GENESIS AND EVOLUTION OF ANTI TERRORISM AND ALLIED LAWS IN INDIA

*"**One man's terrorist is another man's freedom fighter.** That's a catchy phrase, but also misleading. Freedom fighters do not need to terrorize a population into submission. Freedom fighters target the military forces and the organized instruments of repression keeping dictatorial regimes in power. Freedom fighters struggle to liberate their citizens from oppression and to establish a form of government that reflects the will of the people. Terrorists intentionally kill or maim unarmed civilians, often women and children, often third parties who are not in any way part of a dictatorial regime. Terrorists are always the enemies of democracy. Luckily, the world is shaking free from its lethargy and moving forward to stop the bloodshed."*

- Ronald Wilson Reagan,
Former President of the United States of America

The President was addressing the nation from Camp David, M. D. on 31st May, 1986. That was the period when he was facing opposition in the Senate Foreign Relations Committee in passing of a treaty with the United Kingdom.

He added, "In our world there are innumerable groups and organizations with grievances, some justified, some not. Only a tiny fraction has been ruthless enough to try to achieve their ends through vicious and cowardly acts of violence upon unarmed victims. Perversely, it is often the terrorists themselves who prevent peacefully negotiated solutions. So, perhaps the first step in solving some of these fundamental challenges in getting to the root cause of conflict is to declare that terrorism is not an acceptable alternative and will not be tolerated."

While concluding the President said, "I therefore urge the Senate to promptly approve the revised treaty and reinforce the momentum building against terrorism. With good sense, courage, and international cooperation, our struggle against terrorism will be won."

In 2004, i.e., about eighteen years after the US President's Radio Address, the Parliament of India took a significant step forward by repealing the Prevention of Terrorism Act (POTA), which had established a set of legal rules to prosecute acts of

terrorism, which is largely different than the ordinary rules of the regular criminal justice system.

While POTA itself was enacted in the aftermath of the major terrorist attacks of 2001 in both the United States and India, the Statute built upon a long tradition of anti-terrorism and other security laws in India dating since well before independence. While independent India has faced serious threats from terrorism and other forms of violence for decades, need for special anti-terrorism as well as other security laws have proven effective in combating terrorism. Terrorism though, has persisted as a problem notwithstanding these laws.

Terrorists often deliberately seek "to provoke an over-reaction" and thereby drive a wedge between Government and its citizens – or between ethnic, racial, on geographic issues or religious communities.

Continuing a pattern established by the British, India's anti-terrorism and other security laws have periodically been enacted, repealed, and reenacted in the years since independence. Even when they create distinct mechanisms and procedural rules, of late, India's anti-terrorism laws rely upon the same institutions – police, prosecution, judiciary– used in fighting any other serious crimes.

Independent India's constitutional tradition is a proud one. In combating some of the most serious terrorist threats in the world, a durable, enduring, and ever-improving commitment by India to protect fundamental rights services as an international example. And in the past several years, the Indian Government has taken several positive steps to limit the use of its anti-terrorism laws and to renew its efforts to transform its colonialera police and criminal justice institutions. Following the 11th July, 2006 trains bomb blasts in Mumbai, the Indian Government also chose not to enact new legislation to replace POTA, emphasizing instead the need to upgrade its intelligence and investigative capacity to prevent acts of terrorism and hold perpetrators accountable.

It has been often said that the threat of "terrorism" has become a challenge for the world as a result of the cold war, and this phenomenon is appearing more and more complex since then. Thousands have been killed and injured in this violence, whether terrorist, insurgent, or communal, and in the subsequent responses of security forces. Terrorism, in particular, has affected India more than majority of the UN countries. By some accounts, India has faced more significant terrorist incidents than any other country in recent years, and those incidents such as 11th July bombings on the Mumbai local rail system, Naxal attacks on paramilitary forces and the 26/11 Mumbai attacks have made it clear, that the threat of terrorism persists.

Like other countries, India has responded by enacting special anti-terrorism laws, part of a broader array of emergency and security laws that periodically have been enacted in India since the British colonial period. In the aftermath of the terrorist

attacks of 11th September, 2001 in the USA, and the attacks soon thereafter on the Jammu & Kashmir Assembly and the Indian Parliament buildings, India enacted the sweeping law, the POTA 2002. It came as *"an Act to make provisions for the prevention of, and for dealing with, terrorist activities and for matters connected therewith."*

POTA incorporated many of the provisions found in an earlier law, the Terrorist and Disruptive Activities (Prevention) Act of 1985 (TADA), which remained in effect until 1995. While POTA was prospectively repealed in 2004, cases pending at the time of repeal have proceeded, and the Government has preserved some of POTA's key provisions by reenacting them as amendments to the Unlawful Activities (Prevention) Act of 1967 (UAPA).

Terrorism clearly has a very real and direct impact on human rights, with devastating consequences for the enjoyment of the right to life, liberty and physical integrity of victims. In addition to these individual costs, terrorism can destabilize Governments, undermine civil society, jeopardize peace and security, and threaten social and economic development. All of these also have a real impact on the enjoyment of human rights. In all acts of terrorism, it is mainly the psychological element that distinguishes it from other political offences, which are invariably accompanied with violence and disorder. Fear is induced not merely by making civilians the direct target of violence but also by exposing them to a sense of insecurity.

