

RCSS Policy Studies 52

**Developing
Democracies,
Counter-Terror Laws
and Security**

Lessons from India and Sri Lanka

**N. Manoharan
Dayani Panagoda**

MANOHAR

DEVELOPING DEMOCRACIES, COUNTER-TERROR LAWS AND SECURITY

The Regional Centre for Strategic Studies (RCSS) is a South Asian regional think tank, based in Colombo, Sri Lanka. Established in 1993, it is an independent, non-profit and non-governmental organization which encourages research, dialogue, and deliberation on a broad range of conventional and non-conventional sources of conflict. The RCSS enables scholars and other professionals to address, individually and collectively, problems and issues of topical interest for all South Asian countries.

The Centre's key objectives are to:

- Sponsor, coordinate, and support research on South Asian strategic, security, and environmental issues.
- Promote interaction among scholars and professionals in the region and beyond who are engaged in South Asian studies.
- Foster linkages and collaboration among institutions focusing on studies and activities related to conflict, conflict transformation, and regional cooperation in South Asia.
- Encourage a new generation of analysts and commentators to generate fresh ideas and perspectives on the security discourse in the region.

This publication was made possible by the Mahbub-Ul-Haq Award for Collaborative Research.

Contact address:

Regional Centre for Strategic Studies
68/1, Sarasavi Lane
Colombo-08
Sri Lanka

Tel: + (94) 11-2690913, 2690914

Fax: + (94) 11-2690769

E-mail: info@rcss.org

Website: www.rcss.org

RCSS Policy Studies 52

Developing Democracies, Counter-Terror Laws and Security

Lessons from India and Sri Lanka

N. MANOHARAN AND DAYANI PANAGODA



REGIONAL CENTRE FOR STRATEGIC STUDIES
COLOMBO



MANOHAR
2013

Published by
Ajay Kumar Jain *for*
Manohar Publishers & Distributors
4753/23 Ansari Road, Daryaganj
New Delhi 110 002

and
Regional Centre for Strategic Studies
68/1, Sarasavi Lane
Colombo-08
SRI LANKA

Tel: + (94) 11-2690913, 2690914; Fax: + (94) 11-2690769

E-mail: info@rcss.org

Website: www.rcss.org

© Regional Centre for Strategic Studies, 2013

First published 2013

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical or photo-copying, recording or otherwise, without the prior permission of the Regional Centre for Strategic Studies. It is distributed on the understanding that it shall not, by way of trade or otherwise be sold, lent, hired or otherwise circulated without the prior consent of the RCSS.

Views expressed in materials published in RCSS Policy Studies are of contributors, and not necessarily of the Regional Centre for Strategic Studies

ISBN 978-81-7304-990-3

Printed at
Salasar Imaging Systems
Delhi 110 035

Contents

<i>Introduction</i>	7
1. Counter-terror Laws and Security in Developing Democracies: An Analytical Construct	9
2. India: A Case Study	19
3. Sri Lanka: A Case Study	51
4. Were Counter-terror Laws Able to Augment Security?	71
Conclusion	85

Introduction	1
Chapter I. The History of the Church	15
Chapter II. The Doctrine of the Church	25
Chapter III. The Ministry of the Church	45
Chapter IV. The Sacraments of the Church	65
Chapter V. The Moral Teaching of the Church	85
Chapter VI. The Church in the World	105
Chapter VII. The Church and the Future	125
Index	145

Introduction

... But I am firmly convinced that a comprehensive strategy for security can and must be guided by upholding the rule of law and respecting human rights.¹

Terrorism raises genuine security concerns. And the state attempts to address these concerns through various measures. Use of counter-terrorism legislation is one such measure, employed especially by democracies. The basic rationale is that the legal framework deals with terrorism, which is considered undemocratic. In other words, legislations ought to adequately deter terrorist groups, but at the same time prevail on other counter-terrorism methods of the state from encroaching on human rights of the innocent. How far is this true? Do counter-terror laws enhance security? If so, in what manner? If not, why and what are the problems involved? These key questions are addressed in the present study. In short, the central issue is whether the so-called 'security laws' provide security in its comprehensive sense or just the state security or undermine overall security. The study assumes that there is an inherent tension between state security and the security of its subjects.² Those measures imposed for safeguarding state security end up eroding the basic rights of the individuals and ultimately threatening the 'comprehensive security' of the state. The objective

¹ Sergio Vieira de Mello, High Commissioner for Human Rights at the Eleventh Workshop on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia Pacific Region, Pakistan, 25 February 2003.

² The distinction came to the fore with the emergence of the concept of 'Human Security'. The UNDP report of 1994 first drew the world's attention to this concept.

of the study is to identify the reasons for the tension and suggest measures to overcome it. The study intends to fill the gap in the existing literature on terrorism or counter-terrorism in established democracies.

Counter-terror legislation, the chief measure employed by democratic states to meet the primary threat of terrorism, is analysed here. The case studies of India and Sri Lanka have been examined for empirical analyses. These two countries in particular have been chosen for the following reasons: both countries stand out as successful democracies in the region as well as in the developing world. Experiences from these two countries, therefore, are instructive for all democracies that face the challenge of developing effective responses to terrorism and other security threats while also developing the commitment and institutional capacity to protect human rights in an enduring manner.

At the same time, they have been confronted with protracted internal conflicts that severely impinge their security.

Ever since Independence, both India and Sri Lanka are notable for using counter-terror laws not only to contain rebellion, but also to strengthen security in their respective territories.

Before analysing Indian and Sri Lankan cases, a framework for analyses is defined. The framework, apart from dealing with the concept of security, looks at how terrorism poses a security threat, and how democracies use counter-terrorism legislation to tackle this menace.

CHAPTER 1

Counter-terror Laws and Security in Developing Democracies: An Analytical Construct

DEFINING 'SECURITY'

The concept of 'security' has evolved over a period of time. Barry Buzan labelled security as an 'essentially contested concept'.¹ In the traditional sense, 'security' is understood as a military-strategic term with its exclusive focus on the state and its interests in political and territorial self-preservation. This traditional notion of security has two distinct characteristics. Firstly, the state is considered the principal provider of security against both conventional and non-conventional threats. States, irrespective of whether they are democratic or authoritarian, give priority to their own security. They are unconcerned if the security of their subjects are compromised in the process. The defining maxim is: 'no security outside the state; no state without security'.² Secondly, understanding force postures and capabilities of states is a key tenet of traditional security.³ In short, security is understood within the framework of the 'realist' paradigm. Scholars like Stephen Walt go to the extent of rejecting the inclusion of 'non-military' components like 'pollution, disease,

¹ For details see Barry Buzan, *People, States, and Fear*, Hemel Hempstead: Harvester Wheatsheaf, 1991.

² Michael Dillon, *Politics of Security: Towards a Political Philosophy of Continental Thought*, London: Routledge, 1996, p. 14.

³ Stephen M. Walt, 'The Renaissance of Security Studies', *International Studies Quarterly*, vol. 35, no. 2, June 1991, pp. 211-39.

child abuse, or economic recessions' into security studies, as that would 'destroy its intellectual coherence'.⁴

However, when one looks at the situation in developing countries, the need for a broader notion of security is uncontested. 'Non-military' issues like scarcity, unemployment, displacement, underdevelopment, organized crime, illegal migration, and terrorism are at the heart of the insecurity of developing countries. As Caroline Thomas puts it, 'security in the context of the Third World does not simply refer to the military dimension, as is often assumed in the Western discussions of the concept, but to the whole range of dimensions of a state's existence which has been taken care of in the more developed states, especially those in the West'.⁵ In short, as Vayrynen rightly observes, 'In developing countries, the notion of national security cannot be separated from the non-military threats to security'.⁶ This is mainly because the developing world is characterized by 'their colonial background, the arbitrary construction of their boundaries by external powers, the lack of societal cohesion, their recent emergence into juridical statehood, and their stage of development'.⁷

This gave birth to the concept of 'Comprehensive Security' involving, apart from the already existing national aspect, human, economic and environmental dimensions. The concept gained definite momentum in the post-Cold War era mainly due to reasons like decrease in the possibility of inter-state wars and increase in intra-state conflicts especially in the developing world. The UNDP report of 1994 aptly observes,

⁴ See Stephen M. Walt, 'Rigor or Rigor Mortis? – Rational Choice and Security Studies', *International Security*, vol. 23, Issue 4, pp. 5–48.

⁵ Caroline Thomas, 'New Directions in Thinking about Security in the Third World', in Ken Booth (ed.), *New Thinking about Strategy and International Security*, London: HarperCollins Academic, 1991, p. 269.

⁶ Raimo Vayrynen, 'Towards a Comprehensive Definition of Security: Pitfalls and Promises', Paper prepared at the 31st Annual Convention of the International Studies Association, Washington, D.C., 10–14 April 1990, p. 10.

⁷ Mohammed Ayoob, 'State Making, State Breaking and State Failure: Explaining the Roots of Third World Insecurity', Paper prepared for the seminar on 'Conflict and Development: Causes, Effects and Remedies', The Hague, Netherlands Institute of International Relations, 22–4 March 1994, pp. 2–3.

The concept of security has far too long been interpreted narrowly. . . . Forgotten were the legitimate concerns of ordinary people who sought security in their daily lives. For many of them, security symbolized protection from the threat of disease, hunger, unemployment, crime, social conflict, political repression, and environmental hazards.⁸

‘Security’, thus, in this study, is understood in broad terms incorporating ‘liberal’ and ‘constructivists’ paradigms. The distinct character of ‘comprehensive security’ is that state is no more the central unit or focus of analyses. In fact, in the developing world, the state itself is seen as ‘far from being the provider of security as in the conventional view, has in many ways been a primary source of insecurity. . . .’⁹ Mohammad Ayoob argued on similar lines when he observed that the state in the Third World, is in the process of consolidating itself, pitted against its own people.¹⁰ From the perspective of this study, the ‘comprehensive security’ gains importance because of two main reasons. One, traditional state boundaries have become less relevant in the defence against terrorism. Two, subjects of the state have become the first-line of direct victims of any terrorist attack. Also, non-state threats and actors have become key factors in the contemporary security debate.¹¹

TERRORISM AS A SECURITY THREAT

If terrorism is defined as ‘an act of violence which targeted civilians for the purpose of political subversion of the state to intimidate a population, or to compel a government or an international

⁸ See Chapter 2 titled ‘New Dimension of Human Security’, *UNDP Report, 1994*.

⁹ Rob Walker, ‘The Concept of Security and International Relations Theory’, Working Paper No. 3, First Annual Conference on ‘Discourse, Peace, Security and International Society’, Ballyvaughn, Ireland, 9–16 August 1987, p. 11.

¹⁰ See for detailed exposition Mohammad Ayoob, *The Third World Security Predicament: State-making, Regional Conflict and International System*, Boulder: Lynne Rienner, 1995.

¹¹ Elke Krahmann (ed.), *New Threats and New Actors in International Security*, New York: Palgrave Macmillan, 2005, pp. 22–5.

organization to do or abstain from doing any act' then threats arising from such acts are phenomenal. In other words, every act of terrorism is a threat to security. A principal characteristic of terrorism, distinguishing it from many other forms of violence, is its ability to strike directly at perceptions of personal security.¹² Terrorism is a complex phenomena imbued with political, social, economic and psychological factors. It is arbitrary use of violence. The emergence of terrorism as a weapon of proxy war between hostile nations has further added to this complexity. Terrorism, thus, is not only a threat to state security, but has become a primary source of 'human insecurity'. Terrorism threatens norms, rules and institutions largely because it dents the rule of law, human rights, democratic procedures for settling political disputes and the laws of war. In this sense, 'terrorism is a threat to the global normative structure without which security would be impossible to realise'.¹³ In the post-Cold War era, terrorism figured top in the list of new threats to security. After 9/11, threat from terrorism has been identified as the most dangerous by states. This is not only because of the ruthlessness of attacks, but also their lethality and unpredictability. Increased possibilities of weapons of mass destruction reaching terrorist groups like al-Qaeda have further heightened the threat level. The case of several terrorist groups adopting suicide tactics has increased the threat perception to alarming proportions. The 'globalized terrorism' thus effectively assimilates diverse forms of political violence with the consequence of unifying and amplifying the threat. Seriousness of threat to security by 'New Terrorism' is identified by the following apparent trends:

- Terrorism has become lethal and bloodier;
- Terrorists have developed new financial resources, so that they are less dependent on state sponsors;

¹² Ian O. Lesser, 'Countering The New Terrorism: Implications for Strategy', in I.O. Lesser et al., *Countering the New Terrorism*, Santa Monica: The RAND, 1999, p. 96.

¹³ S.M. Makinda, 'Security and Sovereignty in the Asia-Pacific', *Contemporary Southeast Asia*, vol. 23, no. 3, 2001, pp. 401-19.

- Terrorists have evolved new models of organization with wider network-blurring distinction between domestic and international terrorism;
- Their motivation is diverse;
- Terrorists can now wage global campaigns;
- Terrorists have effectively exploited new communication technologies including use of cyberspace.¹⁴

Terrorism is taken seriously not just because of what it represents, but also because of what it brings about. Terrorism poses serious threat to security. Directly, terrorism is a threat to core human rights like right to life, right to personal liberty and security, the right to humane treatment, the right to due process and to a fair trial, the right to freedom of expression, and the judicial protection and its correspondent obligation to respect and ensure all human rights without discrimination.¹⁵ With terrorist attacks becoming more lethal of late, a growing percentage of terrorist attacks are designed to kill as many people as possible. The trend towards higher casualties reflects the changing motivation of today's terrorists. Terrorist groups lack a concrete political goal other than to punish their enemies by killing as many of them as possible, seemingly without concern about alienating sympathizers. The terrorist threat is also changing in ways that make it more dangerous and difficult to counter. New terrorist threats can suddenly emerge from isolated conspiracies or obscure cults with no previous history of violence. Guns and conventional explosives have so far remained the weapons of choice for most terrorists. Such weapons can cause many casualties and are relatively easy to acquire and use. But some terrorist groups have shown keen interest in acquiring the capability to use chemical, biological, radiological, or

¹⁴ Brian Michael Jenkins, 'The New Age of Terrorism', in David Kamien (ed.), *The MacGraw-Hill Handbook on Homeland Security*, Santa Monica: RAND Corp., 2006, pp. 117-18.

¹⁵ Michael Humphrey, 'Human Rights, Counter-Terrorism, and Security', Paper presented at the seminar on 'Terrorism and Security Law' as part of the 'Globalisation and Human Rights Seminar Series', The Australian Human Rights Centre, UNSW Faculty of Law, 27 August 2003.

nuclear (CBRN) materials. It is difficult to predict the likelihood of a CBRN attack, but most experts agree that today's terrorists are seeking the ability to use such agents in order to cause mass casualties. Ignatieff summarizes the scope of the threat that is more indirect in nature:

A succession of large-scale attacks would pull at the already-fragile tissue of trust that binds us to our leadership and destroy the trust we have in one another. Once the zones of devastation were cordoned off and the bodies buried, we might find ourselves, in short order, living in a national-security state on continuous alert, with sealed borders, constant identity checks and permanent detention camps for dissidents and aliens. Our constitutional rights might disappear from our courts, while torture might reappear in our interrogation cells. The worst of it is that government would not have to impose tyranny over the cowed populace. We would demand it for our own protection. . . . That is what defeat in a war on terror looks like. We would survive, but we would no longer recognize ourselves.¹⁶

COUNTERING TERRORISM IN DEMOCRACIES: USE OF COUNTER-TERROR LAWS

Counter-terrorism is a mix of domestic and foreign policies designed to prevent, deter, limit and finally eliminate the actions of terrorist groups and their support network – both men and material – in an attempt to protect the general public and property from terrorist violence. As a type of policy, counter-terrorism encompasses a range of actions. Counter-terror strategies adopted by various states differ depending on their understanding of terrorism as a security threat. When confronted with terrorism, democracies¹⁷ face a unique challenge. The challenge comes in the form of

¹⁶ Michael Ignatieff, 'Lesser Evils', *The New York Times*, 2 May 2004.

