter alia*, the right to be free of torture and cruel, inhuman and degrading treatment under Article 7 of the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (ICCPR), and the right to nondiscrimination under Article 2 of the ICCPR. Accordingly, there are no circumstances under which it would be lawful to discriminate against an individual or to torture an individual or subject him or her to cruel, inhuman and degrading treatment. When evaluating an alleged limitation on an absolute right, courts should assess whether the law or official conduct being challenged constitutes a limitation, and if it does, that law or official act is incompatible with the right. When evaluating an alleged limitation on a qualified right, courts should engage in a different enquiry and assess where the limit imposed by the law or official conduct being challenged is compatible with the right in question. A limit on a qualified right will not inevitably be incompatible with the right, but might be incompatible if it is based on impermissible criteria or if it goes too far.

²⁰³ *Kartar Singh*, *supra* note 178, ¶¶ 454–456.

²⁰⁴ *Id.* ¶ 253.

²⁰⁵ *Id.*

²⁰⁶ *Id.* ¶ 361.

of arguments raised by petitioners in *PUCL* on similar provisions in POTA.

6. *Power to Create Special Courts*

Special courts were challenged in *Kartar Singh* for violating the constitutional right to equality. The petitioners argued that defendants on trial in special courts navigated less favorable courtroom procedure and faced less independent judges than in a regular trial court. As it had done in relation to restrictions on bail, the Supreme Court upheld the creation of special courts on the ground that persons tried under the TADA were “a distinct class of persons”²⁰⁷ who could therefore be treated differently from other criminal defendants without infringing the right to equality.

The Court sidestepped the fact that defendants under TADA were not prosecuted under that law because they belonged to some prior, already differentiated “distinct class of persons”; they were placed in a distinct class precisely because they were being prosecuted under that particular law. Given the ambiguous scope of TADA offenses, and overlap with offenses under the Indian Penal Code, many TADA defendants could potentially have been tried under ordinary criminal law in regular trial courts with greater procedural protections. Thus, individuals tried in special courts were placed in a “distinct class of persons” by decision makers—police and prosecution officials—with considerable discretion to do so. Prosecution under TADA rather than the Indian Penal Code was not a neutral fact on the ground, but rather a prosecutorial *choice*, with very serious consequences for defendants. The Supreme Court glossed over this, and simply did not consider the genuine question of whether broadly drafted offenses in concert with special courts resulted in discrimination against TADA defendants.

The Court also summarily dismissed arguments that the executive’s substantial control over judicial appointments to special courts sat uneasily with constitutional provisions on judicial independence and clearly departed from usual procedure. It emphasized Parliament’s competence to enact the law as a whole, conflating the legislature’s institutional authority to enact the law in question with the very different question of whether the resulting method of appointing judges to special courts infringed constitutional provisions on judicial independence.²⁰⁸

²⁰⁷ *Id.* ¶ 220.

²⁰⁸ *Id.* ¶¶ 159–161.

While upholding provisions related to special courts with no hesitation, the Supreme Court recommended a measure that suggests some unease over the long-term use of such courts. The Court recommended, but, importantly, did not order, that the government appoint a committee to review regularly whether special courts were still needed.²⁰⁹

7. Limits on Judicial Review

In *Kartar Singh*, the Supreme Court proclaimed its special role in preserving the rule of law, “[T]here is no institution to which the duty can be delegated except to the judiciary.”²¹⁰ Early in *PUCL*, the Court acknowledges “clear [Constitutional] limitations on . . . State actions within the context of the fight against terrorism”²¹¹ and further that the judiciary has the responsibility “[t]o maintain this delicate balance by protecting ‘core’ Human Rights.”²¹² On occasion, the Supreme Court cited citizens’ ability to challenge government actions in court as one of the reasons that provisions encroaching on constitutional rights are acceptable. In *PUCL*, for example, the Court upheld status offenses on the ground that an organization can contest the decision to ban it in court.²¹³

However, while the Supreme Court presented review by the higher judiciary as an important check, it also preserved statutory limits and hurdles to judicial review. The Court had no quarrel with decision-making powers that required only the subjective satisfaction of the decision maker, such as the power to preventively detain someone or the power to declare an area disturbed under AFSPA.²¹⁴ As discussed earlier, statutory powers of this nature restrict courts to reviewing whether the decision maker used the proper procedure, which under the terms of the NSA and AFSPA involves checking only if the official in question was of the correct rank. Nevertheless, the Court did not require—or even recommend *obiter dictum*—that these powers be amended to include decision-making criteria that add some rigor and certainty, and reduce the potential for arbitrariness.

²⁰⁹ *Id.* ¶ 362.

²¹⁰ *Id.* ¶ 366.

²¹¹ *PUCL*, *supra* note 180, ¶ 15.

²¹² *Id.* ¶ 15.

²¹³ *Id.* ¶¶ 37, 42, 37. In *Kartar Singh*, *supra* note 178, ¶ 247, the Court makes the same point, and notes that it has granted compensation to victims of fundamental rights violations.

²¹⁴ *Naga People’s Movement supra* note 179, ¶ 41.

The Supreme Court also uniformly rejected challenges to administrative review mechanisms. It disagreed with arguments in *A.K. Roy* that advisory boards did not accord preventive detainees a fair hearing.²¹⁵ In *PUCL*, the Court similarly rebuffed arguments that review committees did not give banned organizations genuine opportunity to challenge the national government's decision to designate them as terrorist groups.²¹⁶ The petitioners' argument that the national government had too much power over appointing members of review committees met a similar fate.²¹⁷

The Court affirmed administrative review mechanisms, with their lack of independence and highly abbreviated procedural protections. It did not expressly acknowledge that administrative review delayed access to judicial review, or that limits on disclosure to evidence made it difficult for applicants to credibly challenge the government's decision to detain or ban them. Further, when the Supreme Court recommended additional checks and balances—as in *Kartar Singh* where it suggested that the national government appoint a screening committee to review legal proceedings as well as state governments' actions under TADA²¹⁸—these suggested measures were also committees appointed exclusively by and responsible only to the national government.