India has an extensive history of enacting extraordinary laws to combat terrorism and other security threats, which long predates independence from England. These laws include (1) constitutional provisions and Statutes authorizing the declaration of formal States of emergency, (2) constitutional provisions and Statutes authorizing preventive detention during non-emergency periods, and (3) substantive criminal laws defining terrorist and other security-related offences during non-emergency periods.

As the plague of terrorism increases day by day the authority of the State and its legitimacy has come under severe challenge in the recent upsurges in South Asia and around the world. The very nature of terrorism in South Asia has a strong cross-border context and content, which is at the core of any discourse on sub-continental terrorism. The complexities and uniqueness of its approach in the present day sets it apart from traditional forms of terrorism. While terrorism existed in the early 1970s, it was mainly a coercive tactic adopted as part of territorial nationalism fighting to achieve a political objective and contained within regional borders. Established under a well-defined chain of command, it had defined political and economic objectives. Terrorist groups engaged in highly selective acts of violence that included many people watching rather than dead. The principal goal, therefore, was to raise public awareness over grievances, and not necessarily to cause a high number of casualties.

Several factors explain the rise of terrorism as a more global phenomenon and the steady increase in their destructive capacity. First, terrorism now has a global reach due to technology and communication. The development in terrorist weaponry is getting smaller, easier and more powerful. With the dramatic progress in communications and information processing these groups have greater opportunities to divert non-weapon technologies, namely cell phones, the Internet, and publicly available websites-all off-the-shelf technologies-to destructive ends. Second, terrorism today has become more lethal and layered in terms of leadership and cadre membership. Groups are more diffuse in structure and the rise of sleeper cells and amateur terrorists has added to the complexity. The lack of a discernible organizational structure with a distinguishable chain of command enables these groups to avoid easy identification and evasion of detection. Third, over the years increased State sponsorship of terrorism has grown in some contexts, where governing State regimes have promoted sub-State actors as an indispensable element of State power. The greater resources accorded to these groups by State actors have brought about a dramatic proliferation of the groups. These sub-State groups with State support use a mixture of seditious, racial and religious dictates to justify their actions. Fourth, terrorism today is driven by an extreme sense of fundamentalism and ideological leanings that tend to become the core identity of these groups, for which even death is a lesser price to pay. Lastly, with a deliberate unpredictable quality meant to have a psychological effect, the hyper religious motivation of small groups and a broad enabling environment of bad governance, non-existent social services, and poverty that punctuates most of the developing world tends to add to the sense of injustice and grievances characterized by many as the knowledge gap. While there is no universally accepted definition of international terrorism, the US Department of State describes international terrorism as “involving citizens or the territory of more than one country,” and the terms "terrorism” as “premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents, usually intended to influence an audience’. For its part, India was confronted with violence and insurgency movements from the moment of its inception in 1947 and the creation of Pakistan. Since then, India has been battling terrorism and has emerged as one of the world’s most consistent targets of Islamic militants.

The threat from terrorism to India is therefore real. The Indian Republic has been under an intensive and concerted assault by terrorist organizations using religious labels and drawing assistance from across people watching rather than dead. The principal goal, therefore, was to raise public awareness over grievances, through causing a high number of casualties.

Not only cross border but also such groups who operate in the States of West Bengal, Jharkhand, Chhattisgarh are the Naxalites, and other various separatist

groups. Andhra Pradesh, the Naxalbari movement of militant peasants against rich landowners is one of the greatest threats to India's internal stability and security. Currently India faces Maoist insurgency violence in more than fourteen States. The Northeastern States have experienced serious insurgency movements since 1956, when States like Nagaland and Mizoram demanded independence. The rise of the United Liberation Front of Assam (ULFA), which sought to create an independent State of Assam in the Northeast, is another indigenous insurgent movement with which India contends. The Indian Government's response to the grievances of such groups has been a mix of political accommodation, economic development and the use of military force to restore peace. Such movements account for the domestic sources of terrorism in India.

The beginnings of this religious insurgency in Kashmir can be traced back to the rise of the Jammu Kashmir Liberation Front in India. Over the years this group was marginalized in favour of more radical groups like Lashkar-e-Taiba and Harkat-ul-Mujahideen, which became violently active and adopted terrorist tactics with the involvement of Pakistan to perpetuate a low intensity conflict with India. Groups like the Lashkar-e-Taiba are known for the attack on the Indian Parliament in December 2001, the 2006 Mumbai train bombings, the February 2007 blast of a train between India and Pakistan, and the orchestration of the 26/11 Mumbai attacks. Some of the other groups that operate in the region and have been alleged to have carried out attacks against India are Jaish-e-Muhammad, Harkat-ul-Mujahideen, Harkat-ul Jihad-al-Islami, Jamat-ul Mujahideen, and Hizb-ul Mujahideen.