¹⁷ 'Democracies' are those societies that fulfil the following conditions: Freedom of belief, expression, organization, demonstration, and other civil liberties, including protection from armed militancy; a 'rule of law' under which all citizens are treated equally and 'due process' is secure; political independence and neutrality of the judiciary and other institutions of 'horizontal accountability' that check the abuse of power, such as electoral administration, audits, and a central bank; an

undemocratic nature of terrorism. Terrorists are fundamentally anti-democratic and have no regard for human rights; they have their own 'code of conduct' and seek to destroy the very structures and institutions that form the basis of democratic life. Terrorists often view democracies as 'soft', usually on the grounds that 'their publics have low thresholds of cost tolerance and high ability to affect state policy'.¹⁸ As one of the scholars puts it, terrorism 'is the most flagrant form of defiance of the rule of law. It challenges government's prerogative of the monopoly of armed force within the state. Terrorists attempt to replace the laws of the state by their own laws of the gun and the kangaroo court.'¹⁹ In short, terrorism is anti-thesis to democracy. In that case, is it possible to address this 'undemocratic' problem within the framework of democracy?

This is what is known as 'democratic dilemma' faced by every democratic country confronted by terrorism. On the one hand, it has to protect the territorial integrity, sovereignty and security of its people from arbitrary violence by terrorists. If it fails to fulfil this task, its authority and credibility is undermined. On the other hand, a democratic state alienates the population and loses its legitimacy in case it slips into repression and authoritarianism in the process of combating terrorism.²⁰ How does the state address this 'dilemma' and maintain equilibrium?

It is generally assumed that the 'criminal justice model' is a better option for democracies to overcome the 'democratic dilemma' they face. Terrorism inevitably involves commission of crime. Since democracies have well-developed legislations, systems and structures to deal with crime, the criminal justice

open and pluralistic civil society, including not only associational life but the mass media as well; and civilian control of the military.

¹⁸ Robert Pape, 'The Strategic Logic of Suicide Terrorism', *American Political Science Review*, vol. 97, no. 3, August 2003, p. 349.

¹⁹ Paul Wilkinson, *Political Terrorism*, London: Macmillan, 1974, p. 12.

²⁰ Boaz Ganor, 'Preface', in Jonathan Adiri, *Counter-terror Warfare: The Judicial Front – Confronting the 'Democratic Dilemma' Counter-terror Warfare and the Evolution of the 'Probable Scope*, Herzlia International Policy Institute of Counter-terrorism, July 2005.

system should be at the heart of their counter-terrorism efforts.²¹ Legal regimes, so goes the rationale, enable 'fair' prosecution of perpetrators and supporters of terrorist acts; open and public trials give adequate social stigma to terrorists and their supporters, thus acting as deterrence for others committing acts of terror. Fair trial increases public faith in the government and at the same time dilutes terrorists' justification of 'fight against repressive regimes'. 'Judicial review' ensures that the legal response is in accordance with the 'rule of law' and 'juries' reinforce community standards of fairness. The 'adversarial process' exposes ineffective or arbitrary law enforcement. Overall, the 'checks and balances' present in the system guarantee utmost efficiency and at the same time assure that innocents are not penalised. It is further argued that while serving their sentence, prisons or rehabilitation centres would help terrorists get back to the mainstream when they are released after their prison terms. Thus, 'criminal justice model' in the traditional sense is supposed to act against terrorism at two levels: 'deterrence' and 'correction'.

It is found, however, that the existing criminal laws are not adequate to equip sufficiently the institutions of government, especially the security forces, to deal with the rising sophistication of terrorism. Terrorists are now widespread, well networked with support links all over, and more organized in terms of technology and resources. Some call this 'New Terrorism' that is apart from 'networked, multinational enterprise with a global reach which aims to inflict death and destruction on a catastrophic scale'.²² Added to this is a new dimension of criminal-terrorist nexus

²¹ Lindsay Clutterbuck, 'Law Enforcement', in Audrey Kurth Cronin and James M. Ludes (eds.), *Attacking Terrorism: Elements of a Grand Strategy*, Washington D.C.: Georgetown University Press, 2004, p. 141.

²² For more details on 'New Terrorism' see Nadine Gurr and Benjamin Cole, *The New Face of Terrorism: Threats from Weapons of Mass Destruction*, London: I.B. Tauris, 2000; Andrew Tan and Kumar Ramakrishna (eds.), *The New Terrorism: Anatomy, Trends and Counter-Strategies*, Singapore: Eastern Universities Press, 2002; Mathew J. Morgan, 'Origins of New Terrorism', *Parameters*, Spring 2004, pp. 54-71; David Tucker, 'What's New About the New Terrorism and How Dangerous Is It?', *Terrorism and Political Violence*, vol. 13, Autumn, 2001, pp. 1-14; I.O. Lesser et al., *Countering the New Terrorism*, Santa Monica: RAND, 1999; Walter Laqueur,

at dangerous proportions. So, to deal with the 'well armed and far more dangerous and modernised enemy', exclusive counter-terror laws are required to supplement the existing criminal laws, as what is at stake is not just law and order but the very existence of state and society. As terrorism tends to exploit the very values of democracy, special counter-terror legislation would try and plug those loopholes which terrorists take advantage of.²³ This raises the deterrence value of the existing criminal laws to a new level. Moreover, the extraordinary laws introduce a new aspect – prevention – to the existing 'deterrence' and 'correction' strategies of the 'criminal justice model'. In other words, the counter-terror laws try to prevent terrorists from committing violent acts. The basic motivation for introducing special laws is derived from lack of confidence in the existing criminal justice system to take care of a perceived or real security threat.

Such counter-terror laws fall under five categories:

- *Emergency provisions*: These are inbuilt in many constitutions to meet emergency situations.
- *Laws of proscription*: Legal sanctions that criminalize the banned

The New Terrorism: Fanaticism and the Arms of Mass Destruction, London: Oxford University Press, 1999; Ashton B. Carter, John Deutch and Philip Zelikow, 'Catastrophic Terrorism', *Foreign Affairs*, vol. 77, no. 6 (1999), pp. 80-94; Walter Laqueur, 'Postmodern Terrorism', *Foreign Affairs*, vol. 75, no. 5 (1996), pp. 24-36; Alexander Spencer, 'Questioning the Concept of "New Terrorism"', *Peace, Conflict & Development*, Issue 8, January 2006, pp. 1-33; Col. Russ Howard, 'The New Terrorism', MIT Security Studies Program Seminar, 9 March 2005. For detailed exposition of 'New Terrorism' in the Indian context, see Gurmeet Kanwal and N. Manoharan, *India's War on Terror*, New Delhi: Knowledge World, 2010.

²³ Terrorists especially take advantage of the amount of freedom – of expression, movement and association – available in democratic systems; the prevalence of 'rule of law' and 'due process of law' that make prosecution of terrorists difficult; and the existence of free media that gives adequate publicity which militants need. William Eubank and Leonard Weinberg demonstrate that most militant incidents occur in democracies and that generally both the victims and the perpetrators are citizens of democracies. Quan Li has found that although militant attacks are less frequent when democratic political participation is high, the kind of checks that liberal democracy typically places on executive power seems to encourage militant actions.

terrorist groups and a range of undesirable activities that are detrimental to the safety of the state and its people.²⁴

- *Special laws*: Exclusive laws against terrorism like the Patriot Act in the US, Prevention of Terrorism Act (PTA) of Britain and, till recently, Prevention of Terrorism Act (POTA) of India.
- *Security forces empowerment laws*: Those that give immunity and additional special powers to the security forces, for instance the Armed Forces Special Powers Act of India and Indemnity Act of Sri Lanka.
- *Other laws used for the purpose*: Exclusive laws on control of finances, money laundering, drug trafficking and so on.

How far have these extraordinary laws been successful in preventing, deterring and correcting terrorism and enhancing security? Indian and Sri Lankan cases of use of counter-terror legislation in combating terrorism are examined to answer this key question.

²⁴Brice Dickson, 'Law versus Terrorism: Can Law Win?', *European Human Rights Law Review*, Issue 1, 2005, pp. 16-17.

CHAPTER 2

India: A Case Study

SECURITY DEBATE AND THREAT PERCEPTION

India's long struggle with various forms of politicized violence has created a 'chronic crisis of national security'.¹ Since security is perceived as 'an integral component of its [India's] development process',² it has become part of the very 'essence of India's being'. The main sources of insecurity to India are terrorism, organized crime, violence based on communal and caste divides, criminalization of politics, inequality, etc. Of these, terrorism figures prominently. In fact, India is one of the countries worst affected by terrorism. In the recent period, India has witnessed more terrorist incidents than any other country in the world.³ However, the international community recognized and acknowledged this only very recently.

Traditionally, the threat to India's territorial and internal security existed in four main forms: rebellion in Punjab, militancy in Jammu & Kashmir, insurgency in the north-east, and Left-wing extremism in its central part. Every case has 'a distinct identity moulded by its geopolitical and socio-economic context.'⁴ To these four main forms, a new dimension has come to the fore in the garb of jihadist

¹ K.P.S. Gill, 'The Imperatives of National Security Legislation in India', *Seminar*, April 2002.

² This came out clearly in the National Security Advisory Board's document on India's Nuclear Doctrine.

³ For instance, in 2004, 45 per cent of the total terrorist incidents in the world took place in India. The latest figures in the wake of series of terrorist attacks especially in urban centres are more alarming.

⁴ Chaman Lal, 'Terrorism and Insurgency', *Seminar*, Issue No. 483, November 1999.

terrorism with international linkages. External sponsorship to all the above violent manifestations also added to the complexity of the threat.⁵

PUNJAB

The rise of militancy in Punjab was an enigma. Although the state occupied 1.6 per cent of the total land area of India, it contributed to one-fourth of the food production in the country. During the 1980s, the state had the highest per capita income and the number of people living below the poverty line was the lowest. Despite this relative prosperity, the Sikhs, in the late 1970s, started agitating for a separate state called 'Khalistan' due to perceived religious, political and economic grievances. The Sikh fundamentalists, headed by Jarnail Singh Bhindranwale dubbed 'religious depravity of Sikhs and ever increasing Hindu domination' as the main cause of their relative deprivation.⁶ There was also a growing perception that Sikhism was facing a danger of assimilation into Hinduism.⁷ The idea, therefore, was to create a separate Sikh state free of Hindu domination. The cause sanctioned the use of violence. Bhindranwale called on young Sikhs to sacrifice their lives for their religion.⁸ Given his popularity, the ruling Congress party attempted to use him to check the growing influence of the Akali Dal, their main political rival in the province. This experiment backfired as Bhindranwale turned anti-Congress in due course of time. The Akali Dal also played the communal card by exploiting the ethnic

⁵ Interview with M.L. Kumawat, Special Secretary (Internal Security) Government of India, 18 July 2008, New Delhi.

⁶ Harjot Singh Oberoi, 'Sikh Fundamentalism: Translating History into Theory', in Martin E. Marty and R. Scott Appleby (eds.), *Fundamentalism and the State*, Chicago: Chicago University Press, 1993, p. 267.

⁷ Khushwant Singh, an eminent Sikh historian, wrote, 'If the present state of amalgamation continues, there is little doubt that before the century has run its course the Sikh religion will have become a branch of Hinduism and the Sikhs a part of the Hindu social system'. See Khushwant Singh, *History of the Sikhs*, vol. 2: 1839-1988, Columbia: South Asia Books, 1999, p. 185.

⁸ Joyce Pettigrew, *The Sikhs of the Punjab: Unheard Voices of State and Guerrilla Violence*, London: Zed Books, 1995, p. 17.

divide between Hindus and Sikhs. The inability and unwillingness of the central government to bring in appropriate policies to protect the Sikh religion, language and culture exacerbated the alienation of the community.⁹

Outfits like the All India Sikh Student Federation (AISSF), Dashmesh Regiment and Dal Khalsa emerged to carry on Bhindranwale's orders. These groups indulged in both targeted and indiscriminate killings costing more than 30,000 lives, majority of them were Sikhs. One of the high-profile victims of the Sikh insurgency was the then serving prime minister of India, Indira Gandhi, former Chief of the Army Staff, Gen A.S. Vaidya and the then chief minister of Punjab, Beant Singh.¹⁰ The militants even carried on their violent campaign overseas and bombed Air India's flight 182 that exploded near the coast of Ireland on 23 June 1985 killing all 329 on board. The militancy was said to have received immense moral and material support from Pakistan that was ever-ready to recognize a separate 'Khalistan'.¹¹ The support of the Sikh diaspora (about one million) in countries like the United Kingdom, Canada, and the US was also another major factor in sustaining Sikh militancy.¹² Sikh diaspora organizations like International Sikh Youth Federation, World Sikh Organization, National Council of Khalistan, California Sikh Youth, Sikh Youth of America, International Sikh Organization, Anti-47 Front, and Babbar Khalsa International were intensely involved in mobilization of support

⁹ Charanjit Singh Kang, *Counterterrorism: Punjab a Case Study*, Thesis submitted to the School of Criminology, Simon Fraser University, Spring 2005, p. 45.

¹⁰ Mrs Gandhi was assassinated in October 1984 by her own bodyguards who were Sikhs. The killing was considered a revenge for the desecration of the Golden Temple under her orders. In response, bloody riots broke especially in Delhi targeting the Sikh community.

¹¹ Interview with Lt Gen Kuldeep Singh Brar by Amberish K. Diwanji, *Rediff News*, 9 June 2004.

¹² See Darshan Singh Tatla, *The Sikh Diaspora: The Search for Statehood*, Seattle, Washington: University of Washington Press, 1999; N. Gerald Barrier and Verne A. Dusenbery (eds.), *The Sikh Diaspora: Migration and Experience beyond Punjab*, New Delhi: Chanakya Publications, 1989; Suneel Kumar, 'Linkages between the Ethnic Diaspora and the Sikh Ethno-national Movement in India', *Faultlines*, vol. 19, April 2008.

and resources among Sikhs abroad, lobbying with local governments, and spreading international propaganda through the media.

The Indian government's initial response to the crisis was lethargic. It was considered a law and order problem. However, when the situation went out of hand, the central government went to the extent of raiding the Golden Temple under 'Operation Bluestar'.¹³ Although Bhindranwale and his group were eliminated in this operation, new groups succeeded in reaping on the discontent caused by the Golden Temple raid and anti-Sikh riots. According to K.P.S. Gill, these two incidents were the 'most significant victories for the cause of "Khalistan" . . . not won by the militants, but inflicted upon the nation by the government. These two events, in combination, gave a new lease of life to a movement which could easily have been contained in 1984 itself.'¹⁴ The then Prime Minister Rajiv Gandhi's brief conciliatory approach failed to resolve the problem. At one point, the militants seemed to have outsmarted the security forces due to the lack of political will, indecision and disorganized response of the Indian government.¹⁵

It was only since 1989 that the government in New Delhi gradually took a firm view on the crisis and adopted a new counter-terrorism strategy. A detailed plan was in place. The efforts were much more systematic and coordinated among the local police, army, paramilitary forces, elite forces like the National Security Guards (NSG) and the intelligence agencies. On the ground, unified command centres, tactical operation headquarters and shared communication networks were evident to maintain the coordination.¹⁶ Under the leadership of the newly-appointed Director General of Police, K.P.S. Gill, the Punjab police was

¹³ See K.S. Brar, *Operation Blue Star: The True Story*, New Delhi: South Asia Books, 1993.

¹⁴ K.P.S. Gill, *Punjab: The Knights of Falsehood*, New Delhi: Har-Anand, 1997, pp. 95-7.

¹⁵ Ved Marwah, *Uncivil Wars: Pathology of Terrorism in India*, New Delhi: Centre for Policy Research, 1996, p. 167.