C. Assessing the Supreme Court's Security Jurisprudence

1. Championing Executive Powers

On the one hand, the Supreme Court stressed its special responsibility for upholding rights and curbing unlawful state behavior. On the other hand, it deferred greatly to the executive and to the legislature in all four petitions, and was reluctant to actually wield the review powers that it had emphasized. The security laws challenged in *A.K. Roy*, *Kartar Singh*, *Naga People's Movement*, and *PUCL*, all emerged largely unscathed. The Court struck down only one provision of TADA. It remedially interpreted a handful of provisions in TADA, POTA, and AFSPA, reading a *mens rea* requirement into offenses that were ambiguously framed²¹⁹ and reading a six-month review

²¹⁵ *A.K. Roy*, *supra* note 177, ¶¶ 88–90.

²¹⁶ *PUCL*, *supra* note 180, ¶ 39.

²¹⁷ *Id.* ¶ 39.

²¹⁸ *Kartar Singh*, *supra* note 178, ¶ 265.

²¹⁹ *Id.* ¶ 127; *PUCL*, *supra* note 180, ¶¶ 25, 27.

requirement into the state's power under AFSPA to designate an area as "disturbed."²²⁰ Each law was upheld as a whole, and most individual provisions in each also survived the Court's review with ease.

The Supreme Court also occasionally adopted a dialogic mode of review²²¹—rather than striking down or remedially interpreting an executive power, it suggested nonbinding checks and balances. Some suggestions were concrete—the Court proposed that the national government set up a committee to review how TADA was being used.²²² Other suggestions were so obvious as to seem superfluous. The Court suggested that trial judges remain aware that custodial confessions might be coerced.²²³ When offering nonbinding suggestions, the Court could have considered what good domestic practice or international standards would point towards. Instead, these *obiter dicta* proposals cleaved very close to the contours of the law at issue, suggesting that the government appoint *ad hoc* review bodies.

In *Naga Peoples Movement*, the Supreme Court made an ostensibly binding order that, on closer examination, is more akin to a nonbinding order. The Court directed that the Indian army treat as "binding" an internal list of "dos and don'ts" for using AFSPA powers.²²⁴ However, the Supreme Court did not read these guidelines into AFSPA or any other relevant legislation. It failed to clarify if victims of violence could apply for compensation on the grounds that soldiers using AFSPA powers acted against these internal guidelines. The Supreme Court also chose not to monitor whether national and state governments or the armed forces complied with its orders. By contrast, in many other constitutional rights cases, the Court has used remedies such as structural injunctions to examine whether the executive is implementing measures to ameliorate widespread or chronic government failures.²²⁵

The Court suggested self-restraint and self-monitoring by national and state governments, in the face of considerable evidence that officials and institutions have abused their security powers. In the Court's analysis, abuse of power is an aberration; officials are clearly

²²⁰ *Naga People's Movement*, *supra* note 179, ¶ 43.

²²¹ See generally Mark Tushnet, *Dialogic Judicial Review*, 61 ARK L. REV. 205 (2009).

²²² Kartar Singh, *supra* note 178, ¶ 265.

²²³ *Id.* ¶¶ 263–264.

²²⁴ *Naga People's Movement*, *supra* note 179, ¶ 63.

²²⁵ See *Shubhankar Dam*, *supra* note 154.

to be trusted and seniority is seen as a self-evident safeguard when exercising extraordinary powers. For example, in *A.K. Roy*, the Court upheld the devolution of preventive detention powers to district level officials.²²⁶ It noted that “a certain amount of minimal latitude has to be conceded” to make the law effective, without acknowledging that executive discretion under the NSA is considerably more than minimal.²²⁷ In *PUCL*, the Court upheld a controversial provision that effectively denied journalists and lawyers the ability to keep sources or client information confidential. While doing so, it had little patience with arguments that Investigating Officers, fairly junior police officials, might overuse the power to demand confidential information, stating “[o]f course the IOs will be circumspect and cautious.”²²⁸ In *Naga People’s Movement*, the Supreme Court affirmed that noncommissioned officers, who are also relatively junior, can exercise shoot-to-kill powers because they have the necessary “status and experience” to do so.²²⁹ Vast executive discretion was thus, largely treated by the Court as unremarkable and its extraordinary scope as necessary.

2. *Conflating Legislative Legitimacy with Constitutionality*

On a range of issues across these four petitions, the Supreme Court repeatedly underlines that the Indian Parliament had full authority to pass the law at issue, and therefore, the particular provision at issue. The Court treats its affirmative response to the initial question of whether the national legislature could legislate on a particular subject as decisive on the very different question of whether a specific legal provision was compatible with the Constitution. However, simply because an institution exercises legitimate authority does not inexorably mean that the outcome of that exercise will, in substance, be legitimate.

The Supreme Court privileges the first step of its inquiry, and avoids the heart of the matter—interpreting what the Constitution demands and allows. To evaluate whether a provision of ordinary law is compatible with the higher law of the Constitution, the Court should explicate what the relevant constitutional provisions mean. If the meaning of particular provisions has been explored in previous decisions, drawing upon those precedents might suffice. Elucidating

²²⁶ *A.K. Roy*, *supra* note 177, 329–30.

²²⁷ *Id.* 323.

²²⁸ *PUCL*, *supra* note 180, ¶ 37.

²²⁹ *Naga People’s Movement*, *supra* note 179, at 533–34.

the necessarily general words of constitutional provisions is particularly important where statutory provisions seem, on the face of it, to be limiting fundamental rights guaranteed by the constitution. It is also important where these statutory provisions depart from long established legal standards within a jurisdiction, as many provisions in TADA, POTA, and AFSPA did. Previous jurisprudence, developed around challenges to ordinary criminal law, might not address the questions raised by these new, far more extensive, provisions.