Harkat-ul Jihad-al-Islami (HUJI) have been attributed to Bangladeshi soil. In Kashmir, limited guerrilla warfare is conducted primarily in rural areas and is fought against by regular Indian Army forces and special police units that operate primarily in the Kashmir valley. Thereafter the emergence of newer groups like the Deccan Mujahideen and Indian Mujahideen was noticed. These groups appear to confirm disturbing new trend of events domestically. All indications suggest involvement of local elements in the actual local level planning, execution of these acts with the help and support of external groups. The increasing use of technology and communications has enabled them to successfully avoid detection in the processes of planning and executions of operations, Adopting these strategies, the Indian Mujahideen joined the terror of forces claiming responsibility for the series of blasts in November 2007 in the State of Uttar Pradesh (Lucknow and Varanasi) and the 2008 attacks in the cities of New Delhi, Jaipur, India's software capital Bangalore, the industrial city of Ahmedabad, and the high-tech hub Hyderabad. The Indian Mujahideen, a homegrown group, has been linked to the Bangladeshi Harkat-ul Jihad-al-Islami, and another organization that has been in controversy for its radicalism, the Student Islamic Movement in India (SIMI). The SIMI was founded in Uttar Pradesh in 1977 to promote teachings of Islam, but became increasingly radical in the 1990s. India

banned it in 2001, labelling it a terrorist organization. In February 2007, the Indian Supreme Court labelled SIMI "secessionist" and refused to lift the ban.

The strategy of these groups across the border is to:

1. Recruit and train local modules, and activate them when required
2. Maintain continuous flow of finances to sustain terrorist network
3. Supply hardware through land and sea routes
4. Target vital installations, economic infrastructure, political leaders
5. Attack soft targets like marketplaces, mass transit systems, hospitals, rail stations, bus stations and places of worship and congregations
6. Provoke communal tension to create a wedge between communities, etc.

The Indian response to insurgency has been the use of force to quell disturbances in the affected region. Over the years, it has moved into coordinated counter-insurgency operations, economic development and psychological initiatives.

The doctrine mentions the use of transnational factors in future attacks and, therefore, advocates the use of force against foreign and hardcore terrorists while giving a fair opportunity to others to surrender, shun violence and join the moderate mainstream of the nation. The importance of civic projects that emphasize and target youths, creation of jobs, and improvement of education and health care are emphasized. The role of armed forces is to act as a facilitator to bring down the level of violence and then enhance civil control in the disturbed areas. Isolation of the conflict zone from external material assistance and support at the borders is also stressed. The doctrine also warns of weapons of mass destruction falling into the hands of non-State actors, and the likelihood of terrorist organizations targeting financial markets, banks and command and control systems. It attempts to formalize conduct of counter-insurgency operations with a strategy of civicism and military measures, oscillating between a mix of political accommodation, economic development and the use of force. The doctrine lays emphasis on local groups as "misguided elements of society," which should be given a chance to amend themselves while simultaneously adopting a hard-liner approach that shows no mercy to foreign mercenaries. The doctrine does not elaborate on transnational common cause.

Background

Criminal law matters in India, including anti-terrorism initiatives, are governed by a post-independence constitutional and international law framework which includes a strong commitment to fundamental rights. Many of these institutions remained largely intact after independence.

Police and Criminal Justice Framework

The legal and institutional framework that independent India inherited from the British to govern criminal law, criminal procedure, and policing largely remains in place today. Police matters are governed primarily by the Police Act of 1861, one of several framework Statutes enacted in the wake of the Indian uprising of 1857 to establish British control more firmly over the undivided Indian Subcontinent. The 1861 Statute self-consciously followed the paramilitary model of policing that the British had established in Ireland, structuring the police not to promote the rule of law, serve the community, or ensure accountability, but rather to 'perpetuate British rule.'

Upon independence, the British bequeathed to India and Pakistan the laws, institutions, philosophy, and norms of the colonial police. The new culture of the Government implemented no significant changes in policing, and the police remained principally an instrument of coercive State power and political intelligence. The strength of the armed police continued to grow, reaching approximately 60 percent of all forces by the late 1960s. Despite reform proposals in the intervening years, and also with having each State its own Police Administration laws, the Police Act of 1861 continues to govern policing throughout India even today.

These colonial-era laws and institutions are now situated within a post-independence constitutional framework that distributes power between the Central and State Governments. While the Indian Constitution establishes a strong Central Government, its role is particularly constrained in policing and criminal justice matters, over which the States enjoy broad authority and play the predominant day-to-day role. The Constitution grants the Central and State Governments concurrent jurisdiction to enact substantive and procedural criminal laws and authorizes the Central Government to legislate exclusively on matters involving national security and the use of the military or Central Police forces help State civilian authorities to maintain public order. At the same time, the Constitution leaves public order and police matters principally to the States, which accordingly regulate, supervise, and exercise centralized control over the majority of police resources in their day-to-day operations.

The Central Government had limited authority to investigate and directly enforce some criminal matters that otherwise fall within the ambit of State authority but may do so only under exceptional and highly constrained circumstances. The Central Bureau of Investigation (CBI) would take over a particular criminal case to investigate with that State's consent.

To overcome such and other limitations very often the Indian Army has been given additional special powers to aid civilian administration in some of the border States and then in 2008, the National Investigation Agency (NIA) was constituted to deal with terrorism issues.

The Constitution of India guarantees the independence of the judiciary, which is a unitary, integrated system with jurisdiction over both Central and State law issues. The independence and responsibility of the judiciary to interpret and enforce fundamental rights are considered basic features of the Constitution that cannot be withdrawn even by any constitutional amendment.