¹⁶ William Scott Latimer, 'What Can the United States Learn from India to Counter Terrorism?' Thesis submitted to the Naval Postgraduate School, Monterey, California, March 2004, p. 26.

better equipped and trained. All these were backed-up by a resolute political will. As a result, terrorism gradually faded from the scene starting from 1992-3. But, the insurgency ended up claiming over 21,469 lives and thousands were injured in the process.¹⁷

JAMMU & KASHMIR

Militancy in the strategically vital Jammu & Kashmir region continues to pose serious threats to the internal security of India claiming over 40,000 lives. Militancy started in 1988 due to various social, economic and political frustrations building up in the state. This was ably aided by the influence of Islamic militancy across the border. New Delhi did not properly respond to rising voices for political reforms by the Kashmiris. This motivated a call for independence or *Azadi*.¹⁸ However, the articulation of such extreme demand was made not through political means but through violence.¹⁹

Initially, Jammu and Kashmir Liberation Front (JKLF) led the guerrilla revolt by selective assassinations of 'Indian spies' and 'political collaborators'. It had weapons and training assistance from Pakistan.²⁰ The aim of the JKLF was to achieve complete independence of Kashmir from both India and Pakistan.²¹ In response, the Indian government took harsh measures, which in turn, further aggravated the alienation of ordinary Kashmiris. This offered a fertile breeding ground for more militant groups to prosper.²² In fact, 1990-3 can be termed as a boom period for

¹⁷'Peace at Last in Punjab', *The Economist*, 22 May 1993, p. 45.

¹⁸Victoria Schofield, *Kashmir in Conflict: India, Pakistan and the Unfinished War*, London: I.B. Tauris, 2000, p. 184.

¹⁹Sumit Ganguly, *The Crisis in Kashmir: Portents of War, Hopes of Peace*, Washington, D.C.: Woodrow Wilson Center, 1997, p. 1.

²⁰Praveen Swami, *India, Pakistan and the Secret Jihad: The Covert War in Kashmir, 1947-2004*, New York: Routledge, 2007, p. 164.

²¹It was initially known as HAJY group after the four founding members: Hamid Sheikh, Ashfaq Wani, Javed Mir and Yasin Malik.

²²Numerous guerrilla groups, called as *tanzeems*, that came up during this period include Jihad Force, Al Barq, Allah Tigers, Muslim Jaanbaaz Force, etc.

militancy in Kashmir when the overwhelming majority of militants were indigenous.²³

Utilizing this opportunity, Pakistan promoted a more Islamist group called Hizb-ul Mujahideen to fight for Kashmir's integration with Pakistan. At the same time, the Inter-Services Intelligence (ISI) tried to split the JKLF to create pro-Pakistan factions. Two prominent breakaway groups emerged as a result: Al Umar Mujahideen and Ikhwan-ul Muslimeen. Violence spread beyond the Valley as few more Pakistan-sponsored militant groups like Harkat-ul Ansar jumped into the fray with dominant ideology of '*Kashmir banega Pakistan*' (Kashmir will become Pakistan). In the process, the JKLF was gradually marginalized and laid down arms in 1994. Kashmiris who were more liberal in their religious ideas disliked the Pakistan-supported fanatic militant groups. In addition, the general desolation on killings and destruction due to insurgency crept in from 1995-6. Desolated militants gave up the armed struggle and joined the Indian forces as auxiliaries.²⁴ This helped the security forces to prevail on the rising spiral of violence. A superficial normalcy was visible as parliamentary and legislative elections took place in 1996.

But the normalcy proved to be deceptive as the *fidayeen*²⁵ phase of violence erupted from July 1999, immediately after the Kargil War. Two principle terrorist groups involved in this type of attacks were the Pakistan-based Lashkar-e-Toiba and Jaish-e-Mohammed. Apart from Jammu & Kashmir, these two groups started targeting other important urban centres like Delhi, Mumbai, Bengaluru, Hyderabad, Ahmedabad, Jaipur, Varanasi, and Kolkata. They

²³ Sumantra Bose, *Kashmir: Roots of Conflict, Paths to Peace*, New Delhi: Vistaar Publications, 2003, p. 116.

²⁴ Otherwise known as *Ikhwanis*, some of these ex-militants were absorbed into Special Operations Group, while others were attached to paramilitary forces like Central Reserve Police Force (CRPF) and Border Security Force (BSF). Interview with Maj. Gen. G.D. Bakshi (Retd.), New Delhi, 2 April 2009.

²⁵ Literally translated as 'life-daring' the militants usually come in teams of two or three, attack camps of the army, paramilitary, police or government installations and, try to get away. They do not mind getting killed in the process. However, their aim is to kill as many as possible – security personnel or civilians. Some call this 'suicidal attacks' as against suicide attacks.

successfully exploited the resentment of the Indian Muslims, especially the youth, in the aftermath of the Gujarat communal riots of 2002.

Another cycle of normalcy returned to the state in 2004 basically due to a multi-pronged strategy, combining military, political and developmental initiatives. This once again proved short-lived. Since June 2010, the Kashmir Valley has been witnessing an *intifada*-type of violence ably perpetrated by elements from across the borders. This has seriously undermined the legitimacy of the popularly-elected National Conference government under Omar Abdullah forcing New Delhi to announce an eight-point peace package to the state including appointment of a team of interlocutors to initiate 'sustained uninterrupted dialogue' addressing the entire range of issues.²⁶

NORTH-EAST INDIA

The north-east of India is more complicated and has the unique distinction of facing militancy for the longest period of time. For this reason, some call it a region of 'thousand mutinies'. Militancy continues even today in one form or the other. Thousands have died as a result, apart from affecting normalcy and development in the region that comprises eight states.²⁷ Several militant groups are fighting for various causes ranging from separatist to autonomist.

²⁶The three-member group, which was named in October 2010, included noted journalist Dilip Padgaonkar, academician Radha Kumar and the former Central Information Commissioner, M.M. Ansari. The group was entrusted to talk to people from all sections of all the three regions of the state: Jammu, Kashmir and Ladakh.

The other aspects of the package included the release of youth detained for stone pelting, re-opening of educational institutions, ex-gratia payment of Rs. 5 lakh to the families of those killed during recent protests, reduction of the number of bunkers and redeployment of security forces, review of areas covered by the Armed Forces Special Powers Act (AFSPA), special task forces to examine development needs of the state, and Rs. 100 crore as additional central assistance for developing infrastructure of educational institutions.

²⁷Traditionally, the seven states of the north-east are Assam, Meghalaya, Nagaland, Mizoram, Arunachal Pradesh, Manipur and Tripura. Recently, Sikkim was

The cross-border linkages of these militant groups with forces in the neighbouring states of Bangladesh, Myanmar, Nepal, Bhutan and China at various time periods, has added to the complexity of the situation. The borders of these states with neighbouring countries are not only porous, but also sensitive.²⁸

Of these eight states, only Arunachal Pradesh, and Sikkim did not face any kind of indigenous militancy. Mizoram, although free of violence today, did confront one of the most violent insurgencies at one point. The roots of the multiple insurgencies and autonomist movements lie deep in the history and geography of the region.²⁹ The underlying issue is the inadequate physical, cultural and emotional integration with the 'mainland'. The terrain of the region, which is dominated by hills and dense forests, is more conducive for insurgency, but at the same time difficult for policing and administration. Scant presence of the state administration has further alienated the people making them sympathizers of insurgents. Support from neighbouring countries in the form of sanctuaries, arms and logistics has also been sustaining militancy in the region.³⁰ Unfortunately, despite the presence of immense resources, most of the states in the region are not self-sustaining; they mostly depend on the central government even to fund their day-to-day administrative expenses. This has created a chronic 'dependency syndrome' and fiscal irresponsibility.³¹

Naga insurgency that commenced at the time of Indian Independence continues even today and remains the oldest in the north-east. It is also considered the mother of all insurgencies of the region. Despite acquiring statehood in 1963, the hardliners

included under the 'north-east' after it was incorporated into the North Eastern Council (NEC), the region's apex funding and development agency.

²⁸Wasbir Hussain, 'Insurgency in India's Northeast: Cross-border Linkages and Strategic Alliances', *Faultlines*, vol. 17, February 2006, pp. 105-25.

²⁹Ved Marwah, 'India's Internal Security Challenges', IDSA Foundation Day Lecture, 11 November 2003.

³⁰Interview with E.N. Rammohan, former DG Border Security Force, Jaipur, 24 May 2010.

³¹Interview with Maj. Gen. Dhruv Katoch (Retd.), New Delhi, 20 August 2010.

continue to fight for secession initially under the banner of the Naga National Council (NNC) and later under National Socialist Council of Nagaland (NSCN). In due course, the NSCN split to form NSCN (Isak-Muivah) and NSCN (Khaplang).³² Violence escalated not only because of counter-insurgency operations by the Indian forces, but also because of turf war between the two factions of the NSCN. Naga's demand for Nagalim (Greater Nagaland) comprising Naga-inhabited territories in the neighbouring states of Assam, Manipur and Arunachal Pradesh further complicated the issue. Under the umbrella of ceasefire, peace negotiations have been going on since 1997 between the NSCN (IM) and the government of India. However, an acceptable solution continues to be elusive.³³

After Independence and until 1963, Assam remained the single state in the region. Manipur and Tripura were administered as Union Territories. When Nagaland was created, other ethnic groups also put forth similar demands through armed means using secessionist rhetoric. The breakup of Assam led to two reactions: fresh demands for a homeland by various tribes of the state and anti-foreigner movement by the ethnic Assamese.

In the aftermath of Independence, illegal immigrants came in hordes to Assam from the then East Pakistan and later Bangladesh. The local Assam government and the central government did not take any concrete measures either to check or deport the illegal immigrants.³⁴ This led to the 'anti-foreigner movement' spearheaded mainly by the All Assam Students Union (AASU). The inability of the AASU to achieve the objective of the movement led to its split into Assam Gana Parishad (AGP) that took to democratic means and the United Liberation Front of Assom (ULFA) that resorted to

³²The split was on tribal lines. While Muivah and Isak belong to the Thangkul-Sema tribe, Kaplang is from the Hemi Naga-Konyak tribe.

³³Negotiations between the NSCN(IM) and the Government of India have been going on for the past 12 years in various parts of the world. The major issues under negotiations are the degree of autonomy and whether Naga-dominant areas outside Nagaland ('Nagalim') would be included in any peace agreement.

³⁴Josy Joseph, 'Securitisation of Illegal Migration of Bangladeshis to India', *RSIS Working Paper No. 100*, January 2006.

armed means. While the AGP accepted the Indian Constitution, the ULFA wanted an independent Assam free of 'Indian colonialism'. While co-opting Bengalis, Nepalis and other tribal groups (Bodo, Karbi, Dimas, Rabha, Lalung and Mishing), ULFA saw Hindi speakers as 'Indian populations supportive of the colonial rule'.³⁵ This was seen as a pragmatic ploy by the ULFA to broaden its support base. Yet another consideration was that most of the top ULFA leadership has taken refuge in neighbouring Bangladesh, the prime source of illegal migration into Assam. Despite repeated calls for negotiations by the Indian government, the ULFA continued to resort to terrorist activities mainly in Assam. Recently, due to arrests of many of its top leaders, the ULFA has indicated that it was not opposed to 'honourable dialogue without giving up the outfit's ideology'.³⁶

While Nagas, Assamese, Mizos and Manipuris demanded separate sovereign states, the Bodos (Bodoland Liberation Tiger Force), the Hmars (Hmar Revolutionary Front), the Karbis (Karbi National Volunteers), Kukis (Kuki National Front), Reangs (Bru National Liberation Front), Khasis (Hynniewtrep National Liberation Council), Koch Rajbongshis (Kamatapur Liberation Army), Jaintias, Garos and Dimasas wanted autonomous homelands within the state of their existence to preserve their distinct identities. In addition, there exist a large number of Islamist militant organizations especially in Assam to safeguard their interests and security.³⁷

³⁵ Interview with Col. Anil Bhat (Retd.), New Delhi, 16 September 2008.

³⁶ 'Talks with ULFA should begin in next two months: Gogoi', *The Hindu*, 29 September 2010.

³⁷ The most notable groups are Muslim United Liberation Tigers of Assam (MULTA), Muslim United Liberation Front of Assam (MULFA), Adam Sena, People's United Liberation Front (PULF), Muslim Security Council of Assam (MSCA), United Liberation Militia of Assam (ULMA), Islamic Liberation Army of Assam (ILAA), Muslim Volunteer Force (MVF), Islamic Sevak Sangh (ISS), Islamic United Reformation Protest of India (IURPI), United Muslim Liberation Front of Assam (UMLFA), Revolutionary Muslim Commandos (RMC), Muslim Liberation Army (MLA), Muslim Tiger Force (MTF), and Muslim Security Force (MSF). These apart, involvement of Harkat-ul-Jihad-al Islami of Bangladesh, and Harkat-ul-Mujahideen of Pakistan are seen.

These gave birth to several mini insurgencies in the region for the Indian state to confront.

Mizos were at the forefront for a separate state. The famine of 1959-60³⁸ in the areas inhabited by Mizos formed a critical moment for this demand when the then Assam state government failed to respond on time. An agency in the name of Mizo Famine Front (MFF) under Pu Laldenga was involved in the relief of the affected. Later, it metamorphosed into the Mizo National Front (MNF) to fight for sovereign Mizoram. Despite various development initiatives by the Indian government, the MNF went on to declare the independence of Mizoram on 1 March 1966. This triggered counter-insurgency operations by the Indian forces that lasted till a final political settlement was reached in 1986.³⁹

Cross-border linkages of various militant groups in this geographically isolated spot and the involvement of foreign countries have made the problem more intricate.⁴⁰ The Naga militant groups took the help of both erstwhile East Pakistan, China and Myanmar. The ULFA took sanctuaries in Bangladesh and Bhutan. The MNF also took the help of China and East Pakistan and later Bangladesh. Except Bhutan, all other neighbouring countries tried to use the militants of the north-east to keep India in a destabilized mode.⁴¹ China stopped aiding north-east militant groups in the 1980s, but Pakistan filled the void through its ISI with more rigour.⁴²

³⁸ Referred to as *mautampui*, famines are caused by rats, which initially attracted by bamboo flowering, later turn to crops. The flowering occurs every 50 years. The famine that occurred in 1959-60 was the most severe.

³⁹ Through the Mizo Accord signed on 30 June 1986, the MNF agreed to renounce violence and work within the Constitution of India.

⁴⁰ Spreading to over 2, 25,000 sq km, the north-east shares border with Nepal, Bhutan, Bangladesh, Myanmar, and China. But, it is connected to the Indian mainland through a narrow corridor of about 21 km popularly called 'Siliguri Corridor' or 'Chicken's Neck'.

⁴¹ Subrata K. Mitra, 'The reluctant hegemon: India's self-perception and the South Asian strategic environment', *Contemporary South Asia*, vol. 12, no. 3, September 2003, pp. 399-400.

⁴² Interview with E.N. Rammohan, former Director General of Border Security Force, New Delhi, 20 May 2008.

As of 2011, out of over several militant groups in the region, only four went out of action and only one insurgency (Mizoram) has been resolved. The north-east, as a result, continues to be a major threat to India's internal security. However, not much attention is paid to internal security threats from this region as compared to Jammu & Kashmir.⁴³ The endurance of militancy in this region is partly because of its deep linkages with local politics and administration.

LEFT WING EXTREMISM

Prime Minister Manmohan Singh has characterized Left-wing extremism (LWE) as 'India's greatest internal security threat'.⁴⁴ It started as an agrarian rebellion in the aftermath of a police-firing incident in the Naxalbari village of West Bengal in May 1967.⁴⁵ To direct the rebellion, a new party called Communist Party of India (Marxist-Leninist) was formed on 22 April 1969 with Charu Majumdar as the Secretary of the Central Organizing Committee. The party was to follow the Maoist line to achieve the 'revolution'.⁴⁶ The ripples of West Bengal were felt as far as Tamil Nadu, Andhra Pradesh, Bihar, Uttar Pradesh, Orissa, Punjab and Kerala. However, due to coordinated military response from the then West Bengal, government supplemented by adequate land reforms, the movement lost its steam by the mid-1970s.⁴⁷ But

⁴³ Interview with B.G. Verghese, noted author and journalist, New Delhi, 17 November 2010.

⁴⁴ 'Communist rebels pose single biggest threat to India, says PM', *The Hindu*, 20 December 2007.

⁴⁵ Sumanta Banerjee, *In the Wake of Naxalbari*, Kolkata: Subarnarekha, 1980, pp. 111-12.

⁴⁶ Satya Prakash Dash, 'Formative Years', in *Naxal Movement and State Power*, New Delhi: Sarup and Sons, 2006, p. 21.