In *A.K. Roy*, when interpreting the rather loosely worded constitutional provisions on the executive's ability to pass ordinances that limit fundamental rights, the Court declares that the Constitution "is what it says and not what one would like it to be."²³⁰ The Court does not acknowledge that in interpreting constitutional provisions abstract enough to accommodate a range of meaning, it shapes the content and scope of those provisions. Avoiding its own activist interpretive stance in other types of decisions,²³¹ the Supreme Court chose a far more perfunctory role for itself when reviewing security laws.²³² In *A.K. Roy*, the earliest of the four decisions considered here, the Supreme Court did, indeed, consider what rights Article 22 of the Indian Constitution granted to persons who were preventively detained. In its subsequent decisions, however, the Court did not grapple with the content of constitutional rights implicated by the statutory provisions at issue, which included in particular the rights to a fair trial, equality, freedom of association, and life and liberty.

Typically, in these decisions, the Supreme Court simply declares that a contested statutory provision does not violate a particular constitutional right. A more rigorous way to reach the same result would be to acknowledge that the provision in question limits a constitutional right, but on considering the content of the right, find that the limitation is an acceptable one. A disaggregated analysis that acknowledges rather than elides a limit would be more transparent. Further, clarity is not its only advantage. Such analysis more effectively protects the constitutional right over the long term. When the Court

²³⁰ *A.K. Roy*, *supra* note 177 at 273.

²³¹ See Forster & Jivan, *supra* note 173, at 4; see also Ahuja, *supra* note 174; Chopra, *supra* note 175.

²³² See Satish & Chandra, *supra* note 176, at 52 (arguing that the Indian Supreme Court interprets statutes, rather than the Constitution, when it reviews anti-terror laws and engages in minimalist interpretation when doing so, deciding cases on the narrowest grounds sufficient to decide the issues before the court).

simply asserts that, for example, special court trials conducted inside prisons, or custodial confessions admitted as evidence against codefendants, do not raise, even *prima facie*, any fair trial concerns, this affects the ambit of the right itself. Such reasoning paves the way for arguments that the right to a fair trial does not include trials in open court or strong safeguards against coerced confessions. By contrast, acknowledging that a particular measure constrains how an individual can exercise a constitutional right, but justifying that constraint would help to limit that constraint to situations where a compelling justification exists.

In a few instances, the Supreme Court takes a step beyond simply asserting that a statutory provision is constitutionally valid. The Court notes in addition that the Constitution allows a particular constitutional right—whether the right to a fair trial or the right to equality or freedom of association—to be limited. As discussed above, the Supreme Court offered this justification when upholding provisions banning organizations in POTA.²³³ Although somewhat less cursory than an unreasoned assertion, this approach too is an elision. Very few rights are absolute, but simply because a right can be limited does not mean that *any* limit is permissible, as the Court's articulation would imply.

In national security cases, the Supreme Court has treated the legislature's choice about how far to limit a right—or, more accurately, the executive's choice on this question—as decisive. For example, the Court ignored some arguments about potential discrimination under security laws,²³⁴ and rebutted others in a manner that entirely begged the question at hand. Petitioners argued the special regulation created by security laws, coupled with wide executive discretion and overlap with ordinary law, created the potential for discrimination because for substantially similar actions, one person might be investigated and prosecuted under one set of rules, and another person under a different, more onerous set of rules. The Supreme Court consistently responded that differential regulation was not discriminatory because the relevant law created such regulation and that individuals processed under

²³³ PUCL, *supra* note 180, ¶¶ 41–42.

²³⁴ See PUCL, *supra* note 180, ¶¶ 35–42 (ignoring arguments based on the right to equality, the Court upheld statutory provisions giving the police power the ability to compel individuals, including lawyers and journalists, to disclose information and provisions related to classifying an organization as “terrorist” without notice, publicly declared reasons, or a hearing).

different rules fell in a special category.²³⁵ While upholding the NSA's provisions on advisory board procedure in *A.K. Roy*, the Court dismissed the argument that procedural rights be proportionate to the loss involved—loss of freedom in this instance—for the individual.²³⁶ It rejected the idea of a “prescribed standard of reasonableness,” stating instead that the “availability of rights . . . can't be decided generally” and has to be decided “on the basis of statutory provisions which govern the proceedings, provided that provisions are constitutionally valid.”²³⁷ Rather than evaluating whether statutory provisions conformed to constitutional norms, the court deflected challenges to statutory standards by circular reliance on those very statutory standards. Thus, through these four decisions, the Supreme Court envisions constitutional rights not as binding constraints, but as what is left over after the executive enhances its powers to use force and detain individuals.²³⁸

3. Selective Attention to Sociopolitics

When affirming contested provisions, in all four decisions the court underscored threats to national security as validating, or even necessitating,²³⁹ that particular provision or the law that it was a part of as a whole. In *Kartar Singh*, the Court noted, “[r]ules of natural justice cannot remain the same applying to all conditions . . . However unsavoury (sic) the procedure may appear to a judicial mind, these are facts of life which are to be faced.”²⁴⁰ References to security threats are measured in *A.K. Roy*, but tend towards the overwrought in later

²³⁵ See, e.g., *Kartar Singh*, *supra* note 178, at 222; *Naga People's Movement*, *supra* note 179, at 47–55.

²³⁶ *A.K. Roy*, *supra* note 177, at 88.

²³⁷ *Id.* at 89.

²³⁸ Gearty argues that, in the early 1800s, a Hobbesian conception of unconstrained armed force as a necessary bulwark against chaos gained more influence than competing ideas of security that valued individual autonomy and the constraints this implied for state power. He argues that the common law reflected and reproduced this Hobbesian view of security as the most important function of the state. The corollary to this was an arid conception of individual liberty as the residue that remains after the sovereign has secured law and order. See Conor Gearty, *Escaping Hobbes: Liberty and Security for our Democratic (Not Anti-Terrorist) Age* (London Sch. of Econ., L., Soc'y & Econ., Working Paper No. 3/2010), http://www.lse.ac.uk/collection/law/wps/WPS2010-03_Gearty.pdf.