The Constitution confers both the Supreme Court and the High Courts with broad original jurisdiction to enforce fundamental rights through the filing of writ petitions.

Fundamental Rights and Criminal Procedure

India is bound by legal obligations that protect fundamental rights under its own Constitution and Statutes and under international treaties to which it is a party.

Indian Constitution

The Supreme Court of India has expansively interpreted the Indian Constitution's fundamental rights guarantees. The Constitution protects equality before the law and equal protection of the laws under provisions which embody a broad guarantee against arbitrary or irrational State action. Indian citizens are guaranteed the rights to speech and expression, peaceable assembly, association, free movement, and residence although Parliament may legislate "reasonable restrictions" on some of these rights in the interests of the "sovereignty and integrity of India," "security of the State," or "public order." The Constitution also authorizes suspension of judicial enforcement of these rights during lawful, formally declared periods of emergency.

In *Synthetics and Chemicals Ltd.*, (1990) 1 SCC 109, the Supreme Court while explaining the importance of concept of 'sovereignty' held thus:

> "The sovereign power is plenary and inherent in every sovereign State to do all things which promote the health, peace, morals, education and good order of the people. This power of sovereignty is, however, subject to Constitutional limitations."

In *Sukumar Sengupta & Ors.* 1990 (Supp) SCC 545, the Supreme Court noted :

> "On the question of 'sovereignty', reliance was placed before us on 'A Concise Law Dictionary' by P.G. Osborn, 5th Edition, p. 297, where 'sovereignty' has been defined as "the supreme authority" in an independent political society. It is, essential, indivisible and illimitable. However, it is now considered and accepted as both divisible and limitable, and we must recognize that it should be so. Sovereignty is limited externally by the possibility of a general resistance. Internal sovereignty is paramount power over all action within, and is limited by the nature of the power itself".

Specifically in the criminal justice context, the Constitution prohibits *ex post facto* laws, double jeopardy, and compelled self-incrimination. Individuals arrested and taken into custody must be provided the basis for arrest "as soon as may be" and produced before a Magistrate within 24 hours. In its landmark case of *D. K. Basu (1997) 1 SCC 416,* the Supreme Court noted that "there is one other aspect also which needs our consideration. We are conscious of the fact that the police in India have to perform a difficult and delicate task, particularly in view of the deteriorating law and order situation, communal riots, political turmoil, student unrest, terrorist activities, and among others the increasing number of underworld and armed gangs and criminals. Many hard core criminals like extremists, the terrorists, drug peddlers, smugglers who have organized, gangs, have taken strong roots in the society. It is being said in certain quarters that with more and more liberalization and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by such categories of hardened criminals by soft peddling interrogation, it is felt in those quarters that if we lay too much of emphasis on protection of their fundamental rights and human rights, such criminals may go scot-free without exposing any element or iota of criminality with the result, the crime would go unpunished and in the ultimate analysis the society would suffer. The concern is genuine and the problem is real." While noting this, the Supreme Court extended the Constitution's procedural guarantees further by requiring the police to follow detailed guidelines for arrest and interrogation. The Constitution also guarantees the right to be represented by a lawyer of the arrested person's choice, and the Supreme Court has held that legal assistance must be provided to indigent arrested persons at Government expense, a right that attaches at the first appearance before a Magistrate. These guarantees do not apply to laws authorizing preventive detention, which, the Constitution subjects to a more limited set of protections.

While the Constitution does not explicitly define "due process of law," it does prohibit deprivation of life or personal liberty from any person except according to "procedure established by law," and the Supreme Court has extensively interpreted this guarantee to encompass a range of procedural and substantive rights that approximate the concept of "due process." Procedures must be "right, just and fair," and not arbitrary, fanciful or oppressive. The Court has time and again held, based on its broad understanding of the right to life and liberty, that the Constitution guarantees the right to privacy and freedom from torture or cruel, inhuman, or degrading treatment. The Court also has recognized a constitutional right to a fair criminal trial, including among other elements the presumption of innocence; independence, impartiality, and competence of the judge; adjudication at a convenient and non-prejudicial venue; knowledge by the accused of the accusations; trial of the accused and taking of evidence in his or her presence; cross-examination of prosecution witnesses; and presentation of evidence in defense. The Constitution

also requires a speedy trial, extending from the outset of an investigation through all stages of the criminal process.

Statutes and Procedural Rules

The Constitution requires pretrial detention to be as short as possible, and a number of statutory provisions implement this principle. Under the Criminal Procedure Code, detention in police custody beyond the constitutional limit of 24 hours must be authorized by a competent Magistrate. When the accused is initially produced before the Magistrate, the Magistrate must release the accused on bail unless it "appears that the investigation cannot be completed" within 24 hours and the accusation is well-founded – in which case by specifying the reasons thereof, the accused can be remanded to police custody for up to 15 days, although in-principle remand is disfavoured. Bail is meant to be the rule and continued detention is the exception. For minor "bailable" offences, release on bail is available as of right, while for most serious or "non-bailable" offences, the accused may be released on bail at the discretion of the Court.

Before ordering remand to police custody, the Magistrate must record the reasons for continued detention. Upon finding "adequate grounds" to do so, the Magistrate may order detention beyond the fifteen-day period for up to 60 days, or in a case involving a potential imprisonment of at least ten years or the death penalty, for up to 90 days. This extended period of detention, however, must take place in judicial custody, rather than police custody.