⁴⁷ The success was partly due to 'Operation Steeple Chase' launched in 1971 jointly participated by military, paramilitary and the state forces in the Naxal-affected areas. The movement by and large died out after the arrest and death of Charu Majumdar in July 1972. See Shankar Gosh, 'A Chapter Ends', in *The Naxal Movement*, Kolkata: Firma K.L. Mukhopadhyay, 1974, p. 4.

terms like 'Naxalism' and 'Naxalites' became popular to signify any peasant or tribal insurgencies in the country.

From the late 1970s and 1980s, the Naxal movement was revived especially in Bihar and Andhra Pradesh. In Bihar, Maoist Communist Centre (MCC) was formed in 1975 by Kanhai Chatterjee and Amulya Sen. Comprising mainly of lower caste and landless people, this group was extremely brutal in executing landlords. As a countermeasure, the landlords belonging to the upper caste raised private militias like Ranvir Sena that was involved in ruthlessly massacring of not only Naxals but their sympathizers as well. In Andhra Pradesh, despite the presence of various leaders, it was Kondapalli Seetharamayya who successfully reorganized the Naxalites in the late 1970s. The movement gained strength especially in Telangana region of the state due to prevalence of stark deprivation. However, by the 1990s the Andhra Pradesh government was able to gain the upper hand by killing most of the Naxal leaders operating in the state and driving the rest to the neighbouring states. Despite the existence of several Naxal groups, during this period, PWG, MCC and Janashakti emerged as powerful groups and they struggled for supremacy amongst themselves.

In the wake of mounting casualties due to turf wars, unification was realized as the right antidote to advance 'people's revolution'. A joint front called Communist Party of India (Maoists) was formed with the merger of MCC and PWG in September 2004 that went on to become the most powerful group in the country with pan-Indian character.⁴⁸ Their military wings also merged to form the People's Liberation Guerrilla Army (PGLA) with more sophistication in terms of operational tactics and equipment. The Maoists then set themselves the goal of replacing constitutional, parliamentary democracy with its *Janathana Sarkar* or 'people's government'.⁴⁹ They also sought unity with the struggles of the

⁴⁸'On Recent Attempt to Revive Naxalite Movement', *The Proletarian Era*, vol. 39, no. 13, 2006. p. 1.

⁴⁹Interview with Prakash Singh, former Director General of Police (Uttar Pradesh) and the author of *Naxalites*, Lucknow, 21 November 2008.

oppressed nationalities in J&K and the north-east and have also been trying to co-opt the resistance of the peasants and tribals to the establishment of Special Economic Zones (SEZs) around the major cities of Kolkata (Calcutta) and New Delhi as also in the forested areas of Orissa, Jharkhand and Chhattisgarh. The aim is to spread the revolution from the countryside to cities.⁵⁰

The problem of LWE has been like a 'shifting pain' that moved from West Bengal to Bihar and then to Andhra Pradesh and then to central India. When there was pressure in Andhra Pradesh, the Naxals found suitable sanctuary in the central Indian areas of Bihar, West Bengal, Jharkhand, Chhattisgarh, Orissa, Maharashtra and Karnataka. This constitutes the so-called 'Red Corridor', which they found conducive for insurgency and an ideal base to set-up 'Revolutionary Zones'. The movement of Maoists to tribal-dominated central India is, in fact, a perfect matching of the aggrieved and the 'Robin Hoods'.⁵¹ The Maoists, in this regard, have learnt the art of operating through front organizations⁵² in each state centring on local grievances and could successfully draft some intellectuals and human rights activists on their side. This has led to a wide coalition of anti-state and anti-government forces. The tribals, however, realized gradually that it was a double-edged sword and a trap. They found Naxals behaving not as friends, but more as masters.⁵³

The rise of LWE can also be attributed to the failure of moderate political parties in articulating the rising expectations and

⁵⁰ Interview with Brig. Ponwar, Director, Jungle Warfare School (Chhattisgarh), New Delhi, 18 July 2008.

⁵¹ Interview with B.G. Verghese, 17 November 2010, New Delhi.

⁵² The Intelligence Bureau has identified about 57 front organizations. Some of them include Karnataka Vimochana Ranga and Kudremukh National Park Virodhi Okkuta, Pratirodh Manch, Revolutionary Democratic Front, Chasi Mulia Samiti, Kui Lawenga Sangha, Jana Natya Mandali, Krantikari Kisan Samiti, Bal Sangam, People's Committee against Police Atrocities, Struggling Forum for People's Resistance, Naujawan Pratirodh Sangharsh Manch, Krantikari Budhijivi Sangh, Krantikari Sanskritik Sangh, Krantikari Chhatra League, Communist Yuva League, Naari Mukti Sangh, Mazdoor Mukti Sangh, etc.

⁵³ Interview with District Magistrates of Bijapur and Bastar, Jabalpur, 22 August 2010.

grievances of the people at the right time in an adequate manner. Various splits in Left parties – CPI(M) from CPI, CPI(ML) from CPI(M) and various Maoist splinter groups from CPI(ML) – are a reflection of this lacuna.⁵⁴

According to experts, the Maoists are estimated to have a strength of some 10,000 armed cadres, and about 45,000–50,000 part-timers. From just nine states and 53 districts in 2001, LWE is variously estimated to have affected some 203 to 252 districts in 18 states.⁵⁵ Of these, the core of the insurgency is focused in Chhattisgarh, Orissa and Jharkhand, with significant activity levels in Bihar, West Bengal, Andhra Pradesh, and Maharashtra. They are now aiming at forming a ‘Red Corridor’ (or Compact Revolutionary Zone) that stretches from Pashupati in Nepal to Tirupati in south India.⁵⁶

JIHADIST TERRORISM⁵⁷

If terrorism is defined as ‘an act of violence which targeted civilians for the purpose of political subversion of the state to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act’ then ‘jihadist terrorism’ primarily draws on extreme interpretations of Islam for its rationale, its ideology, and, to varying degrees, its motivation. Threats arising from this kind of terrorism are phenomenal because

⁵⁴ Interview with Ved Marwah, former Governor of Manipur and Jharkhand, New Delhi, 30 November 2010.

⁵⁵ Interview with Dr Ajai Sahni, Executive Director, Institute of Conflict Management, New Delhi, 18 July 2008.

⁵⁶ G.D. Bakshi, *Left Wing Extremism in India*, Manekshaw Paper No. 9, New Delhi: Centre for Land Warfare Studies, April 2009.

⁵⁷ On the use of ‘Jihadi terrorism’ India’s Home Minister P. Chidambaram clarified, ‘I find that Hafiz Saeed uses the word in every speech that he makes. He made three speeches last month. In every speech, he used the word *jihad*. I find that al-Qaida leaders use the word *jihad*. I find LeT leaders using the word *jihad*. We have voice transcripts of attackers of Mumbai and their handlers using the word *jihad*. So, for the wrong reason perhaps and unfortunately when terrorists use the word *jihad*, those who oppose terrorism are forced to use the word *jihad*.’ See *The Times of India*, 13 March 2010.

of their non-amenability to negotiations or agreements or any other form of political settlements.

In recent years, terrorists have been drawing inspiration from Islamic scriptures – Quran verses, *ahadith sira* and *sharia* – to justify attacks on ‘infidels’. The largest number of Muslims have fought and died in the name of *jihad* from this region (South Asia) in the last quarter of a century. Together, this region has one-third of the world’s Muslim population and over 200 Islamic extremist groups and *jihadi* organizations of various brands and sizes. Most of the Islamic terrorists who struck in different parts of the world have had some link or the other with the region.⁵⁸ History, geography and international power politics have conspired to make this region the single-largest contributor to the growth of Islamic terrorism as also its major victim. To flush out the Soviets, Islamic zealots were brought from all parts of the Islamic world to Pakistan and Afghanistan forging a unity among those who shared nothing in common but willingness to die for a cause they considered Islamic. And this went global in due course.⁵⁹

Despite India being home to a large number of Muslims next only to Indonesia, Indian Muslims have by-and-large remained out of international *jihadist* terrorist groups. According to a US Department of State report, India is one of the worst affected countries by terrorism, especially *jihadists*. In the recent period, India has witnessed more terrorist incidents than any other country in the world.⁶⁰ *Jihadist* terrorism initially commenced in J&K and later in a decade spread to other parts of India. Closely witnessing the strength of the *jihadists*, the ISI made them a part and parcel of its larger plan to ‘bleed India’, ‘liberate’ Kashmir and Indian Muslims. For this, a subservient regime under the Taliban in Afghanistan served as a suitable backyard. The ISI initially used Pakistan-based

⁵⁸ Ajit Doval, ‘Islamic Terrorism in South Asia and India’s Strategic Response’, *Policing: A Journal of Policy and Practice*, vol. 1, no. 1, 2007, p. 63.

⁵⁹ See Fawaz A. Gerges, *The Far Enemy: Why Jihad Went Global*, New York: Cambridge University Press, 2005.

⁶⁰ For instance, in 2004, 45 per cent of the total terrorist incidents the world over took place in India. The latest figures in the wake of a series of terrorist attacks especially in urban centres are more alarming.

militant groups like the Lashkar-e-Toiba, Jaish-e-Muhammad, Hijbul Mujahideen, Harkat-ul-Jihad-al Islami (HuJI), but gradually encouraged local Muslim groups like Students Islamic Movement of India (SIMI), Indian Mujahideen and Al Ummah to 'wage *jihad* against India'.⁶¹ It is, therefore, fully externally sponsored: weapons, finances, ideological motivation, plans and manpower to a great extent. The demolition of the Babri Masjid and the subsequent communal riots and bombings acted as a defining moment for the rise and intensification of *jihadist* terrorism in India. '*Jihadist-terrorists*' nexus with criminal gangs like those of Dawood Ibrahim also came to the fore after this period. India or its interests abroad have witnessed deadly attacks from *jihadists* since 1992.⁶²

The West never understood the gravity of this phenomenon until the September 11 attacks. After 9/11, Pakistan struck deals with both the United States and Taliban-al-Qaeda combine and also adopted a policy of 'different strokes for different folks' to deal with three categories of terror groups operating from its soil: anti-West, anti-India and anti-Pakistan.⁶³ Dealing with these groups with such categorization did not work due to deep linkages and common ideological motivation. Islamabad, however, has been trying hard to at least delineate anti-Indian *jihadist* groups by its 'Karachi Project' which took shape roughly in 2003 immediately after the ISI's Forward 23 post that supervised training and

⁶¹ SIMI was initially formed in 1977 as a student wing of Jamaat-e-Islami Hind, but started operating independently since 1981. With an aim to establish a Shariat-based true Islamic state in India, SIMI disregarded India's core values of secularism, democracy and nationalism. Indian Mujahideen (IM) is a home-grown *jihadi* group with deep linkages with *jihadi* groups based in Pakistan like Lashkar-e-Toiba and Jaish-e-Muhammad. The government of India banned both. SIMI and IM are said to be responsible for facilitating most of the terror attacks in India at least since 2005.

⁶² Interview with B. Raman, former Additional Secretary, Cabinet Secretariat, Chennai, April 2010.

⁶³ See for detailed arguments Ashley J. Tellis, *Pakistan and the War on Terror: Conflicted Goals, Compromised Performance*, Washington D.C.: Carnegie Endowment for International Peace, 2008.

induction of anti-Indian militants in Pakistan occupied Kashmir (PoK) was wound up under intense US pressure.⁶⁴

The primary objective of the Project was to brainwash, train and use disgruntled Indian Muslims to carry out terror attacks on 'fair targets' of India, especially urban and semi-urban areas. Apart from knowing the terrain well, Indian youth could gather local intelligence and use their contacts without any suspicion. Most of the youth involved are well educated and some of them are highly qualified professionals.⁶⁵ This is part of Pakistan's sub-conventional warfare strategy to bleed India, both militarily and economically, without leaving any evidence of its involvement – a 'plausible deniability' operation.⁶⁶ In other words, Islamabad intends to give an impression to the outside world that all terror attacks in India are home-grown. Pakistan wishes to stay clean especially to the United States with whom it is a crucial partner for combating global terrorism.⁶⁷

INDIAN RESPONSE

India's national security strategy is still evolving; the evolution has been based on security environment, threat assessment and capabilities to meet those threats. India is yet to have a clear-cut published security strategy to approach both internal and external security threats. Although, in recent years, India has been approaching security in a wider sense in the name of 'comprehensive

⁶⁴ Interview with a Research and Analyses Wing (RAW) official, New Delhi, 3 May 2010.

⁶⁵ Interview with Praveen Swami, Associate Editor, *The Hindu*, Jaipur, 25 May 2010.

⁶⁶ ISI's strategy, in this regard, revolves around (i) taking subversion and terrorism to the heartland of India; (ii) preparing an extensive ISI network in India and raising cadres of terrorists and spies; (iii) triggering blasts of greater intensity in major cities; (iv) planting ISI agents in every part of India; (v) creating a near insurgency situation in Muslim-dominated regions; (vi) opening newer fronts in Pakistan's proxy war against India; (vii) creating a communal divide in the country and (viii) destabilizing the economy of the country.

⁶⁷ See Stephen Philip Cohen, 'The Jihadists Threat to Pakistan', *Washington Quarterly*, vol. 26, no. 3, Summer 2003, pp. 7-25.

national security',⁶⁸ internal and territorial security continues to enjoy high priority over other components of security. To secure, especially, the 'high priority' internal security, India has relied more on military option. Political and developmental models have been underplayed, but not ignored. As a post-colonial developing country, use of force came naturally to India. Since terrorism challenged the very credibility and legitimacy of the state, military approach came also as a reflex action of what the state knew 'best and found convenient to resort to'.⁶⁹

The military approach involves, apart from employment of security forces, extensive use of legal provisions like counter-terrorism laws and emergency provisions to strengthen the hands of the security forces. The colonial strategy of 'overawing the people', with the use of force, continues to this day.⁷⁰ For instance, despite various reform proposals, the Police Act of 1861 remains even today to govern policing throughout India. Although the law and order function is bestowed with the federal units (states), the Indian Constitution authorizes the central government to legislate exclusively on matters involving national security and the use of the military or central police forces to help state civilian authorities to safeguard overall internal security of India.⁷¹ Pursuant to this authority, the Indian government enacted several laws conferring sweeping powers like search, arrest, and preventive detention authority to the armed forces, even authorizing them to shoot to kill suspected terrorists or insurgents. While doing so, the

⁶⁸ In his address to the nation on the eve of 60th Independence Day, President A.P.J. Abdul Kalam, identified four major components of 'comprehensive national security': territorial security, internal security, energy security and economic security.

⁶⁹ S.D. Muni, 'Responding to Terrorism: An Overview', in S.D. Muni (ed.), *Responding to Terrorism in South Asia*, New Delhi: Manohar, 2006, p. 456.

⁷⁰ David Arnold, 'Police Power and the Demise of British Rule in India, 1930-47', in David Anderson and David Killingray (eds.), *Policing and Decolonisation: Politics, Nationalism, and the Police, 1917-65*, Manchester: Manchester University Press, 1992, p. 58.

⁷¹ Kuldip Mathur, 'The State and the Use of Coercive Power in India', *Asian Survey*, vol. 32, no. 337, 1982, pp. 343-6.

governments could not resist the pressures to ‘give short shrift’ to the fundamental rights of their citizens.

AN OVERVIEW OF LEGAL RESPONSES

India has a long tradition of anti-terror and other security laws dating back to its pre-Independence years. These laws were enacted, repealed and re-enacted periodically since Independence, but not going farther from the British tradition. The basic argument during enactment of such special laws is that the existing criminal laws are incapable of meeting emerging threats. That the conventional criminal laws approach crime ‘as an individual infraction violating individual rights’ missing out ‘movements that collectively subvert and disrupt the structures of governance and enforcement themselves.’⁷² The impulse to enact special laws, therefore, stems from real and perceived problems concerning the effectiveness of the regular criminal justice system itself, which create intense pressures to take particular offences outside that system. In this regard, the National Human Rights Commission (NHRC) noted that anti-terrorism laws are ostensibly justified because:

- It is difficult to secure convictions under the criminal justice system; and
- Trials are delayed [under the regular courts].⁷³

There is ‘a tendency towards the “routinising of the extraordinary” through the institutionalisation of emergency powers during non-emergency times and without formal derogation from human rights obligations’.⁷⁴

⁷² K.P.S. Gill, ‘The Imperatives of National Security Legislation in India’, *Seminar*, vol. 512, April 2002, pp. 14–20.