²³⁹ See *Kartar Singh*, *supra* note 178, ¶ 19 (saying that the legislature was “forced . . . to enact” security laws early on in its judgment, before it has really considered any of the petitioners' arguments).

²⁴⁰ *Id.* ¶ 284.

decisions. In *Kartar Singh*, the Supreme Court says that “impugned enactments” have to be evaluated against the “totality of the series of events due to the unleashing of terrorism, waves after waves . . . [of] blood-curdling incidents during which the blood of sons of the soil had been spilled over the soil of their motherland.”²⁴¹ In *PUCL*, the Court opines, “[o]ur country has been the victim of an undeclared war by the epicenters (sic) of terrorism”²⁴² and then notes that the “[f]ight against the overt and covert acts of terrorism is not a regular criminal justice endeavour (sic) To face terrorism we need new approaches, techniques, weapons, expertise and of course, new laws.”²⁴³

Clearly, the challenge of controlling terrorist violence is a fundamental consideration in the Supreme Court’s evaluation of security laws, and by extension, the protection afforded to constitutional rights. However, the court’s attention to the sociopolitical context in which security laws operate is rather selective. It ignores petitioners’ submissions—which were borne out by considerable empirical evidence—on how expansive executive powers under security laws have been abused in serious and recurring ways. In *PUCL*, for example, the court refused to consider “hypotheticals” about how contested statutory provisions could be abused.²⁴⁴ It neglected the fact that most provisions in POTA had previously been a part of TADA, so arguments about potential abuse were based on past abuse of the same or very similar executive powers, and therefore deserved serious consideration. Several years previously in *Kartar Singh*, Justice Sahai’s dissent drew attention to widespread torture in police custody.²⁴⁵ However, the majority in *Kartar Singh* responded by upholding the admissibility of custodial confessions during trial, and arguing that it was time “to take a small positive step towards removing this stigma on the police,” citing the “increasing earnestness and commitment” of senior police officials against custodial torture.²⁴⁶

Thus, the Supreme Court treats the threat of terrorism and separatism as an overwhelming, unarguable fact on the ground, which calls for the exceptional legal frameworks set up by the laws considered in this Article. It should then be willing to consider how these frameworks as a whole abridge access to basic rights such as fair trial, freedom of

²⁴¹ A.K. Roy, *supra* note 177, ¶ 67.

²⁴² *PUCL*, *supra* note 180, ¶ 7.

²⁴³ *Id.* ¶ 9.

²⁴⁴ *Id.* ¶ 22.

²⁴⁵ *Kartar Singh*, *supra* note 178, ¶ 453.

²⁴⁶ *Id.* ¶ 450.

association, or freedom of expression. Instead, the Court evaluates each contested provision in isolation, without considering how different provisions interact, and therefore, how a particular provision contributes incrementally to the cumulative limit that the law as a whole places on a particular constitutional right. Thus, the Supreme Court evaluated the admissibility of custodial confessions without considering the fact that a suspect under TADA or POTA could be held in police custody, and pretrial detention generally, for a very long period of time and was therefore more vulnerable to pressure than an ordinary suspect. Similarly, the Court refused to grant fuller procedural rights for preventively detained individuals during administrative review without weighing the fact that review boards were *ad hoc* bodies appointed by the government of the day. While evaluating individual legal provisions segregated from their larger statutory framework, the Supreme Court has willfully ignored relevant empirical evidence and neglected to take constitutional norms seriously. As a result, it has evaded a genuine reckoning with the security laws being reviewed. The Court has interpreted the law—statutory as well as constitutional—to loosen constitutional constraints over the executive’s room for manoeuvre and, therefore, to confine the span of a constitutional right so as to validate the powers with which the executive has endowed itself. When evaluating security laws, the Supreme Court’s interpretive stance upends the traditional relationship between statutes and constitutional provisions, with the latter being reduced to whatever the former will permit.

VI

DIRECTIONS FOR REFORM

I began this Article by stating that India’s national security laws operate outside effective constitutional checks and balances, and that this fosters human rights abuses and diminishes the scope of constitutional rights. This is not to say that security legislation, in a literal sense, has not been passed by the legislature or has not been reviewed by the judiciary. As such, it is possible to perceive the trajectory of security laws as evidencing deep principled preference across all branches of the Indian state for the particular features and resulting executive powers discussed in Part II above. However, as I have argued above, this seeming unanimity results not from reasoned agreement but from a failure to attend closely to the effects of such

unfettered executive power and to take seriously the constitutional standards that that security laws should meet.

As discussed in Part IV above, India's national government has made aggressive, excessive use of its ordinance making power to press security ordinances into service, preempting and diluting legislative deliberation in the process. While many individuals have their rights restricted and abused by state actors using security powers, those who are directly affected by security laws have neither the numbers nor the political influence to stir significant debate or sway many votes in Parliament. As a result, the legislature has endorsed, rather than reviewed or reformed, executive led security legislation.

Just as parliamentary scrutiny of security laws has been mild, judicial review has been deferential. As a result, the executive branch dominates lawmaking in this arena and exercises power with little restraint. This skewed institutional dynamic has lasting constitutional consequences. India's current and past security laws treat constitutional rights as immaterial rather than binding. When interpreting these laws, the judiciary in its turn has treated constitutional rights as modifiable and dispensable indulgences, such that whatever remains after the executive has claimed extraordinary powers to use force and detain individuals is considered adequate.