The police must file with the Magistrate a Police Report commonly called as "charge-sheet" setting forth the particulars of their allegations "without unnecessary delay." If the charge sheet is not filed upon expiration of the 60 or 90 day extended detention period, the arrested accused person must be released on bail, regardless of the seriousness of the offence alleged. However, if the charge sheet is filed before that period expires, and the Magistrate decides to charge the accused, the decision to grant bail must be determined based on the contents of the charge sheet and the annexures thereof.

Indian law sharply limits the use of Statements given to the police or while in police custody. Under the Indian Evidence Act[1], confessions made to police officers are inadmissible as substantive evidence against the accused, and confessions made to others while in police custody must be made in the immediate presence of a Magistrate to be admissible. More generally, the Code of Criminal Procedure[2] prohibits Statements made to the police in the course of an investigation by any person, if reduced to writing, to be signed by the individual or used for any purpose during proceedings concerning the offence under investigation, except to impeach that person's subsequent testimony. These legal provisions, which date to the colonial

1 Corresponding to erstwhile Act. Now refer Bharatiya Sakshya Adhiniyam, 2023.
2 Now refer "Bharatiya Nagarik Suraksha Sanhita, 2023".

period, are intended to reduce the incentive for police to engage in torture and other coercive interrogation practices. However, these limitations are not unqualified. If part of a confession or other Statement given to the police leads to the discovery of admissible evidence, that portion of the Statement may be admitted as corroborative evidence.

International Law

India is a party or signatory to several international instruments protecting individuals from arbitrary or improper treatment under anti-terrorism and other security laws, including the International Covenant on Civil and Political Rights, the International Convention on the Prevention and Punishment of the Crime of Genocide, and the International Convention on the Elimination of All Forms of Racial Discrimination, and the four Geneva Conventions. As a U.N. member State, India is bound by the U.N. Charter, which pledges member States to "promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion," and by the Universal Declaration of Human Rights, which protects the rights to liberty, freedom of expression and opinion, peaceful assembly, an effective remedy for acts violating fundamental rights, and a "fair and public hearing by an independent and impartial Court." Several non-binding sources of law further clarify the principles underlying these binding international obligations.

British Colonial Emergency and Security Laws

Laws authorizing the use of extraordinary powers by the executive have existed in undivided India from the earliest days of direct British rule. Following the 1857 Indian uprising and the consolidation of British control, the Indian Council Act of 1861, which was the Statute establishing the overall governance framework for British India, authorized the Governor-General to legislate outside the ordinary lawmaking process in emergency situations by unilaterally issuing ordinances to ensure "the peace and good Government" of India. Such ordinances frequently were used to authorize administrative detention and to establish Special Court to adjudicate cases relating to law and order, especially during wartime. Two subsequent framework Statutes, the Government of India Acts of 1919 and 1935, also granted the Governor General emergency ordinance-making authority based on similar criteria.

In addition to this general emergency ordinance-making authority, the British enacted special emergency legislation during the two world wars. During World War I, the British enacted the Defence of India Act of 1915, which adapted the wartime "emergency code" from Britain for use in India and authorized the Governor General in Council to issue rules to secure the public safety and defense of British India. The Act authorized civil and military authorities to detain individuals or impose other restraints on personal liberty if they had "reasonable grounds" to suspect a person's conduct was "prejudicial to public safety."

A second Defence of India Act was enacted in 1939, at the outset of World War II, authorizing the Government to preventively detain anyone whose conduct was likely "prejudicial to the defence of British India, the public safety, the maintenance of public order, His Majesty's relations with foreign powers or Indian princely States, the maintenance of peaceful conditions in tribal areas or the efficient prosecution of the war." Special tribunals were established to adjudicate violations of the Act's wartime rules, which remained in effect until they lapsed in October 1946.

But the British never limited their use of such extraordinary powers in India to formally declare periods of emergency. During non-emergency periods, the British also relied extensively upon sweeping laws authorizing preventive detention and criminalizing substantive offences against the State. As early as 1818, a regulation in Bengal granted the executive general authority to place individuals "under personal restraint" – notwithstanding the absence of "sufficient ground to institute any judicial proceeding" – whenever justified to maintain British alliances with foreign Governments, preserve tranquillity in the princely States, or preserve the security of the State from "foreign hostility" or "internal commotion." Detainees had no right to learn or contest the basis for their detention, and detention orders were not subject to time limits or independent oversight.

The 1818 regulation ultimately was extended throughout India. Subject to minor amendments, it remained in effect even for several years after independence, before being superseded by new legislation conferring similar authority. The British also enacted criminal laws punishing offences against the State such as sedition, which was first criminalized in India in 1870.

The British also sought to extend the extraordinary powers initially justified on the basis of wartime emergency into non-emergency periods. Before the end of World War I, the British began to explore ways to preserve during peacetime the wartime emergency powers authorized by the Defence of India Act. A Government committee recommended that several wartime powers be maintained during peacetime, and in response, the Government in 1919 enacted the Anarchical and Revolutionary Crimes Act, commonly known as the "Rowlatt Act" for the chair of the committee recommending its enactment.