⁷³ National Human Rights Commission of India, *Opinion in Regard: The Prevention of Terrorism Bill, 2000*, para 6.4, available at http://nhrc.nic.in/annexDoc00_01.htm#no2, accessed on 19 April 2009.

⁷⁴ Usha Ramanathan, ‘Extraordinary Laws and Human Rights Insecurities’, *Asia Rights Journal*, Issue 1, July 2004, pp. 1–6. Also see Derek P. Jinks, ‘The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in

Justification for special laws also drew significantly on the prevailing international environment. Especially, in the aftermath of the 9/11 terrorist attacks, pro-terror law arguments were bolstered by the counter-terrorism initiatives of developed countries like the US and UK and stipulations from the United Nations Security Council (UNSC). The UNSC Resolution 1373 explicitly called upon all member states to ensure that adequate anti-terrorism measures are taken to prevent and criminalize the financing or collection of funds for 'terrorist acts', to freeze assets or resources of persons who commit or are involved in the commission of terrorist acts, to prohibit the making of any assets, resources, or services available to persons who commit or are involved in the commission of terrorist acts, to bring to justice any persons who commit or are involved in financing, planning, preparing, or supporting 'terrorist acts', and to legislate separate, 'serious criminal offences' proscribing 'terrorist acts' under domestic law.⁷⁵ Resolution 1373 also 'calls upon' states to become parties to the 12 existing international conventions and protocols concerning terrorism, to fully implement those agreements and previous Security Council resolutions addressing terrorism, to improve border security, and to exchange information with and provide judicial assistance to other member states in terrorism-related criminal proceedings. To monitor states' implementation and compliance, Resolution 1373 established the Counter-Terrorism Committee (CTC). The resolution called upon states to report their progress towards implementation to the CTC within 90 days and periodically thereafter.⁷⁶

During the debate on POTA in the Indian Parliament, the proponents of the law repeatedly invoked resolution 1373 to argue

India', *Michigan Journal of International Law*, vol. 22, no. 2, Winter 2001, p. 311.

⁷⁵To be read with UNSC Resolutions 1456 (20 January 2003) and 1566 (8 October 2004).

⁷⁶All 191 UN member states submitted initial reports documenting their efforts to comply with the resolution, with 160 states doing so within nine months of the resolution's adoption. This record of compliance is particularly striking when compared with the much lower level of compliance with reporting obligations under human rights treaties such as the ICCPR.

that the Bill was not simply justified under the local conditions, but required under international law. After POTO was promulgated in 2001, for example, the Home Secretary publicly stated that the ordinance 'implements in part the obligation on member states imposed' by Resolution 1373.⁷⁷ Upon introducing the Bill in Parliament, the then Home Minister L.K. Advani, asserted that the CTC's adoption of the resolution prompted the government to conclude it was India's 'duty to the international community to pass [POTA]'.⁷⁸ Such justification went on to affect the later adjudication of POTA's legality before the courts. For instance, the Supreme Court of India upheld POTA by stating that because of Resolution 1373, 'it has become [India's] international obligation to pass necessary laws to fight terrorism'.⁷⁹

As new laws have been enacted in response to terrorism and other threats to security in recent years, they have shared a number of continuities with these earlier emergency and security laws, both before and after Independence. These laws include:

- constitutional provisions and statutes authorizing the declaration of formal states of emergency;
- constitutional provisions and statutes authorising preventive detention during non-emergency periods; and
- Substantive criminal and special laws defining terrorist and other security-related offences and establishing special rules to adjudicate during non-emergency periods.

This study concerns the third category of laws and their impact on security.

Preventive Detention Act (PDA) of 1950, 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 defence or security of India, India's

⁷⁷ *The Tribune*, 11 November 2001.

⁷⁸ Parliament of India, Joint Session Debates, 26 March 2002.

⁷⁹ *People's Union for Civil Liberties vs. Union of India*, A.I.R. 2004 S.C. 456, 466.

relations with foreign powers, state security or maintenance of public order, or maintenance of essential supplies and services. The Act, however, provided for limited procedural protections required by the Constitution, as for instance, to provide the detainee with the grounds for detention within five days and also required the Advisory Board review of all detention orders. Although introduced as a temporary measure 'to address exigent circumstances in the aftermath of independence and partition', the Act remained for nearly two decades.⁸⁰

The government enacted the Unlawful Activities (Prevention) Act (UAPA) in 1967, that gave the central government broad powers to ban as 'unlawful' any association involved with any action, 'whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise', that is intended to express or support any claim to secession or that 'disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India'.⁸¹ But, the central government must provide the grounds for such declaration unless otherwise such disclosure was against the public interest. Yet another safeguard is that such notification becomes effective only upon confirmation by a special judicial tribunal that consists of a single High Court judge and has all the powers of a civil court. If confirmed, the declaration remains in force for two years from the date the notification became effective. Once declared as 'unlawful', the UAPA provides the central government with broad powers to restrict its activities including prohibition of individuals from association or paying or delivering funds or property in support of the banned organization.⁸²

The government enacted the Maintenance of Internal Security Act (MISA) in 1971 that more or less retained provisions of the PDA. The Act gave wide powers of preventive detention,

⁸⁰ A.G. Noorani, 'Preventive Detention in India', *Economic and Political Weekly*, 16 November 1991, p. 2608.

⁸¹ Unlawful Activities (Prevention) Act, No. 37 of 1967, section 2(1)(o).

⁸² It is the onus of the aggrieved person to show to a judge that funds in question are not being used or are not intended for the purpose of the unlawful association. See Section 7 of the Act.

search and seizure of property without warrants, telephone and wiretapping. The Act was invoked liberally during the nation-wide Emergency (1975-7) especially targeting political opponents. The law, through a Constitutional amendment (39th Amendment), was placed under the 9th Schedule of the Constitution, thereby making it totally immune from any judicial review.⁸³ As per the election commitment made, the succeeding Janata government repealed MISA in 1978, but after much hesitation and difficulty.

During the Emergency (1975-7) MISA and other preventive detention laws were amended to permit much longer periods of detention, to make it easier for the government to exercise detention authority without Advisory Board scrutiny, and to eliminate other procedural protections that otherwise applied.⁸⁴ These laws, in fact, became 'a way of everyday administration and there was neither criteria nor a basis for the detentions under MISA during the Emergency'.⁸⁵

Since the 1980s, the government witnessed major challenges to its internal security in the form of politicized violence in the north-east, Punjab, J&K and *jihadist* terrorism all over the country. In response, stringent legislation explicitly designed to combat 'terrorism' was brought in from time-to-time.

The first in the series was the National Security Act (NSA). The Congress government under Indira Gandhi introduced the NSA in 1980 that remains in effect even today. The NSA restored many of the provisions of the PDA and the MISA. Ironically, the Act 'presaged years of new repressive legislation' including TADA and POTA. The stated purpose of the NSA is to combat 'anti-social and anti-national elements including secessionist, communal and pro-caste elements and elements affecting the services essential

⁸³ But a 9-judge bench in a unanimous verdict delivered on 11 January 2007 ruled that legislations did not get the protection of the Ninth Schedule if they were violative of the basic structure of the Constitution. 'Ninth Schedule open to challenge: SC', *The Indian Express*, 11 January 2007.

⁸⁴ Venkat Iyer, *States of Emergency: The Indian Experience*, New Delhi: Butterworths, 2000, pp. 167-70.

⁸⁵ John Dayal and Ajoy Bose, *The Shah Commission Begins*, New Delhi: Orient Longman, 1978, pp. 37-8.

to the community'.⁸⁶ The NSA authorizes preventive detention for up to 12 months, and both the permissible grounds to order preventive detention. The procedural requirements for preventive detention under the NSA are essentially the same as under the PDA and MISA. The Act also gives immunity to those security forces involved in quelling the violence.

Terrorist Affected Areas (Special Courts) Act (TAAA) was enacted by parliament in 1984. The Act established special courts to adjudicate certain 'scheduled offences' related to terrorism in areas designated by the central government, for specified time periods, as 'terrorist affected'.⁸⁷ The statute required the special courts to hold proceedings on camera unless the prosecutor requested otherwise, and authorized the courts to take measures to keep witness identities secret upon a request by either the prosecutor or the witnesses themselves. The TAAA also instituted a stringent bail standard under which an individual accused of a scheduled offence could not be released if the prosecutor opposed release, absent reasonable grounds to believe the accused was not guilty, and extended the time during which an individual may be detained pending investigation from 90 days to one year.

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

⁸⁶'Time to end abuses', *Seminar*, Issue 512, April 2002.

⁸⁷Under Section 2(1)(h), the TAAA broadly defined a 'terrorist' as a person who 'indulges in wanton killing of persons or violence or in the disruption of services or means of communications essential to the community or in damaging property' with intent to 'put the public or any section of the public in fear', 'affect adversely the harmony between different religious, racial, language or regional groups or cases or communities', 'coerce or overawe the government established by law', or 'endanger the sovereignty and integrity of India'.

- commit a 'terrorist act';⁸⁸
- conspire, attempt to commit, advocate, abet, advise or incite, or knowingly facilitate the commission of a terrorist act or 'any act preparatory to a terrorist act';
- 'harbour or conceal, or attempt to harbour or conceal any person knowing that such person is a terrorist'; or
- hold property that has been 'derived or obtained from commission of any terrorist act' or that 'has been acquired through the terrorist funds';
- to commit any 'disruptive activity', defined as any act, speech, or conduct that, 'through any other media or in any other manner whatsoever', either 'questions, disrupts, or is intended to disrupt, whether directly or indirectly, the sovereignty and territorial integrity of India;' or
- 'Is intended to bring about or support any claim, whether directly or indirectly, for the cession of any part of India from the Union.'⁸⁹

Apart from including the stringent bail and pre-trial detention provisions and the procedural rules for the special courts under the TAAA, TADA admitted confessions made to police officers as substantive evidence as long as the officer's rank was superintendent or higher.⁹⁰

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

⁸⁸TADA defined 'terrorist act' as one of several specifically enumerated acts of violence if committed 'with intent to overawe the government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people.'

⁸⁹ See section 4 of the Act.

⁹⁰ See section 15 of the Act.

The BJP-led NDA government in 1999 commissioned the Law Commission of India to undertake a study to determine whether a new anti-terrorism legislation was necessary. The commission, in its report, proposed Prevention of Terrorism Bill,⁹¹ which differed very little from the dormant Criminal Law Amendment Bill of 1995 or the much-feared TADA. The Vajpayee government's efforts to introduce a new anti-terrorism law based on the proposal from Law Commission did not fructify because of stiff resistance not only from the opposition parties, but also from coalition partners of the government and the NHRC. The common thread of apprehension was that the new law would be as ineffective as its predecessor laws in combating terrorism due to, by-and-large, similar provisions.⁹²

However, 9/11 attacks in the US muted resistance to a stiff special law. Making the best use of the opportunity, the government brought in Prevention of Terrorism Ordinance (POTO)⁹³ in October 2001 to review its 'hobbled laws' and 'dilatory procedures'.⁹⁴ The government's resolve to convert the ordinance into proper law was strengthened due to two high profile attacks in India: on the Legislative Assembly of J&K in October 2001 and an audacious assault on the Indian Parliament in December 2001. The government charged that those opposing the enactment of the new anti-terrorist law 'would be wittingly or unwittingly pleasing the terrorists by blocking it in Parliament'.⁹⁵ Ultimately, the government successfully enacted the POTA into law in March 2002 in an extraordinary joint session of both houses of parliament.

The Prevention of Terrorism Act directly criminalizes:

⁹¹ Law Commission of India, 173rd Report submitted in 2000. The full text of the Bill is available at <http://lawcommissionofindia.nic.in/tada.htm>

⁹² Era Sezhiyan, 'Perverting the Constitution', *Frontline*, 8-21 December 2001.

⁹³ Prevention of Terrorism Ordinance, No. 9 of 2001 (24 October 2001). A second ordinance in December 2001 renewed POTO (Prevention of Terrorism Ordinance, No. 12 of 2001 (30 December 2001)) with slight modifications, after parliament adjourned without enacting the legislation.

⁹⁴ Prime Minister Atal Behari Vajpayee's address to the nation on terrorist attacks on the United States, 14 September 2001.

⁹⁵ Parliamentary debates, India, 7 November 2001.

- the commission of a 'terrorist act';⁹⁶
- conspiring, attempting to commit, advocating, abetting, advising or inciting, or knowingly facilitating the commission of a terrorist act or 'any act preparatory to a terrorist act';
- 'voluntarily harbour[ing] or conceal[ing], or attempt[ing] to harbour or conceal any person knowing that such person is a terrorist';
- 'possession of any proceeds of terrorism'; and
- knowingly holding any property that has been 'derived or obtained from commission of any terrorist act' or that 'has been acquired through the terrorist funds'.

The statute does not define 'terrorist organization' in substantive terms, providing instead that:

- the central government may designate and ban a 'terrorist organization' if it believes that entity is 'involved in terrorism', and
- an organization shall be deemed to be 'involved in terrorism' if it commits or participates in acts of terrorism, prepares for terrorism, promotes or encourages terrorism, or is otherwise involved in terrorism.⁹⁷

⁹⁶The law defines 'terrorist act' to include:

- any one of several enumerated acts of violence if committed 'with intent to strike terror in the people or any section of the people' or with intent to 'threaten the unity, integrity, security and sovereignty of India'; or
- commission of any act 'resulting in loss of human life or grievous injury to any person'; or
- causing 'significant damage to any property', if the defendant is a member of, or voluntarily aids or promotes the objects, of an association declared unlawful under UAPA and in possession of unlicensed firearms, ammunition, explosives, or other instruments or substances 'capable of causing mass destruction.'

⁹⁷POTA, Section 18.

Pre-trial detention under POTA can go up to six months⁹⁸ and bail provisions were stringent.⁹⁹ The law explicitly provides that the accused is not entitled to have counsel present 'throughout the period of interrogation'.¹⁰⁰ As for confessions, they are admissible as substantive evidence if made to police officers not lower in rank than Superintendent of Police and in an 'atmosphere free from threat or inducement'.¹⁰¹ POTA also authorized the central and state governments to establish 'special courts' to adjudicate offences punishable under the statute.¹⁰² POTA conferred broad immunity to government officials for actions taken under the statute 'in good faith' or 'purported to be done in pursuance of the Act'.¹⁰³

Due to the highly controversial provisions, POTA became one of the major issues during the election campaign in May 2004. As promised, the new Congress-led UPA government repealed POTA in the same year and re-enacted amended version of Unlawful Activities Prevention Act, 1967 (UAPA).¹⁰⁴ But this statute retains most of POTA's substantive terrorism-related offences. POTA's provisions permitting the government to designate 'terrorist organizations' have been maintained with only two changes. First, the amendments supplemented POTA's existing provisions by authorizing the central government to designate as a 'terrorist organization' any entity that has been designated as such by the UN Security Council.¹⁰⁵ Second, the amendments explicitly require an individual liable for an offence related to membership

⁹⁸ POTA Section 49(2) (a) & (b).

⁹⁹ POTA Section 49(6) & (7). If the arrested is a non-citizen, POTA flatly prohibits them from being granted bail 'except in very exceptional circumstances and for reasons to be recorded in writing.' POTA Section 49(9).

¹⁰⁰ POTA Section 52(4).

¹⁰¹ POTA Section 32. See Sarayu Natarajan and Ananth Lakshman, 'Admissibility of Confessions Taken Under POTA for Conviction of Offences Under the IPC', *Asiarights Journal*, Issue 3, December 2004.

¹⁰² POTA Section 23(4).

¹⁰³ POTA Section 57.

¹⁰⁴ Prevention of Terrorism (Repeal) Ordinance, No. 1 of 2004 (promulgated on 21 September 2004); Prevention of Terrorism (Repeal) Act, No. 26 of 2004 (enacted on 21 December 2004).