India is not the only constitutional democracy where judicial review of security laws has been timid and legislative debate lukewarm. Tushnet discusses how the traditional separation of powers has failed to check executive excesses in the United States since September 11, 2001, and he goes as far as to suggest creating a new constitutional body with the special mandate to review executive decisions on national security.²⁴⁷ Brooks argues that the international law of armed conflict continues to categorize conflicts in ways that cannot adequately guide states on how to tackle modern-day terrorism. She advocates that the international law of armed conflict be substantially reformed so it can better regulate national law and policy on security.²⁴⁸

Under regulated security powers have had such serious effects that fundamental reforms of the sort that Tushnet and Brooks suggest might be warranted, and even necessary. However, designing paradigm shifting reform and marshaling political support for it is arduous and protracted. In India, both the process and content of security legislation

²⁴⁷ Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2681–82 (2005).

²⁴⁸ Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 755–61 (2004).

is so skewed towards the executive that even modest reform would improve these laws and better regulate the executive's security powers. With this in mind, I focus below on how to improve judicial review of security laws and restructure the laws themselves in order to foster decision making that does not regard rights as remnants.

A. Restoring Judicial Review

Rigorous judicial review is essential in checking and balancing executive power under security laws. In Part V above, I argued that the Indian Supreme Court neglects constitutional and international norms when reviewing security laws, denuding the content of constitutional rights in the process. This normatively barren deference amounts to judicial retreat, harms the rule of law, and leaves individuals vulnerable to serious abuses. For the individual citizen and for the rule of law, it is important that the Court shift its approach. It can do so by concentrating on the substantive content of constitutional rights, drawing upon the rich resources offered by its own rights jurisprudence outside the national security context, comparative jurisprudence from other constitutional democracies, and international human rights law.

In all four decisions discussed above, the Court rarely referred to international human rights norms, and used this material somewhat tendentiously. In *PUCL*, the Court suggests that U.N. S.C.R. 1373 obligates India to pass a new anti-terrorism law.²⁴⁹ However, although U.N. S.C.R. 1373 requires states to take certain anti-terrorism measures, particularly related to terrorist financing, it does not demand a new law and certainly does not require the particular measures the Indian government imported from TADA into POTA. Further, while the Supreme Court invoked international law in support of POTA, it did not engage with international law on human rights, such as the International Covenant on Civil and Political Rights, to which India is a party, or the jurisprudence of the U.N. Human Rights Committee

²⁴⁹ *PUCL*, *supra* note 180, ¶¶ 10–13. The Supreme Court echoed the view of India's Minister for Home Affairs when the Prevention of Terrorism Bill was first introduced in Parliament, who stated that India had "a duty to the international community" to pass this law. *See* Parliament of India, Joint Session Debate (Mar. 26, 2002), <http://164.100.24.208/debate/debtext.asp?sno=3795&ser=&smode=t> (statement of L.K. Advani); Lok Sabha Debate (Mar. 18, 2002), <http://164.100.24.208/debate/debtext.asp?sno=3791&ser=&smode=t> (statement of L.K. Advani).

under the ICCPR.²⁵⁰ Such omissions by the Supreme Court were missed opportunities.

International human rights law has the advantage, as Brooks points out, of applying at all times to all individuals, regardless of whether the state is dealing with dangers it considers extraordinary.²⁵¹ The standards in the ICCPR, along with the jurisprudence of the United Nations Human Rights Committee would be especially relevant to interpreting security laws. The Indian Supreme Court has tended to treat national security or the more nebulous “public order” as an unassailable trump that permits almost any limit on a right. International law such as the General Comments of the UNHRC²⁵² or the Siracusa Principles²⁵³ can assist in defining and evaluating limitations on the grounds of national security and public order. Petitioners, in turn, should frame arguments with reference to international standards, thus pushing the judiciary to contemplate seriously how far a right can be constrained.

The Supreme Court should elucidate the content of a constitutional right with reference to international and comparative standards, and consider how far limitations might extend without rendering the right meaningless. It should then evaluate whether rights limiting statutory provisions meet these standards. In order to do this, it should adopt the well established proportionality approach, inquiring whether a statutory provision that, *prima facie*, limits a constitutional right pursues a legitimate aim, and if so, whether the rights limiting means chosen to achieve that aim impose the smallest possible restriction on the right in question. When evaluating a statutory measure—admissibility of custodial confessions for example—courts should demand convincing evidence from the government supporting the need

²⁵⁰ India acceded to the ICCPR on April 10, 1979. *See* United Nations Treaty Series, 999 U.N.T.S. 171; 1057 U.N.T.S. 407 (Dec. 16, 1966), http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-4&chapter=4&lang=en%23EndDec.

²⁵¹ Brooks, *supra* note 248, at 747.

²⁵² *See, e.g.*, U.N. Human Rights Committee, *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency* (Aug. 31, 2001), <http://www.refworld.org/docid/453883fd1f.html>; U.N. Human Rights Committee, *CCPR General Comment No. 11: Article 20: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred* (July 29, 1983), <http://www.refworld.org/docid/453883f811.html>; U.N. Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (July 21, 2011), <http://www.refworld.org/docid/4e38efb52.html>.

²⁵³ U.N. Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (Sept. 28, 1984), <http://www.refworld.org/docid/4672bc122.html>.

for that particular measure in order to evaluate whether the aim is legitimate and the measure reasonable, rather than being satisfied with insufficiently examined appeals to the vital need for security. If a statutory provision limits a right more than is necessary to achieve its intended aim, that disproportionate limitation should make the provision unacceptable.

Balancing tests do not, of course, completely inoculate against excessive deference in national security cases, and can be used to put a gloss on arbitrary laws or policies. But, as Roach²⁵⁴ and Wells²⁵⁵ point out, despite its malleability, proportionality analysis at least steers courts towards overtly reasoned decisions. Structured analysis would sideline the sort of high-strung hypotheticals that run through *Kartar Singh* and *PUCL*, and concentrate attention on the likely effect of a particular provision. The structure of the test—its focus on whether a limitation goes further than necessary—would encourage both petitioners and respondents to draw upon comparative and international jurisprudence to support their arguments.