The Act conferred broad power upon the Government to combat "anarchical and revolutionary movements," a term the law did not define. Despite the lapse of the Defense of India Act and the end of the war, the Act preserved detention orders and other restraints on freedom of movement entered under that law's wartime authority. The Act also conferred new authority to order preventive detention or other restrictions on freedom of movement for up to two years of any individuals who the Government had reasonable grounds to believe were involved in an anarchical or revolutionary movement or, in parts of the country designated by the Government as "affected areas," were suspected of connection to certain specified criminal offences.

While individuals subject to preventive detention were afforded an opportunity to appear before an investigating authority and learn the basis for their detention, such proceedings were not governed by the procedural and evidentiary protections governing regular criminal proceedings, such as the right to representation by counsel. In its discretion, the investigating authority was permitted to refrain from disclosing "any fact the communication of which might endanger the public safety or the safety of any individual."

In addition to authorizing preventive detention and other restraints on free movement, the Rowlatt Act defined particular substantive criminal offences and set forth special procedures to adjudicate those offences if the Government determined that (1) anarchical and revolutionary movements were being promoted in all or part of India, and (2) the specified offences were related to those movements and sufficiently prevalent to justify special, expedited procedures. Special Courts were established to try such offences, and ordinary procedural protections did not apply – the Act authorized in camera trial proceedings and eliminated the right to appeal. However, the law did ensure some judicial oversight over the exercise of Public Prosecutorial discretion, requiring the Government to provide its allegations to the Chief Justice of the High Court, who had discretion to seek additional facts before deciding whether to constitute a Special Court to adjudicate the alleged violation.

With its extension of wartime powers into an ordinary, non-emergency period, the Rowlatt Act became a focal point of the non-cooperation campaign led by Mahatma Gandhi in the early 1920s. In the face of this intense popular opposition, the Government tempered its policies and permitted the Rowlatt Act to lapse in 1922. However, the British did not refrain from exercising emergency-like powers during peacetime. To the contrary, the Government continued to exercise preventive detention authority throughout the 1920s under the pre-existing 1818 regulation and to rely on what the British Prime Minister Ramsay MacDonald termed as "Government by ordinance."

When faced once again with large scale, nationwide civil disobedience during the 1930s, the Government resumed and intensified its use of repressive powers, issuing ordinances, for example, that authorized bans of associations designated as "unlawful" and restrictions on freedom of the press. A 1930 Bengal ordinance authorized the Government to "commandeer any property... for its use" without any right to compensation or meaningful judicial review and set up special tribunals to adjudicate political offences. Other ordinances authorized warrantless searches, indefinite detention, bans on nationalist newspapers, confiscation of property from associations the Government declared "unlawful," and the use of special procedural rules (such as the elimination of appellate review) particularly in security-related criminal prosecutions.

The most far-reaching of these ordinances, the Emergency Powers Ordinance, was issued in January 1932, when the Government determined to crack down on the nationalist movement more aggressively. As described by the then British Home Secretary, the provisions in the ordinance were a species of Martial Law administered by civil officers, intended to avoid the more frontal imposition that would result from direct use of the military. Nationalist organizations affiliated with the Congress were banned throughout India, and within a few months thousands of nationalist activists were arrested and later convicted under both ordinary criminal laws and emergency ordinances. The Government also ordered the preventive detention of approximately 3,500 individuals at one point or another during the course of the 1930s.

The establishment of elected, semiautonomous provincial Governments under the Government of India Act of 1935 maintained the basic pattern established by the British. The Act explicitly granted the provincial legislatures authority to enact preventive detention laws of their own, and while the newly elected, Congress-led Governments initially made efforts to repeal the emergency powers enacted before 1935, by 1937 they increasingly began to rely upon the same kinds of measures used by the British to maintain order and exercise social control. Between 1946 and 1950, under circumstances similar to those surrounding enactment of the Rowlatt Act, nearly all of the provincial Governments responded to the lapse of the rules promulgated under the Defence of India Act of 1939 by enacting "public safety Acts" authorizing preventive detention in the absence of a formally declared emergency.

The 1935 legislation also strengthened the colonial executive's emergency powers by permitting it to supersede provincial authority if it determined that the "constitutional machinery" within a province had failed. The centrally appointed provincial governors, formally at their discretion but with the concurrence of the Governor-General, were authorized to legislate by ordinance upon a proclamation that the Government "could not be carried on in accordance with the Act's provisions." Even in the absence of a formal breakdown in "constitutional machinery," provincial governors were authorized to legislate by ordinance when faced with threats to the "peace and tranquillity of the province" by "any persons committing, or conspiring, preparing, or attempting to commit, crimes of violence" intended to overthrow the Government. The Governor-General also was permitted to direct the provincial governors' exercise of their executive authority to "prevent any grave menace to the peace or tranquillity of India or any part thereof."

Taken together with the existing authority to exercise emergency powers when faced with a threat to the security of India from either war or internal disturbance, the broad sweep of the emergency powers conferred upon the Governor-General by the 1935 Act led Winston Churchill famously to describe them as "likely 'to rouse Mussolini's envy.'"

Emergency and Security Laws from 1947 to 1975

From 1947 to 1975, independent India followed the same basic pattern established by the British in its use of emergency and security laws. While India's post-independence Constitution includes an extensive array of fundamental rights protections, its emergency and security provisions incorporate a number of the same basic principles found in the Government of India Act of 1935: extraordinary powers that may be exercised during declared periods of emergency, but supplemented by several layers of preventive detention and other security laws that readily afford the Government multiple options to exercise similar powers even formally non-declared periods of emergency.