¹⁰⁵ UAPA Section 35(1)(b).

in a designated 'terrorist organization' to intend to support the organization's activities. However, the law continues to provide limited substantive criteria to guide the government's designations and no opportunity for judicial review – which is particularly anomalous given that under the existing provisions of UAPA, designations of 'unlawful associations' are guided by statutory definitions and are subject to full review by a tribunal which has the powers of a civil court.¹⁰⁶ The UAPA did away with the Special Courts altogether. Terrorism-related offences shall now be tried in the same courts as any other criminal offence, without any special executive control over jurisdiction or judicial administration. The UAPA also eliminated the power of the courts to try defendants in absentia. However, the discretion of the courts to hold on camera proceedings, potentially in prejudicial settings, or take other steps to protect the identity of prosecution witnesses, but not defence witnesses has been retained.¹⁰⁷

Apart from these broad special laws, there are act-oriented or area-specific laws, which include:

Anti-hijacking Act, 1982: It was enacted in response to the spate of hijackings by Sikh terrorist organizations to deter hijackers. Under this Act, hijackers are liable for punishment if found guilty of causing harm to passengers or crew members of the hijacked flight apart from seizure of any aircraft by force or intimidation or through any unlawful means.¹⁰⁸

Armed Forces (Special Powers) Act, No. 28 of 1958: It was passed on 11 September 1958 to confer certain special powers to the members of the armed forces in disturbed areas in the state of Assam and Manipur, and after an amendment in 1972, it was extended to the entire north-eastern region. Under the Act, the armed forces

¹⁰⁶ UAPA Sections 2(1)(o)-(p).

¹⁰⁷ Kapil Sibal, 'What we talk about when we talk about law', *The Indian Express*, 24 September 2008.

¹⁰⁸ The Act was brought in to give effect to the UN Convention for the Suppression of Unlawful Seizure of Aircraft, 1970. See Chapter II of the Act for offences and punishments.

personnel were given broad powers in a 'disturbed area' to shoot any person acting in contravention of law but after giving due warning, search any place without warrant of those who have committed cognizable offence, and destroy any place from where attacks on armed forces are made.¹⁰⁹ This is the most dreaded law in the north-east. The same Act was invoked in J&K in 1990 under the Armed Forces (Jammu and Kashmir) Special Powers Act, No. 21 of 1990.

Armed Forces (Punjab and Chandigarh) Special Powers Act, No. 34 of 1983: This Act enabled the governor of the state to declare the whole or parts of the state as 'disturbed'. The aim was to entrust special powers to the security forces to quell violence in the state. It allowed the armed forces personnel to arrest without warrant any person who had committed or about whom 'reasonable suspicion' existed that s/he was about to 'commit a cognizable offence'. They are also authorized to enter into any premises without a search warrant to execute an arrest or prevent any offence from taking place. Under this Act, civil liberties can be suspended in the 'disturbed' area. The legislation prevented prosecution of armed forces personnel for any actions carried out under powers conferred by this Act.¹¹⁰

These apart, the individual federal units of India possessed their own version of security/special laws. Notable among them are (in the order of chronology):

- Madras Suppression of Disturbances Act (1948);
- Bihar Maintenance of Public Order Act, 1949;
- The Assam Maintenance of Public Order (Autonomous District) Act (1952);
- The Assam Disturbed Areas Act (1955);
- The Nagaland Security Regulation Act (1962);
- Uttar Pradesh Control of Goondas Act (1970);

¹⁰⁹Special powers are listed under clause 4 of the Act.

¹¹⁰For full text of the Act see <http://punjabrevenue.nic.in/armsact.htm>

- West Bengal Maintenance of Public Order Act (1972);
- Jammu and Kashmir Public Safety Act (1978);
- Assam Preventive Detention Act (1980);
- Punjab Disturbed Areas Act (1983);
- Chandigarh Disturbed Areas Act (1983);
- Gujarat Prevention of Anti-Social Activities Act (1985);
- Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act (1986);
- Jammu and Kashmir Disturbed Areas Act (1990);
- Maharashtra Control of Organized Crime Act (1999);
- Karnataka Control of Organized Crime Act (2000);
- Andhra Pradesh Control of Organized Crime Act (2001);
- Chhattisgarh Special Public Security Act (2005).

CHAPTER 3

Sri Lanka: A Case Study

SECURITY DEBATE AND THREAT PERCEPTION

Being a small island state, Sri Lanka's perceptions towards security is dominated by safeguarding of territorial integrity and sovereignty from external aggression and internal subversion.¹ At Independence, successive regimes focused mainly on external threats. It was for this reason that Sri Lanka continued its pre-Independence defence agreement with the UK. But, in the subsequent decades, the state had to confront two major threats to its internal security in the form of Sinhala and Tamil militancies. While Sinhala militancy was aimed at overthrowing the legitimately elected governments in 1971 and 1987-90, the Tamil militancy was secessionist in nature.

SINHALA MILITANCY

The first internal threat to the security of Sri Lanka came in the form of rebellion led by the Leftist Janatha Vimukthi Peramuna (JVP) in April 1971. The aim of the JVP was to seize power in Colombo and establish a socialist state. The JVP followed 'blitzkrieg' tactics during this insurrection: swift, short and fierce. The *modus operandi* was to create confusion by capturing all police stations and in turn capturing power.² Between 5-11 April, JVP men were able to

¹ Sugeeswara P. Senadhira, 'Internal and External Factors in Security Studies in Sri Lanka', in Dipankar Banerjee, *Security Studies in South Asia: Change and Challenges*, New Delhi: Manohar, 2000, pp. 193-4.

² For more details on the first insurrection of the JVP see A.C. Alles, *Insurgency—1971: An Account of the April Insurrection in Sri Lanka*, Colombo: The Colombo Apothecaries' Co., Ltd., 1977; Swaroop Rani Dubey, *One-day Revolu-*

attack 93 police stations and capture five. The group, however, could not go beyond because of various factors. Firstly, there was some confusion in the rank and file on the date and timing of the attack. The days that followed 5 April were marked by 'confusion, bewilderment, rumour and speculation'.³ Secondly, aided with specific intelligence inputs, the state took preventive measures by imposing Emergency and arresting top leaders.⁴ Thirdly, as the outfit itself was new, the JVP failed to create an adequate mass base before launching the attack.⁵

However, JVP-led rebellion in 1987-9 was severe. Apart from other things, the group tried to project 'Indian expansionism' as a threat to Sri Lanka when the Indian Peace Keeping Force (IPKF)

tion in Sri Lanka: Anatomy of 1971 Insurrection, Jaipur: Aalekh Publishers, 1988; S. Arasaratnam, 'The Ceylon Insurrection of April 1971: Some Causes and Consequences', *Pacific Affairs*, vol. 45, no. 3, 1972, pp. 356-71; F. Halliday, 'The Ceylonese Insurrection', *New Left Review*, no. 69, September-October 1971, pp. 55-91; A. J. Wilson, 'Ceylon: The People's Liberation Front and the 'Revolution' that Failed', *Pacific Community*, vol. 3, no. 2, 1972, pp. 364-77; Robert Kearney and Janice Jiggins, 'The Ceylon Insurrection of 1971', *Journal of Commonwealth and Comparative Politics*, vol. XIII, March 1975, pp. 40-64; W. A. Wiswa Warnapala, 'The Marxist Parties of Sri Lanka: The 1971 Insurrection', *Asian Survey*, vol. 15, no. 9, 1975, pp. 745-57.

³ S. Nadesan, *The JVP Insurgency of 1971: A Speech made in the Ceylon Senate on 14 and 15 May 1971*, Colombo: The Nadesan Centre for Human Rights through Law, 1988, p. 1.

⁴ Despite domination by Left-leaning parties, the UF government called the insurrection as 'the tragedy of misguided and adventure' and 'unprecedented situation created by a group of narrow-minded people, conspiratorially organized, who had launched an effort by force of arms to displace the duly constituted government of the day in order to replace the entire system of parliamentary democracy.' *Ceylon Daily News*, 30 April 1971.

⁵ In his evidence before the Criminal Justice Commission Rohan Wijeweera himself admitted that in April 1971 'the revolutionary preconditions for the seizure of power by the proletariat and for an armed revolutionary struggle were absent. . . . It had not reached a stage where the masses saw no other solution but revolution . . . the JVP had not yet reached the stage where the masses could see it as a real alternative to the government, accept its leadership and join in the class under its banner.' See for the full text of the statement made by Rohana Wijeweera before Criminal Justice Commission, 2 November 1973 <<http://www.jvpnet.com/publi/we-may-killed.html>>

landed on the island in mid-1987. The agenda gradually shifted to rallying against Provincial Council elections, which JVP argued would divide the country. Through its front organization DJV (*Deshapremi Janata Vyaparaya* – Patriotic People's Movement) it issued death threats to those who would participate in the elections. It imposed curfews to prevent people from going to vote. Those who violated the curfew were killed. The strategy worked to the satisfaction of the group.⁶ Then it turned against UNP members and leaders and demanded them to abandon the party or face death. It did not hesitate to align with criminal elements to achieve this objective. The violence was becoming more disorganized, brutal and irrational. This was too much for the then UNP government and the people to bear. Then it decided to take on the security forces head on. In August 1989, it gave an ultimatum to all the security forces personnel to abandon their posts or get killed along with their family members. This provided space for the security forces to go after the JVP members for personal reasons, which proved to be too costly for the JVP.⁷ By the end of 1989, the rebellion was put down. JVP is now functioning as a political party on the island.

TAMIL MILITANCY

The rise of armed militancy in the Tamil community was necessarily an extension of ethnic politics between the majority Sinhala and minority Tamils. The failure of Tamil moderate politics to articulate and win the rights of Tamils gradually led to a situation where the militant youth took over the movement. Interestingly, it was members of the student wing of the predominant moderate party – the Tamil United Liberation Front (TULF) – who later took to violence by forming various militant groups to fight for separation.

⁶ Interview with a former JVP member who claimed anonymity, Colombo, 11 August 2005.

⁷ Jagath P. Senaratne, 'The JVP and Tamil Secessionist Insurrections of Sri Lanka and the Naxalite Insurrection(s) of India: A Provisional Comparative Assessment', Paper presented at the Workshop on the 'Naxalite Movement' organized by Observer Research Foundation, Chennai, India, 28-9 January 2005.

At one stage, 37 groups existed; five among them were prominent: Liberation Tigers of Tamil Eelam (LTTE), Tamil Eelam Liberation Organization (TELO), Eelam People's Revolutionary Liberation Front (EPRLF), People's Liberation Organization of Tamil Eelam (PLOTE) and Eelam Revolutionary Organization of Students (EROS). Irrespective of the group, the militants were referred to as 'boys'. In the fight for hegemony among these groups, the LTTE emerged as the most powerful militant organization.⁸ Till recently, it was the only Tamil militant group that existed. The other groups either connived with the Sri Lankan armed forces against the LTTE (PLOTE, EPRLF, Eelam People's Democratic Party - EPDP, and Tamil Makkal Viduthalai Puligal - TMVP) or merged with the LTTE (EROS).⁹ It is, therefore, significant to look at this group to understand the extent of Tamil militancy in Sri Lanka.

The aim of the LTTE was to establish, through armed struggle, a separate Tamil state (*Eelam*), which would be socialist and casteless.¹⁰ Lenin's conception of self-determination and the revolutionary vanguard formed the organization's basic ideology. Earlier, the LTTE's struggle was defined in Marxist terms, but as Velupillai Prabhakaran, their leader, rose to prominence, Marx 'withered away'. The class war was transformed into a 'race war'. The Tiger symbol, an allusion to the military character of the South Indian Chola Empire, used by the LTTE, highlighted its links of Tamilness.¹¹ The ideology of violence in the Tigers was drawn from the Dravidian National Movement in Tamil Nadu in the 1950s and 1960s and it marked a revival of martial culture of the long suppressed military castes of south India, like Maravar.¹²

⁸A.J. Wilson, *Sri Lankan Tamil Nationalism: Its Origins and Developments in the 19th and 20th Centuries*, London: C. Hurst & Co., 2000, p. 27.

⁹Presently, TELO and a section of EPRLF are with the pro-LTTE Tamil National Alliance.

¹⁰Prabhakaran's interview to Sudeep Mazumdar, *Newsweek*, 11 August 1986.

¹¹Prabhakaran's interview to Anita Pratap, *Sunday*, 11-17 March 1984.

¹²Maravars were listed as a criminal caste by the then colonial British government of India. See for details Peter Schalk, 'The Concept of Martyrdom of the LTTE', *Temenos*, vol. 33, 1997, pp. 151-90.

The 'cult of martyrdom' and the ideology of vengeance were based on such appeals to a heroic past.¹³ On the other hand, unlike other guerrilla organizations, Prabhakaran had a deep impact on the LTTE's ideology: the character of deep suspicion, fanatic braveness, relentless pursuit of vengeance and disregard for human life. Death was immaterial to the LTTE cadres who carried cyanide capsules around necks and were expected to use it when captured.¹⁴ The main objective was to avoid any risk of divulging information about the group during torture.

Begun as a handful of youth, the LTTE, at one point, had over 10,000 hardcore cadres. It was the only militant group to have separate wings for land, sea and air. These apart, there were separate units for artillery, commando, armoured, intelligence, medical, and welfare. The group also had a separate wing for women fighters.¹⁵ At the macro level, the Tigers' strategy had four key components:

- the use of times of peace to prepare for war, in line with the Maoist doctrine of retreat and recuperate;

¹³For details see Michel Roberts, 'Filial Devotion in Tamil Culture and the Tiger Cult of Martyrdom', *Contributions to Indian Sociology*, vol. 31, no. 2, 1996, pp. 245-72.

¹⁴When trapped by police while attempting a bank robbery on 5 June 1974, Sivakumaran swallowed a cyanide capsule he used to carry with him and died instantaneously. This method was later adopted by the LTTE. See Dagmar Hellmann-Rajanayagam, *The Tamil Tigers: Armed Struggle for Identity*, Stuttgart: Franz Steiner Verlag, 1994.

¹⁵Women began to figure in the LTTE after 1983 in the *Vituthalai Puligal Magalir Munnani* (Women's Front of Liberation Tigers) and later as *Suthantira Paravaigal* (Birds of Freedom) coined by Thileepan. A journal of the same name was started during this period to raise national consciousness and social awareness among Tamil women. Performing initially paramilitary and supporting roles, the women were used in combat since 1986. Their first operation was conducted in July 1986 (Adamban Offensive) against the Sri Lankan Armed Forces. Later, exclusive training camps were set up in 1987, and their secondary and tertiary leadership was structured by 1989. Of the estimated total cadre strength, women accounted for nearly one-third, and were inducted in all units – fighting, political, administrative and intelligence. There was no discrimination based on sex when it came to training and combat operations. Interview with Tamilini (Political head of women wing of the LTTE), Killinochchi, 30 July 2005.

- an attempt to attain total control over the Tamil struggle to gain legitimacy as the sole representative of Sri Lankan Tamils.¹⁶
- subordination of the political struggle to the military one;¹⁷
- a mixture of guerrilla and conventional warfare tactics in battle.

In addition, the Tigers made use of suicide bombers as a tactic. Though many militant groups followed this technique, the LTTE was one of the few organizations to adopt it as an article of faith.¹⁸ A separate unit known as the 'Black Tigers' existed to organize attacks on civilian and military targets and eliminate key leaders by this means.¹⁹

For the Tigers, Prabhakaran was supreme. At the helm was the military wing. It reflected classical Maoist doctrine by emphasizing discipline and the absence of a formal ranking system.²⁰ The

¹⁶ It was with this motive the LTTE eliminated almost all groups and their leadership that were opposed to it. The LTTE thought that it alone was 'capable of leading the Tamil community'. All other Tamil groups that operated outside the orbit of the LTTE were stamped as 'traitors'.

¹⁷ Reasoning the imperativeness of military arm of the LTTE, Prabhakaran observed, 'When we say during this period, "They will use the army to attack us, we will resist and counterattack and we will protect you", well . . . only when we actually do it, do we establish our political credibility and role. That is why we have given due attention to military affairs in our organization. . . . Only a political organization with military strength is capable of effective resistance.' Interview to N. Ram, *The Hindu*, 5 September 1986.