Applying an established test that facilitates evidence-based reasoning is especially important when evaluating security laws because judges, government officials, and legislators will be more prone to bias on this topic than on many others. Armed conflict and terrorist attacks leave vivid memories. Revulsion at arbitrary violence, sympathy for victims, and fear of future attack might all lead decision maker to overestimate threats or devalue due process and basic liberties.²⁵⁶ The Indian Supreme Court has clearly tended to do this when asked to review security legislation.

As discussed in Part V, the Supreme Court treats security threats as an omnipresent menace against which few holds should be barred. When reviewing security laws, it has typically asserted without explication that statutory provisions under challenge comply with the Constitution. On occasion, the Court has reasoned a little more explicitly, and stated that the compass of a constitutional right depends upon the particular statutory scheme at issue. In doing this, the Supreme Court has subordinated constitutional provisions to the aim and content of security laws, rather than treating constitutional norms as the prior standard against which laws should be measured. There is one instance

²⁵⁴ Roach, *supra* note 170.

²⁵⁵ Christina Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115, 220–26 (2005) (noting that Wells discusses “balancing tests” in the U.S. context).

²⁵⁶ *Id.* at 160–79.

in *Kartar Singh* when the Court does treat the relevant constitutional provision as a prior standard, but it articulates a somewhat startling test for evaluating statutory provisions in light of this prior standard. The Court asks whether a challenged provision “completely denies” a constitutional right and is “tyrannical and despotical (sic) in character;” if not, the provision is valid.²⁵⁷ In effect, unless a statutory provision repudiates a right entirely, it is valid. Proportionality analysis—with its focus on least restrictive means—imposes a test that protects rights far better than the principles articulated in the Supreme Court’s security jurisprudence.

Applying consistent legal analysis to questions of national security is imperative because security laws bearing the particular features discussed in Part II have been a long-standing part of India’s legal landscape, as have human rights violations facilitated by these laws. If the courts consistently adopt reasoned review grounded in specifics, this will compel the government to proffer cogent evidence for a measure rather than facile invocations of an all-encompassing security threat. Over time, empirically grounded, proportionality based judicial reasoning might influence how the executive drafts security legislation in the first place, prodding governments to weigh how past security laws have actually been used on the ground and to respect due process and individual liberties when designing the executive’s security powers.

B. Reforming Security Legislation—Shared Discretion, Regular Scrutiny

Improving legal drafting and design is a live issue. Security laws have been repealed and legislated fairly often in India, particularly after national elections where the incumbent political formation was defeated.²⁵⁸ So, even though the particular features discussed in Part II recur in different generations of laws, there is opportunity, albeit slim, for reform after a change of government. Opportunities for legislative reform also present themselves when security laws are amended; the UAPA was amended in 2008, incorporating many provisions from the previously repealed POTA, and then amended again in 2013.²⁵⁹

²⁵⁷ *Kartar Singh*, *supra* note 178, ¶ 97.

²⁵⁸ See discussion *supra* Part I pp. 4–12.

²⁵⁹ Unlawful Activities (Prevention) Amendment Act, No. 3 of 2013, INDIA CODE (2012).

Legislative reforms should tackle the troubling features of security laws—and the attendant executive powers—discussed in Part II. Obvious and pressing reforms would include restoring the many procedural rights of the defense that have been diluted or divested entirely, focusing first on the biggest departures from international legal standards. Extraordinary powers in “disturbed” areas as well as status offenses would need to be redesigned. Laws should be amended so that offenses such as “committing a terrorist act” or “disturbing public order” are less nebulous, and police and prosecutorial power is correspondingly more confined. Preventive detention laws should be repealed; the Constitution permits but does not insist upon peacetime administrative detention without charge and the Indian government should choose restraint. More fundamentally, exhortations by human rights groups to amend the Constitution in this regard deserve serious consideration.

Human rights groups, domestic and international, have recommended reforming India’s anti-terrorism laws, preventive detention laws and AFSPA for many years. They have traced how these laws depart from international legal standards and detailed the substantive and procedural changes needed to conform to these standards.²⁶⁰ I do not intend to rehearse in detail recommendations that have already been laid out on several occasions with depth and rigor. I focus instead on reforms that could better regulate the executive’s exercise of power under security laws.

I argued above that neither the legislature nor the judiciary engaged sufficiently with the effects of the executive’s sweeping security powers or with constitutional norms. However, if mandatory legislative and judicial scrutiny were threaded through security laws, this would lead to regular deliberation about the effects of security powers and where their boundaries should lie. Laws should be redesigned so that other branches of the state participate in decisions that are currently the exclusive preserve of the executive. Discretion can be segmented to varying degrees. Introducing checks and balances into the exercise of security power might mean building a judicial or legislative role into the actual decision, or mandating that the executive’s decision be reviewed after it is made and endorsed or overturned or, at a minimum,

²⁶⁰ See, e.g., SARDCH, *supra* note 58; HUMAN RIGHTS WATCH, *supra* note 19; AMNESTY INT’L, *supra* note 116; PEOPLE’S UNION OF DEMOCRATIC RIGHTS, *supra* note 119; Civil Society Coalition on Human Rights in Manipur and the U.N., *supra* note 124.

requiring that the executive report all decisions of a particular nature to the judiciary or legislature.

Security laws require decisions that have an immediate and direct effect on the liberty of an individual, such as detaining an individual without charge. They also involve decisions that do not have an immediate effect on a specific individual, such as bringing an area under the purview of AFSPA. Some decisions are made at a remove from the individuals affected, such as whether to designate an organization as unlawful or terrorist. Others are made in the thick of rapidly unfolding events, such as whether to open fire or arrest someone, or whether to continue interrogating a tired suspect if he seems likely to admit guilt. The nature of the decision would influence whether and how other branches of the state can be involved in decision making. Clearly, some decisions—whether to open fire would be an archetypical one—are not amenable to advance authorization or subsequent quashing and can only be reported after the fact. In general, however, the greater the immediate and direct limit on an individual's rights, the more closely the executive should be scrutinized. Additionally, decision-making powers should be altered to include the highest checks and balances compatible with the particular type of decision at hand, with shared decision making where possible, routine legislative or judicial review in the alternative, and regular reports to the legislature or judiciary at a minimum. Below, I suggest reforms relevant to the executive powers discussed earlier in Part II.