Formal Emergency Powers

The Constitution of India created several sources of formal emergency power similar to those used by the British. As originally written, the Constitution authorized the President to declare a national emergency in circumstances involving a grave threat to the security of India or any part of its territory on account of (1) war, (2) external aggression, or (3) internal disturbance or imminent danger of internal disturbance. Upon proclaiming an emergency, the Central Government could exercise a broad range of special powers. Perhaps most significantly, fundamental rights under Article 19 of the Constitution would automatically be suspended by the declaration of emergency, and the executive was conferred with the power to suspend judicial enforcement of any other fundamental rights.

Between 1950 and 1975, the Central Government exercised its authority to declare a formal State of emergency twice – in 1962, when Chinese and Indian armed forces clashed along India's northern border, and in 1971, when war broke out between India and Pakistan. Each of the two wartime proclamations of emergency was followed by parliamentary action conferring sweeping powers upon the executive.

Rules promulgated under the Defence of India Act of 1962, authorized the Central and State Governments to engage in preventive detention extending well beyond the length of time permitted under ordinary preventive detention laws. While the rules established a system of administrative supervision and review, they set no maximum period of detention, and detainees were not entitled to learn the grounds for detention or to challenge the detention in any forum. The rules also authorized restrictions on freedom of movement and freedom of assembly; conferred broad search, seizure, and warrantless arrest powers upon Magistrates and the police; increased penalties for a number of criminal offences; and, to adjudicate violations, authorized the creation of Special Courts in which many ordinary criminal procedural protections were not available. The Government also suspended judicial enforcement of rights that may have been violated under the emergency proclamation.

While the formal ground for invoking the Constitution's emergency authority in each instance was war and external aggression, in each case the Government maintained the State of emergency long after armed conflict had ceased, echoing efforts by the British to extend into peacetime the sweeping emergency powers authorized on account of war. Although the conflict with China was over within days, the 1962 emergency proclamation remained in effect until 1968. Similarly, the 1971 war with Pakistan ended within weeks, and relations between India and Pakistan were soon normalized, yet the 1971 emergency proclamation remained in effect, along with a concurrent State of emergency declared in 1975 in response to threats posed by "internal disturbance," through 1977.

Finally, the Constitution preserved a version of the power held by the British Governor-General to legislate by ordinance and supersede State Governments. When both Houses of Parliament are out of session, the President, at the request of the cabinet, may promulgate an ordinance if satisfied "that circumstances exist which render it necessary... to take immediate action." Such ordinances have the force of law, but must be ratified by an Act of Parliament within six weeks after the end of its recess which constitutionally may not be longer than six months. On occasion, the executive has even successively repromulgated the same ordinance to extend the period of time before formal legislation becomes necessary.

As under the 1935 Act, the Central Government also could supersede State Government authority based on the "failure of constitutional machinery" within a State. Upon determining that the Government of a State "cannot be carried on in accordance with the provisions" of the Constitution, the Central Government may impose "President's Rule" within that State. Under such circumstances, the President may assume any or all of the non-legislative functions of the State Government, declare that the State's legislative powers shall be exercised by the Parliament rather than the State legislature, or take other steps that might be necessary to deal with the emergency, including suspension of other constitutional provisions.

The Government of India Act, 1935, nowhere used the expression "security of the State" though it made provision under section 57 for dealing with crimes of violence intended to overthrow the Government. While the administration of law and order including the maintenance of public order was placed in charge of a Minister elected by the people, the Governor was entrusted with the responsibility of combating the operations of persons who endangered the peace or tranquillity of Province" by committing or attempting to commit "crime" of violence intended to overthrow the Government." Similarly, Art. 352 of the Constitution empowers the President to make a Proclamation of Emergency when he is satisfied that the security of India or any part of the territory thereof is threated by war or by external aggression or by internal disturbance." These provisions recognise that disturbance of public peace or tranquillity may assume such grave proportions as to threaten the security of the State.

Non-Emergency Preventive Detention Laws

Like the colonial legal framework, the Indian Constitution explicitly authorizes preventive detention during ordinary, non-emergency periods. Subject to procedural safeguards, the Constitution explicitly grants both the Central and State Governments power to enact laws authorizing preventive detention. Preventive detention ordinarily may not extend beyond three months without approval of an "Advisory Board," an administrative tribunal consisting of current or former High Court judges or individuals "qualified to be appointed" as High Court judges. The detainee must be told the basis for detention "as soon as can be" and have an opportunity to challenge the detention order. However, these procedural protections are qualified. Parliament may specify circumstances justifying extended detention without Advisory Board review, and the detaining authority may withhold any information if it deems disclosure against the "public interest."

Soon after the Constitution went into force, the Parliament enacted the Preventive Detention Act of 1950 (PDA), which authorized detention for up to 12 months by both the Central and State Governments if necessary to prevent an individual from acting in a manner prejudicial to the defense or security of India, India's relations with foreign powers, State security or maintenance of public order, or maintenance of essential supplies and services. The Act also implemented the limited procedural protections required by the Constitution.