¹⁸ Among all militant groups in the world, the LTTE has the distinction of carrying out the most number of suicide attacks. Some 273 Black Tigers have died since 5 July 1987 when LTTE's first Black Tiger, Captain Miller, drove an explosive laden truck on the Sri Lanka Army troops garrisoned in Nellyyadi in Vadamadachi, Jaffna. According to LTTE sources, 194 of the Black Tigers who died on their mission till 25 June 2006 were Black Sea Tigers; 56 Black Sea Tigers were women fighters and 18 of the 79 Black Tigers who died during attacks on land were women cadres. *Tamilnet*, 5 July 2006. If the post-2006 figures are taken into consideration, the number of attacks and deaths are a bit higher.

¹⁹ Most notable victims of the Black Tigers are Rajiv Gandhi (former Prime Minister of India) in 1991 and R. Premadasa (former President of Sri Lanka) in 1993, apart from many Sri Lankan ministers, parliamentarians, and Sri Lankan armed forces officers.

²⁰ The LTTE usually revealed ranks of its cadre posthumously. But, at a later date, especially during the ceasefire period of 2002-6, the names of regional commanders were mentioned in public.

Central Committee was the highest decision-making body with Prabhakaran as its Chairman. The structure had both political and military wings to manage Tamil-dominated areas of the north-east. Area commanders were entrusted with sufficient autonomy to take care of tactical matters. They were men and women with many years of fighting experience.²¹

The popular support to the LTTE came from three sources: intra-Sri Lankan Tamil constituency, Sri Lankan Tamil diaspora, and other Tamils including those in India. The paws of the Tigers extended from Canada and the United States in the West to Australia in the East. The linkages were mainly due to the presence of the Tamil Diaspora, which was estimated to be over a million, who fled from the ethnic conflict in Sri Lanka.²² However, in due course, due to crackdowns on the Tigers by the United States, Canada, India, Europe and South Africa, the support base of the LTTE dwindled. Their links, as a result, were more confined to some West European countries like Britain, Germany and Nordic countries, besides Australia, Thailand, Myanmar, Cambodia, and South Africa, but not at the governmental level.²³ India, which was once sympathetic towards the LTTE, outlawed the organization soon after the assassination of its leader Rajiv Gandhi by the Tigers.

The funds for the LTTE came from three major sources:

- *Diaspora contributions:* The major source of funding was by the Sri Lankan Tamil expatriates living in developed countries.²⁴
- *Taxation:* The LTTE also collected 'taxes' from the people living in the Tamil-dominated Northeast of Sri Lanka. Significant

²¹ Some commanders like the now dissident 'Col' Karuna enjoyed more independence of operation. This was an eye-opener for the LTTE leadership, which now favours more central supervision on local Tiger leaders.

²² Sri Lankan Tamil diaspora is broadly divided in two: those who left the country before the intensification of ethnic conflict (roughly before 1983) and those who fled the country after that. The LTTE drew much of its support from the latter category.

²³ After imposing a travel ban on the LTTE official delegations in September 2005, the European Union in May 2006 banned the LTTE. Canada also banned the Tigers in April 2006.

²⁴ The LTTE got nearly \$2mn per month from the Sri Lankan Tamil diaspora based mainly in North America and Europe.

amounts also came from the checkpoints in the A-9 highway as 'transit tax' to let goods, vehicles and people to and from the North and the South.²⁵

- *Commercial Networks*: The LTTE earned income through both legal and illegal commercial activities. At the legal level, the Tigers ran businesses like restaurants and shipping operations in various parts of the world.²⁶ At the illegal level, the LTTE earned huge amounts of money through gunrunning and human trafficking.²⁷ It was this large funding which had enabled the LTTE to increase its firepower by acquiring sophisticated weapons and weapon systems including surface-to-air missiles. The Tigers also used weapons captured from the Sri Lankan security forces.

SRI LANKAN RESPONSE

The Sri Lankan state has always responded to expression of grievances in counter-statist form with repression and violence. Such expression of grievances were simply viewed as 'law and order' and security problems than plain recognition of problem of governance and accommodation.²⁸ There was no comprehensive national security strategy. The two JVP insurrections and the rise of Tamil militancy clearly indicated decline of the state and its legitimacy in the Island. In order to address the disorder, infusing authoritarian means into the democratic institutions was considered as the best means.²⁹

²⁵ Estimatedly, the LTTE collected around SLR 300 mn monthly by this.

²⁶ V. Jayanth, *The Hindu*, 29 March 2000.

²⁷ Anthony Davis, 'Tamil Tiger International', *Jane's Intelligence Review*, vol. 8, no. 10, 1996, pp. 472-3.

²⁸ Jayadeva Uyangoda, 'A State of Desire?: Some Reflections on the Unreformability of Sri Lanka's Post-colonial Polity', in S.T. Hettige and Markus Mayer, *Sri Lanka at Crossroads: Dilemmas and Prospects after 50 Years of Independence*, Delhi: Macmillan India Limited, 2000, p. 114.

²⁹ W. A. Wiswa Warnapala, *Ethnic Strife and Politics in Sri Lanka: An Investigation into Demands and Responses*, New Delhi: Navrang, 1994, p. 160.

AN OVERVIEW OF LEGAL RESPONSES

One such infusion was counter-terror laws, which have been used indiscriminately to deal with any kind of disturbance – either it is labour strike or election violence or riot or insurgency – and not just to meet extraordinary circumstances. But, the successive governments, over and again, stressed that militancy would be countered democratically.

The entire gamut of Sri Lankan counter-terror laws can be divided into five categories:

EMERGENCY PROVISIONS

In the case of Sri Lanka, emergency provisions were widely used to combat militancy. They are popularly known as 'Emergency Regulations' declared under Public Security Ordinance (PSO) enacted just before Independence, interestingly to deal with the general strike of 1947. It was passed as 'an urgent Bill' in 90 minutes despite warning from the floor of the House that 'the matter requires careful consideration'.³⁰ The situation at that time did not demand such stringent provisions like detention without trial, search and seizure, immunity to security forces, absence of judicial scrutiny, etc., to be incorporated in the PSO. The Bill, however, was justified on the grounds that since the 'existing law was inadequate in the event of emergency' it was

unavoidable that a Bill giving the Executive the right to make Emergency Laws not to be questioned in any court had to be introduced in the House. But it was action and reaction, cause and effect.... The Red Marshals in our midst had thrown the gauntlet, seeking to paralyse the life of their own country. The government picked it up and threw it back wrapped in this PSO. . . .³¹

Such a draconian law has to be looked at also from the background of the composition of the then government which was dominated by right-of-the-centre UNP which distrusted the rise of the Leftist

³⁰ Statement by Dr de Zoysa, *State Council Debates*, col. 1942, 10 June 1947.

³¹ *Ceylon Daily News*, 11 June 1947, p. 1.

ideology in the island. In addition, the 1915 Sinhalese-Muslims riots and the way they were dealt with by the British also influenced the elitists.³²

The successive governments, irrespective of the party or coalition that headed them, used PSO frequently by making the provisions more and more stringent through amendments.³³ The hardening of legalities was dictated by political disturbances that occurred every few years in the island's history. The 1959 amendment that conferred additional powers on the chief executive (prime minister) was influenced by the 1958 ethnic riots. The 1971 JVP insurrection made the constitutional makers incorporate the PSO as part and parcel of the 1972 Republican Constitution.³⁴ The 1978 Constitution simply followed the footsteps of the previous Constitution though the UNP government, which came to power in 1977, made some changes to the Emergency provisions by amending the PSO.³⁵ As per the 1978 Constitution, the President is vested with extensive and wide powers to issue regulations. And no court of law can call into question the existence or imminence

³² Communal riots between Sinhalese and Muslims were dealt with ruthlessly by the British fearing 'German conspiracy' and even 'revolution'. By imposing martial law, the colonial administration incarcerated almost all Sinhalese leaders. It was a Tamil leader – Sir Ponnambalam Ramanathan – who went all the way to England to plead the case for the Sinhalese. The leadership believed that imitating colonial method was appropriate to deal with any kind of 'disturbances'.

³³ It should be mentioned that an amendment brought in 1949 fixed a time limit of one month for the emergency regulations unless it was extended by the Parliament, obligation to inform the Parliament within 10 days of declaration of Emergency, and no detention without trial. But such toning down of emergency provisions was an exception.

³⁴ Suriya Wickremasinghe, 'Emergency Rule in the Early Seventies', in A.R.B. Amersinghe and S.S. Wijeratne, *Human Rights: Theory to Practice: Essays in Honour of Deshamanya R.K.W. Goonesekere*, Colombo: Legal Aid Commission of Sri Lanka & Human Rights Commission of Sri Lanka, 2005.

³⁵ The changes include approval by parliament within 14 days of proclamation of Emergency, automatic lapse of Emergency in three months if not approved by two-thirds of majority, supremacy of certain fundamental rights over Emergency regulations, and judicial remedy.

of a state of public emergency.³⁶ The proclamation has only to be sanctioned monthly by Parliament in accordance with Article 155 of the Constitution. Interestingly, the regulations cover a wide range of activities, some with only remote or no relevance to national security.³⁷ The following table gives a chronology of declaration of emergencies since Independence:

Table 1: Emergency Declarations since Independence

From	To
12 August 1953	11 September 1953
27 May 1958	26 March 1959
25 September 1959	3 December 1959
17 April 1961	4 April 1963
5 March 1964	4 April 1964
8 January 1966	7 December 1966
19 December 1966	18 January 1969
26 October 1970	25 November 1970
16 March 1971	15 February 1977
29 November 1978	28 May 1979
3 July 1979	27 December 1979
16 July 1980	15 August 1980
3 June 1981	9 June 1981
17 August 1981	16 January 1982
20 October 1982	20 January 1983
18 May 1983	11 January 1989
20 June 1989	4 September 1994 (except in the northern and eastern provinces and certain areas bordering them)
April 1995	July 1997 (except northeast, its bordering areas, and the capital Colombo)
4 August 1998	3 May 2000
12 August 2005	31 August 2011

Source: *The Gazette of the Democratic Socialist Republic of Sri Lanka*, No. 771/16, published on 17 June 1993; Law and Society Trust, *Sri Lanka: State of Human Rights*, various issues.

³⁶ Brought through the 13th Amendment in 1987 by inserting a new Para 3A under Article 155.

³⁷ The regulations range from maintenance of essential services to law and order.

SPECIAL LAWS

With the rise of Tamil militancy, the ruling elite found the need for more special laws exclusively to deal with militancy. The UNP under J.R. Jayewardene, which got an unprecedented five-sixths majority in the 1977 parliamentary elections,³⁸ was initiating numerous changes in the country: The Constitution was changed; presidential system introduced; and markets opened. Jayewardene wanted to sustain the momentum and wished for conducive atmosphere for investments. There was, however, one obstacle: ethnic issue and the rise of Tamil militancy. President Jayewardene reiterated over and over again that 'if the government is to achieve its goal of national development, then the Naxalites and the terrorists of this country be brought to book'.³⁹ He was very confident of crushing militancy by force. Militants were regarded as a 'handful of trigger-happy criminals, who have to be hunted out before they destroyed democratic society'.⁴⁰ The government firstly proscribed all Tamil militant groups by using 'Proscription of LTTE and other Similar Organizations Proscription Act, 1978'. It also passed the 'Criminal Procedure (Special Provisions) Act' to give more teeth to the existing criminal laws. Armed with above legislations in addition to Emergency, President Jayewardene dispatched his nephew, Brig. Weeratunga, as commander of security forces to Jaffna in early July 1979 to 'destroy terrorism in all its forms in six months time'. When the above measures failed to produce adequate results Jayewardene was impatient; he went ahead to introduce 'Prevention of Terrorism (Temporary

³⁸The UNP got 140 seats out of a total of 168, which even the 'Father of the Nation', D.S. Senanayake, failed to get. Interestingly, the TULF, representing minority Tamils, emerged as the second-largest party with 18 seats, as Srimavo Bandaranaike's SLFP was reduced to mere eight seats.

³⁹'JR seeks peoples' cooperation to bring to book Naxalites and terrorists', *Sun*, 15 December 1982.

⁴⁰Fr Tissa Balasuriya, 'Youth, Insurrection and Democracy in Sri Lanka: 1971-1987 - Can Sri Lanka Avoid Blood Bath of Youth?' *Logos*, vol. 26, no. 2, August 1987, p. 2.

Provisions) Act' (PTA) without properly reading the prevailing socio-political situation.⁴¹

The primary objective to enact PTA was stated as 'prevention of acts of terrorism in Sri Lanka, the prevention of unlawful activities of any individual, group of individuals, association, organization or body of persons within Sri Lanka or outside Sri Lanka and for matters connected therewith or incidental thereto'.⁴² The then Justice Minister was categorical:

Terrorism has to be put down; discussion comes afterwards. You cannot discuss the problems of mankind when a man is about to press the trigger and his pistol is pointed at your head. You have to disarm him before you can talk to him, and that is what this Bill seeks to do.⁴³

To the international community, it was justified that 'in bringing this Bill we have followed what has been followed in other countries.... The countries I have in mind are the United Kingdom, Germany, France, and Italy. In every one of those countries, there are specific laws to deal with these persons [militants]'.⁴⁴ By this, the government sent a message to its people, that Sri Lanka was only following the footsteps of other 'developed democracies'.

It is important, at this juncture, to mention some of the key provisions of the PTA that were thought imperative to prevent and deter militant activities. The offences are listed in Part I of

⁴¹ Some scholars go to the extent of arguing that since Jayewardene came to power in 1977, he pursued institutionalized political violence as a dominant mode of governance and control. And such method was perfected as a form of art by his follower Premadasa. See Gananath Obeyesekere, 'The Institutionalisation of Political Violence and the Dismantling of Democracy in Sri Lanka', in Centre for Rational Development, *Sri Lanka: Myths and Realities* (Colombo: Centre for Rational Development, 1984); and Sasanka Perera, 'Political Violence, Structural Amnesia and Lack of Remorse', in Jayadeva Uyangoda and J. Biyanwila (eds.), *Matters of Violence: Reflections on Social and Political Violence in Sri Lanka*, Colombo: Social Scientists' Association, 1997.

⁴² See the Preamble of the Act.

⁴³ Statement by Anandatissa de Alwis, *Hansard*, 19 July 1979, Cols. 1506-07.

⁴⁴ *Hansard*, 19 July 1979, Col. 1438. Also see Trade and (later) National Security Minister Lalith Athulath Mudali's statement made on 6 September 1983, *Sun*, 7 September 1983.

the Act. They include attack, abduction or killing of a 'specified person',⁴⁵ criminal intimidation, robbery or misuse of government property, manufacture or possession of firearms or explosives, causing racial or communal harmony through speech or writing, erasing or mutilating of sign boards, harbouring a 'proclaimed person'⁴⁶ or concealing information on the whereabouts of such person, and preparation, abetment, conspiracy or incitement to commit offences listed above. Interestingly, most of the offences listed above are part of the existing Penal Code. The difference lies in the penalties. While the first offence in the list (pertaining to killing or abduction of 'specified persons') carries life imprisonment, all other offences are awarded five to twenty years of solitary confinement. But, it is not clear, why an offence like killing, which carries capital punishment under normal criminal laws, carries only life imprisonment under the PTA? One reason for the toning down was to show to the outside world that the 'PTA was less harsh'.⁴⁷ Similarly, it is beyond comprehension why acts like mutilating of sign boards, which is normally overlooked or penalized with simple imprisonment or fine should bear up to 20 years of imprisonment? A plausible explanation for introducing the severity of punishment was that the government might have thought of increasing 'deterrence value' of such offences.⁴⁸

⁴⁵ See Part IX of the PTA for the description of 'specified person': the president; judges of Supreme Court, Court of Appeal, High Court, District Court, Magistrate's Court, primary court or any other court of First Instance; official of a foreign state or international organization; member of parliament, local authorities; members of Special Presidential Commission; juror, counsel or officer of court; and any member of Armed Forces, Police and any other Forces charges with the maintenance of public order. The list thus covers almost all the persons working with the government.