In concrete terms, replacing the executive's monopoly on decision making with shared discretion, subject to regular scrutiny would mean that anti-terrorism laws require the national government to report to each session of Parliament the number of people investigated, arrested, charged, and prosecuted across India in that year and the preceding one. Such information should be broken down by state, caste, religion and ethnicity. The government should also report whether trials result in acquittal or conviction, and whether the prosecution appealed any acquittals. State governments should similarly have the parallel obligation to the state legislature.

Security offenses should be prosecuted in regular criminal courts. However, if special courts are retained in order to expedite terrorism trials, the government should remove legal provisions allowing courts to be convened in locations such as prisons that are effectively closed to the public. By the same token, laws should add provisions obliging national and state governments to periodically report the number and

duration of trials to Parliament and state legislatures, so that the effectiveness of special courts can be queried and evaluated.

Regular reports on the criminal justice process under security laws would give legislators a sense of how anti-terrorism laws are actually being used. This would help legislators to discern if anti-terror laws are being used heavily in states that rarely see violence by non-state actors. It is likely to throw into relief any patterns of ethnic and religious profiling by the government. If, as in the past, the majority of arrests under anti-terrorism laws do not lead to prosecution, and prosecution seldom leads to conviction, and if acquittals are infrequently appealed, these patterns could be publicly debated. Regular empirically grounded reports will make it harder for legislators to ignore the *de facto* preventive detention that occurred under laws like TADA, POTA, and might be continuing under the UAPA. It might encourage legislators to ask the executive—as they are entitled to—for further information. More fundamentally, regular scrutiny of such information might lead legislators to query more closely which particular executive powers are genuinely useful, and which are superfluous and prone to abuse.

Status offenses have gained currency in different common law jurisdictions since 2001.²⁶¹ However, the Indian model stands out for the limits it places on judicially reviewing government decisions on whether an organization is lawful. Rather than deciding unilaterally that an organization is a “terrorist association,” the government should apply to a judge for such a declaration, presenting evidence in its favor. The law could also provide for the executive’s declaration to have immediate effect in limited circumstances, and be endorsed or overturned as soon as possible by a judge. In any event, individuals affected by the decision should be able to apply for judicial rather than administrative review, and should have access to legal representation. Other common law jurisdictions offer examples of tribunals where advocates with special security clearance can view evidence that cannot be aired in open court.²⁶² While such schemes have been criticized, a special advocate mechanism would improve upon the current

²⁶¹ Kent Roach, *The Criminal Law and Terrorism*, in GLOBAL ANTI-TERRORISM LAW AND POLICY 142 (V. Ramraj et al. eds., 2005); *see also* Roach, *supra* note 74.

²⁶² *See generally* John Ip, *The Rise and Spread of the Special Advocate*, PUB. L. 717 (2008); John Ip, *The Adoption of the Special Advocate Procedure in New Zealand’s Immigration Bill*, N.Z. L. REV. 207 (2009); David Jenkins, *There and Back Again: The Strange Journey of Special Advocates and Comparative Law Methodology*, 42 COLUM. HUM. RTS. L. REV. 279 (2011).

prohibition on legal representation for groups designated “unlawful” or “terrorist” in India.²⁶³ Judicial determination of status should be supplemented by legislative scrutiny, with national and state governments being required to report banned organizations to Parliament and state legislatures on a regular basis.

Preventive detention is eminently amenable to similar checks, with the executive proposing detention but the judiciary sanctioning it based on the government’s evidence, and the legislature being asked to review the number of detainees and their characteristics every time it is in session. Given that individuals are detained based on the suspicion that they are likely to pose a security threat, it is particularly important that a judge determines whether the grounds for suspicion are sound. If the legislature, every time it is in session, reviews who is being detained, for how long and whether detainees have been detained or prosecuted previously, it is more likely to detect and challenge discriminatory as well as serial detention.

Part II discussed how declaring a geographical zone “disturbed” or “terrorist affected” under laws like AFSPA and TADA has serious consequences for inhabitants of that area. At present, the executive alone can declare an area disturbed and renew or lift that declaration. Under the Constitution, the national government has the power to declare a national emergency²⁶⁴ or take over the governance of a state,²⁶⁵ but such decisions are effective for a few weeks at most unless both houses of Parliament endorse them.²⁶⁶ Given the serious

²⁶³ Cian C. Murphy, *Counter-Terrorism and the Culture of Legality: The Case of Special Advocates*, 24 KING’S L.J. 19 (2013); Craig Forcese & Lorne Waldman, Study commissioned by the Canadian Centre for Intelligence and Security Studies and the Courts Administration Service, *Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and New Zealand on the Use of ‘Special Advocates’ in National Security Proceedings* (2007), <http://ssrn.com/abstract=1623509>; Susan Nash, *Special Advocacy: Political Expediency and Legal Roles in Modern Judicial Systems*; 9 LEGAL ETHICS 101 (2006); see Colin Harvey, *And Fairness for All? Asylum, National Security and the Rule of Law*, in GLOBAL ANTI-TERRORISM LAW AND POLICY (V. Ramraj et al. eds., 2005) (generally discussing how changes to immigration and asylum law since 2001 damage the rule of law).

²⁶⁴ INDIA CONST. art. 352, § 1.

²⁶⁵ INDIA CONST. art. 356, § 1.