The PDA was originally set to expire after one year. Indeed, the then Home Minister explicitly Stated that the bill was meant as a temporary expedient, intended only to address exigent circumstances in the aftermath of independence and partition, and that any decision to make it permanent demanded closer study. However, as with the use of formal emergency authority, this was re-enacted each year for almost 20 years. While it finally lapsed in 1969, preventive detention authority returned less than two years later under the Maintenance of Internal Security Act (MISA), which largely restored the provisions of the PDA.

The political exigencies of the 1970s, which included an economic crisis, war with Pakistan as well as the emergence of anti-government movement such as the one led by Jai Prakash Narayan, were seen by the Indira Gandhi regime as threats to its rule. In response, the Government brought MISA.

When MISA was tabled for debate in the Parliament, Atal Bihari Vajpayee said:—

> *"…This is beginning of a police State and a blot on democracy. It is the first step towards dictatorship … These powers will not be used against foreign spies but against political opponents."*

Non-Emergency Criminal Laws

Finally, following the model established by the British with laws such as the Rowlatt Act, independent India has continued to define and punish substantive

offences involving crimes against the State and, in some cases, to establish special rules to adjudicate those offences. The Constitution explicitly authorizes the Parliament to impose reasonable restrictions on freedom of speech, expression, peaceable assembly, and association in the interests of the sovereignty and integrity of India.

Pursuant to this authority, the Parliament enacted the Unlawful Activities (Prevention) Act of 1967 (UAPA), which remains in effect today and affords the Central Government power to ban as "unlawful" any association involved with any action, such as "whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise," that is intended to express or support any claim to secession or that "disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India."

When the Central Government declares an organization unlawful it must provide the grounds for the declaration but does not have to disclose any fact if it deems disclosure against the public interest. The Central Government's notification ordinarily becomes effective only upon confirmation by a Special Judicial Tribunal. The Tribunal consists of a single High Court judge and has all the powers of a Civil Court. The Central Government must refer its notification to the tribunal within 30 days, and after giving the organization notice and an opportunity to respond, the tribunal must either confirm or cancel the notification within six months of the notification's issuance. If confirmed, the declaration remains in force for two years from the date the notification became effective. The Government may order the declaration to take effect immediately pending confirmation by the tribunal. The Central Government may also, either on its own motion or on the application of any person aggrieved, cancel the notification at any time.

Once an organization has been banned as "unlawful," the UAPA provides the Central Government with powers to restrict its activities. The Central Government may, by written order, prohibit individuals from paying or delivering funds if they are being used for the purposes of an unlawful association. Any person aggrieved by such an order may apply within 15 days to a judge to show that the funds in question are not being used or are not intended for the purpose of the unlawful association.

The Statute also criminalized several forms of individual involvement with banned associations and their activities. Anyone who is a member of, or participates in meetings of, or contributes to an association declared unlawful could be imprisoned. Any individual who takes part in, commits, advocates, or abets any unlawful activity was also punishable. Anyone who in any manner assists the unlawful activities of any association declared unlawful faces imprisonment.

To repeal MISA, in 1977, the Government proposed to amend the Code of Criminal Procedure to add a set of provisions permanently conferring similar preventive detention authority. In the face of tremendous political outcry, this proposal was

withdrawn, and during the summer of 1978, well over a year after taking office, the Government did finally repeal MISA.

However, despite the repeal of MISA, preventive detention authority soon returned. By October 1979, the Government had issued an Ordinance Prevention of Black Marketing and Maintenance of Essential Commodities Ordinance authorizing detention to prevent actions endangering essential supplies, and in February 1980, this ordinance was replaced by an Act of the Parliament. Later that year, the Government issued a sweeping preventive detention ordinance to replace MISA, which ultimately was replaced by an Act of Parliament, the National Security Act of 1980 (NSA). The NSA, which remains in effect today, restored many of the provisions found in the PDA and the pre-Emergency version of MISA including the TADA which came into force in 1985 and POTA which came into force in 2004.

The Stated purpose of the NSA is to combat "'anti-social and anti-national elements including secessionist, communal and pro-caste elements and elements affecting 'the services essential to the community.'" The NSA authorizes preventive detention for up to 12 months, and both the permissible grounds to order preventive detention and the procedural requirements under the NSA are essentially the same as under the PDA and MISA.

Contemporary Anti-Terrorism Laws

Paul Wilkinson, an authority on terrorism related works, culled out five major characteristics of terrorism. They are:

1. It is premeditated and aims to create a climate of extreme fear or terror.
2. It is directed at a wider audience or target than the immediate victims of violence.
3. It inherently involves attacks on random and symbolic targets, including civilians.
4. The acts of violence committed are seen by the society in which they occur as extra-normal, in literal sense that they breach the social norms, thus causing a sense of outrage; and
5. Terrorism is used to influence political behaviour in some way - for example to force opponents into conceding some or all of the perpetrators demands, to provoke an over-reaction, to serve as a catalysis for more general conflict, or to publicize a political cause.

Globally, India has had a prominent role to play in the development of international law on terrorism. Pursuant to the obligations devolving along member States under UNSR 1373 of 2001, the SAARC Council of Ministers signed the Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism at the 12th SAARC Summit at Islamabad in 2004. This came into force on 12th January, 2006.