²⁶⁶ A declaration of emergency under Article 352 of the India Constitution ceases to have effect after a month, unless it has been approved by both houses of parliament. A declaration that secures legislative approval within a month is effective for a maximum of six months. See INDIA CONST. art. 352, §§ 4–5. A decision under Article 345 that the constitutional machinery in a state has failed and needs to be taken over and some or all the functions of the state government ceases to have effect after two months unless it is approved by both

consequences of declaring an area in some way distinct from the rest of the country, governments' declaratory power under laws like AFSPA should be structured like declarations of emergency under the Constitution, evanescent in a few weeks without legislative endorsement and subject to clear, short time limits even with the legislature's approval.

At present, the police and armed forces in a disturbed area are shielded from prosecution to an extent that shades into impunity. To ameliorate this, the government of the state that has been designated, wholly or partially, as "disturbed" should be required by law to report to each session of the state legislature the arrests and shootings within the disturbed area since the legislature last met. Any death caused by state agents wielding security powers should compulsorily be investigated by a member of the judiciary, who should have the power to order prosecution if this is warranted. Preferably, prosecution of government officials should not require special permission from the executive branch at all. More modest, and more politically attainable, reform might entail giving the judiciary power to determine whether permission to prosecute should be granted, allowing the court to hear the prosecution, the victim of the alleged offense and the national government on the issue. Further reaching reform would shift the default from needing special permission to prosecute to having such permission, but allowing the executive to argue that prosecution should *not* be allowed in particular cases.

CONCLUSION

The current mechanisms for executive accountability allowed by Indian security laws are weak and after the fact. Criminal prosecution of government officials who were acting under security powers has to be explicitly authorized by the national government, and in any event cannot be driven by victims of rights violations. While the Supreme Court sets great store by the corrective and preventive powers of judicial review, this remedy is practically inaccessible to most people. Few can afford to approach the High Court in the state capital, or the Supreme Court in New Delhi, paying legal fees as the matter inches its way through the delays routine in Indian courts.

houses of parliament. After securing legislative approval, such a decision is effective for a maximum of six months. *See* INDIA CONST. art. 352, §§ 3–4.

If the executive's decisions are subject to scrutiny at an earlier stage, this can serve both to prevent and correct abuse. For example, if a judge rejects the government's decision to preventively detain someone because the evidence is dubious, this rejection prevents loss of liberty. If all preventive detention had to be routinely reported to the legislature, the government would almost certainly be questioned if the number of detainees increased suddenly, or if many detainees were from a particular religious or ethnic group.

The checks and balances suggested in Part VI would improve existing arrangements because they would be built into particular decisions, and regulate the exercise of specific powers as a matter of routine. Parliamentary debate and judicial review veer towards the cursory when an entire law is at issue. It is a big step to vote against or strike down a law, or even particular provisions of a law. However, while judges and legislators have demonstrably hesitated to excise sweeping executive powers from security laws, they are likely to be bolder when scrutinizing discrete decisions made using these statutory powers. The specificity of these decisions would make it easier to discern if they are hasty, biased, or likely to foster abuse. Judges and legislators would be more likely to grasp the interests, vulnerabilities and rights of individuals affected by a particular exercise of security powers, rather than treating affected individuals as an abstract hypothetical. The granular, limited nature of decisions would make it easier to disagree with the government. Legislative scrutiny and decision making based on the suggestions above would be unlikely to attract whips or block voting by political parties in the legislature, which would create room for small interest groups and individual conscience to have an influence. Because mechanisms for regular scrutiny of security powers lower the stakes of disagreeing with the executive, they are more likely to harness debate and negotiation, both principled and strategic, within the legislature and between different branches of the state.

Reform of India's security laws—whether substantive or procedural—will not be easy to push through, given that certain core security provisions have recurred in different generations of laws. However, building support for reforms to better regulate executive power will be easier than reforms that remove certain powers entirely. Once reforms of this nature are legislated, they have reasonably good odds of gaining leverage. The Supreme Court's jurisprudence indicates that, while it may be deferential to the executive, it is reluctant to cede jurisdiction over security laws. When reviewing security laws, the

Court has disregarded arguments by the government that would have ousted its jurisdiction over particular executive powers.²⁶⁷ Political competition inherent in a democratic electoral system is likely to similarly incline the legislature to retain review and scrutiny powers for itself. Once these powers are in place, political parties in the opposition are unlikely to welcome amendments that strip them of authority, even if they are sanguine about provisions that limit individual rights. Building granular checks and balances into security laws will not remove the problematic, rights limiting features discussed in Part II. But it will ameliorate their capacity to facilitate human rights abuse.

Security laws in India present a troubling oxymoron. They establish extraordinary regulation and place sweeping limits on rights, but are so deeply entrenched as to be, in any meaningful sense, ordinary. These laws have created long running exceptions to constitutional checks and balances that leave individuals vulnerable to abuse. While the government's far reaching powers under security laws have expanded over time, the other branches of the state have retreated, leaving the executive overly dominant. Moreover, national security is an arena where governments can too easily dismiss non-state critics, however cogent, by citing their ignorance of classified information or questioning their patriotism. The legislative and judicial reforms that I have proposed have the potential to unsettle this harmful equilibrium. Multiple, routine, regular checks and balances stitched into the executive's exercise of security powers will compel public deliberation and, as a result, encourage reasoned decision making. This in turn, will push against the steady diminution of constitutional constraints that has allowed Indian security laws to operate as charters for abuse.

²⁶⁷ In *Naga People's Movement*, the Supreme Court of India did not address arguments by the state that the judiciary could not review the decision to declare an area as being disturbed, but overturned the Gauhati High Court's decision that a declaration had been made on insufficient grounds. See *Naga People's Movement*, *supra* note 179 ¶¶ 72–84. In *A.K. Roy*, the court refused to reach a conclusion about whether the president's "satisfaction" about whether to issue an ordinance was justiciable on the ground that there was insufficient material before the court to consider the issue. See *A.K. Roy*, *supra* note 177, ¶ 14.