⁴⁶ 'Proclaimed Person' means any person proclaimed by the Inspector-General of Police by Proclamation published in the Gazette to be a person wanted in connection with the commission of any offence under this Act. See Section 3 of PTA.

⁴⁷ Interview with Tamilmaran, senior lecturer at Colombo University, Colombo, 3 July 2005.

⁴⁸ Interview with Poologasingham, senior lawyer based in Jaffna, 10 July 2005. This view confirmed with opinions made at the Attorney-General's Department, Colombo, 31 July 2005.

But, what makes this Act more draconian is provisions like forfeiture of property of those convicted [Section 4], arrest [Section 6(1)(a)], search any premises or vehicle [Section 6(1)(b, c)], seize any document [Section(1)(d)], prolonged detention [Section 7, 9], restriction of movement of a suspect [Section 11 (1)], trial without preliminary inquiry [Section 15], admissibility of confession as evidence [Section 16], no room for bail (except in exceptional circumstances determined by Court of Appeal) [Section 19], immunity to law enforcement personnel [Section 26], and supremacy of PTA over all other written laws [Section 28].

Were these provisions consistent with the Constitution? What role did judiciary play in this regard? Judicial opinion was sought on the constitutionality of PTA as per Article 122(1)(b) of the Constitution.⁴⁹ Since the Bill was introduced as 'urgent in the national interest', according to Article 122(1)(c), 'the Supreme Court shall make its determination within twenty-four hours (or such longer period not exceeding three days as the President may specify)'. The Supreme Court, surprisingly, ruled that the Bill 'does not require the approval of the People at a referendum nor is it one within the contemplation of Article 83 of the Constitution'.⁵⁰ It is

⁴⁹Article 122(1)(b) says 'the President shall by a written reference addressed to the Chief Justice, requires the special determination of the Supreme Court as to whether the Bill or any provision thereof is inconsistent with the Constitution. A copy of such reference shall at the same time be delivered to the Speaker.'

⁵⁰Article 83 reads 'Notwithstanding anything to the contrary in the provisions of Article 82 –

- (a) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with any of the provisions of Articles 1, 2, 3, 6, 7, 8, 9, 10 and 11, or of this Article, and
- (b) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with the provisions of paragraph (2) of Article 30 or of paragraph (2) of Article 62 which would extend the term of office of the President or the duration of Parliament, as the case may be, to six years, shall become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80.'

true that the apex court had two constraints while giving its opinion: time and scope.⁵¹ But, for learned judges, it does not require more than a glance to realise the consequences of certain provisions if they became part of the statute. The apex court oversaw or chose to ignore to point out to the president and to the Legislature that the Bill was inconsistent with Articles 1, 3, 4, 10, and 11 of the Constitution.⁵² When there was no provision for judicial review in Sri Lanka,⁵³ the judiciary could have gone through the Bill a bit more carefully. Thus, it was the flaw of the judiciary at the first instance.⁵⁴ The 1978 Constitution also was partly responsible for the problem. It was drafted and enacted in a hurry by one party – UNP – that had a grand majority in parliament with a ‘sense of hubris’.⁵⁵ The Constitution paved the way for authoritarian leadership through an executive president, who enjoyed life-long impunity. It gave enough space for extraordinary laws like PTA.

⁵¹Time period of just three days by Article 122(1)(c) and by Article 120(c) ‘Where the Cabinet of Ministers certifies that a Bill which is not described in its long title as being for the amendment of any provision of the Constitution, or for the repeal and replacement of the Constitution, is intended to be passed with the special majority required by Article 84, the only question which the Supreme Court may determine is whether such Bill requires approval by the people at Referendum by virtue of the provisions of Article 83 or whether such Bill is required to comply with paragraphs (1) and (2) of Article 82.’

⁵²Article 1 states that Sri Lanka is ‘Democratic Socialist Republic’; Article 3 articulates that ‘sovereignty is in the People and is inalienable’; Article 4 outlines that the sovereignty of the People shall be exercised and enjoyed in, apart from other things, ‘the fundamental rights which are by Constitution declared and recognised’; Article 10 talks of ‘freedom of thought, conscience and religion’; and Article 11 states ‘No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’

⁵³As per Article 80(3) ‘Where a Bill becomes a law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever.’

⁵⁴It is said that the then Chief Justice, N.D.M. Samarakoon, before his appointment as Chief Justice, was a member of UNP Central Committee and was closely aligned with the ruling UNP.

⁵⁵Interview with Jehan Perera, National Peace Council of Sri Lanka, Colombo, 4 July 2005.

Ironically, the PTA was passed without giving enough opportunity to the people to debate and discuss the Bill; even parliamentarians were not given adequate chance to read through the Bill and it was passed in a single day.⁵⁶ The Sinhala majority was convinced that the only remedy to tackle 'Tamil terrorism' was by bringing in PTA. The Sinhalese also did not get the opportunity to realize the depth of the frustration that pushed the island's Tamil youth towards militancy.⁵⁷ The Tamil moderate leadership, especially the TULF could not do much to prevent the PTA. During the passage of the Bill, the TULF parliamentarians were, in fact, boycotting the House protesting the redrawing of the district of Vavuniya.⁵⁸ Jayewardene assured the Tamil leadership that the law was only a temporary measure.⁵⁹

LAWS OF PROSCRIPTION

Sri Lanka became one of the few countries to use a separate law to proscribe militant groups when it introduced 'Proscription of the Liberation Tigers of Tamil Eelam and Similar Organizations Act No. 16 of 1978'. This law gave the president the power to proscribe any organization, which, in his opinion, 'advocates violence or is directly or indirectly concerned in unlawful activity'.⁶⁰ There was no provision for the banned organization to refute or appeal against the ban. To the government's surprise, however, such labelling did not prevent either the militant activities or people from joining the militant groups. It was this realization that made the government

⁵⁶ A senior lawyer informed the author that it took just a week to conceive and pass the Act.

⁵⁷ Fr. Tissa Balasuriya, 'Youth, Insurrection and Democracy in Sri Lanka: 1971-1987 - Can Sri Lanka Avoid Blood Bath of Youth?', *Logos*, vol. 26, no. 2, August 1987, p. 32.

⁵⁸ The TULF MPs were protesting against the government's moves to redraw the Tamil majority Vavuniya district into an ethnically mixed one by including parts of Sinhala areas from adjacent Anuradhapura district for electoral advantages, but on the pretext of 'better administration'.

⁵⁹ A school of thought among Tamils still believe that Tamil moderate leadership indirectly supported the Bill to 'keep the 'boys' under their control'.

⁶⁰ Section 2 of the Act.

to repeal the Act in 1980.⁶¹ The government, thereafter, did not bring any exclusive law to ban any militant organization; it, however, made use of powers under PSO or PTA to proscribe organizations from time-to-time. The JVP was banned in 1983 immediately after the ethnic riots using Emergency Regulations. Similarly, the LTTE was proscribed in January 1998 after the attack of Dalida Maligawa (Temple of Tooth) by introducing Emergency (Proscription) Regulations of 1998.

This apart, the Sri Lankan government also tried to influence other countries, especially where the Tamil diaspora community is stronger, to proscribe the Tamil militant groups, especially the LTTE. In response, and partly due to the activities of the LTTE, the Tigers were banned in as many as 31 countries that included India, United States, United Kingdom, Australia, Canada and the European Union where more than 90 per cent of Sri Lankan Tamil diaspora is concentrated.

SECURITY FORCES EMPOWERMENT LAWS

Apart from providing immunity to the security forces through PTA (Section 26) and Emergency Regulations, the Sri Lankan government introduced two indemnity laws to reinforce immunity from legal proceedings against the law enforcement. The Indemnity Act No. 20 of 1982 was brought 'to restrict the taking of legal proceedings against certain persons in respect of certain acts and matters done or purported to be done with a view to restoring law and order during the period 1 August 1977 to 31 August 1977, consequent upon the existence of widespread disorder and lawlessness in the country'.⁶² Later, through an amendment brought on 17 December 1988 [Indemnity (Amendment) Act No.

⁶¹ In this regard, the then Minister of Justice, Devanayagam, observed in parliament, 'This Government enacted Act No 16 of 1978, wherein they proscribed the LTTE and similar organizations.... From 1971 to 1978, just before we introduced the Bill, crimes of various kinds totaled 75. After the enactment of the Bill and up to now, crimes of all kinds total 54. Within seven years there were 75 crimes, but within a year there were 54.' See *Hansard*, 19 July 1979.

⁶² Section 2 of the Act.

60 of 1988], the period of the Indemnity Act was extended (from 1 August 1977) till 16 December 1988 to cover the JVP period.

OTHER LAWS

Other legislations that have been used to deal with militancy include:

Criminal Justice Commission Act: On 6 April 1972, one year after the JVP rebellion, the UF government passed the Criminal Justice Commissions Act No. 14 of 1972 that provided for Criminal Justice Commission⁶³ to 'inquire into generally the circumstances which led to the rebellion'; 'to inquire and determine those guilty'; and 'to deal with those who found guilty in the manner prescribed by the Act'. Though the insurrection took place starting 5 April 1971, the period of offences for trial was mentioned as 1 January 1968 to 31 December 1971. The Act was to be valid initially for eight years and then five years if required. The rationale provided for setting-up special tribunal was that 'the practice and procedure of the ordinary courts are inadequate to administer criminal justice....' In similar fashion, harsh provisions like admission of confession as evidence [Section 11(2)], and absence of higher appeal were included.

Criminal Procedure (Special Provisions) Act: Apart from PSO, 'Criminal Procedure (Special Provisions) Law No. 15 of 1978' was the first legislation brought to deal with Tamil militancy in May 1978. The main objective of the legislation was to

prohibit or restrict the release on bail by certain courts of persons who surrender or are produced in connection with the commission of certain offences, to prohibit the imposition of suspended sentences of imprisonment on, and the conditional release of, persons convicted or

⁶³The Commission, that was established on 16 May 1972, consisted of five judges of Supreme Court: H.N.G. Fernando (Chief Justice), A.C. Alles, V.T. Thamotheram, H. Deheragoda, and T.W. Rajaratnam. For a short period, D. Wimalaratne served in place of T.W. Rajaratnam.

guilty of such offences and to provide for the imposition of a minimum punishment for such offences.⁶⁴

The duration of the law was specified as one year, but it was extended annually and exists till this day, making it one of those temporary legislations that remain permanent. An amendment brought in 1982 took away the discretion of granting bail from judiciary and vested it with the Attorney General, who is part of the Executive.⁶⁵

Control of Financing of Terrorism: Suppression of Terrorist Financing Act of 2005 was the latest addition to the existing counter-terror laws passed by the Sri Lankan Parliament on 7 July 2005. This law was adopted to give effect to the UN Convention on Suppression of Terrorist Financing of 1999 to which Sri Lanka is a signatory. Under the law, it is an offence to provide or collect funds for terrorist activities [Section 3(1)(2)]. Such an offence carries imprisonment of 15 to 20 years apart from fine [Section 3(4)].

⁶⁴ See Preamble of the Criminal Procedure (Special Provisions) Law, No. 15 of 1978, certified on 23 May 1978.

⁶⁵ 'Criminal Procedure Code (Special Provisions) Amendment Bill passed', *Ceylon Daily News*, 25 December 1982.

CHAPTER 4

Were Counter-terror Laws Able to Augment Security?

The analyses in Chapters 2 and 3 points to certain common characteristics in counter-terror laws of both India and Sri Lanka. These include:

- Emphasis on protection of state rather than people;
- Over-reaction to the threat posed and far more drastic measures than necessary;
- Hasty enactment without giving much room for public debate or judicial scrutiny;
- Overly broad and ambiguous definitions of terrorism that fail to satisfy the principle of legality;
- Pre-trial investigation and detention procedures which infringe upon due process, personal liberty, and limits on the length of pre-trial detention;
- Special courts and procedural rules that infringe upon judicial independence and the right to a fair trial;
- Provisions that require courts to draw adverse inferences against the accused in a manner that infringes on the presumption of innocence;
- Lack of sufficient oversight of police and prosecutorial decision-making to prevent arbitrary, discriminatory, and disuniform application; and
- Broad immunities from prosecution for government officials which fail to ensure the right to effective remedies.¹

¹Anil Kalhan et al., 'Colonial Continuities: Human Rights, Terrorism and Security Laws in India', *Colombia Journal of Asian Law*, vol. 20, no. 1, 2006, p. 96.

To single out and dwell on few of these characteristics is important before answering whether counter-terrorism laws have enhanced the overall security in both countries:

AMBIGUOUS DEFINITIONS

In counter-terrorism legislation of both India and Sri Lanka, terms like 'terrorism' and 'terrorist organization' are left vague enough to encompass many ordinary criminal law offences and activist groups with little relationship to terrorist activity, creating tremendous potential for arbitrary or selective application. For instance, POTA's broad definitions of terrorism-related offences gave enough room for the police to prosecute ordinary criminal cases with little, if any, connection to terrorism and, more simply, to engage in intimidation and extortion.² They also have facilitated selective enforcement on the basis of religion, caste, tribal status, and political opinion. So was the case with PTA in Sri Lanka. Ironically, they provide themselves as a powerful tool for the police to intervene on behalf of particular parties in private disputes, thus indirectly encouraging bias. Also it facilitates to keep the prosecution ambiguous and open-ended to permit the police to add more charges against the same person or against additional persons as and when required.³

Overall, what comes out clearly is that due to definitional ambiguities, special laws in both countries fail to satisfy the 'principle of legality'.

REVIEW MECHANISM

Conceptually, most of the terror laws provide for administrative review mechanisms with an objective to have an independent check on the prosecutorial discretion. The main issue, however, is that these review mechanisms have not been conferred with enough

² Interview with Mr Gnanasekaran, Criminal Lawyer, Chennai, 14 November 2008.

³ Kuldeep Mathur, 'The State and the Use of Coercive Power in India', *Asian Survey*, vol. 32, no. 4, April 1992, pp. 337-49.

power to exercise meaningful oversight. Citing the example of POTA, one of the noted criminal lawyers Rajeev Dhawan remarks that the review committees 'prescribe ineffective remedies against powerful evasive governments without examining the problems of POTA itself'.⁴ In the Indian case, the federal units consistently underplayed review committee processes and even went to the extent of challenging the legality of review mechanisms. They want their discretion in the use of special laws unconstrained and were irregular in mandatory periodic reporting to the central government on how these laws were implemented.⁵ Because of non-cooperation and legal constraints created by states, the central government was unable to implement whatever recommendations submitted by various review committees from time-to-time on reforms of laws. Yet another problem in the case of Sri Lanka is lack of awareness on the part of detainees of their rights under review mechanisms.⁶

LACK OF UNIFORMITY

There was a broader lack of uniformity in the application of special laws by various federal units in the Indian case. Since 'law and order' is with the federal states of India, they usually exercised their discretion in overall implementation of terror laws. Interestingly, those states where militancy was high did not bother much to make use of legislation enacted especially to tackle political violence. For instance, as of October 2003, 15 of India's 28 states – Arunachal Pradesh, Assam, Chhattisgarh, Haryana, Karnataka, Kerala, Madhya Pradesh, Manipur, Meghalaya, Mizoram, Nagaland, Orissa, Tripura, Uttaranchal and West Bengal – and six of its Union Territories reported no arrests under POTA to a Central Review Committee reviewing the law's implementation. An additional three states did not provide any arrest statistics to the review

⁴Rajeev Dhawan, 'Sugarcoating POTA', *The Hindu*, 31 October 2003.

⁵For detailed discussion on this aspect, see Ujjwal Kumar Singh, 'POTA and Federalism', *Economic and Political Weekly*, 1 May 2004.

⁶Interview with Dr Rohan Edrisinha, Faculty of Law, University of Colombo, Colombo, August 2006.

committee, leaving ten states – Andhra Pradesh, Delhi, Gujarat, Himachal Pradesh, Jammu & Kashmir, Jharkhand, Maharashtra, Sikkim, Tamil Nadu, and Uttar Pradesh – to account for the 301 cases initiated, 1,600 individuals, and 514 detained under the law as of that date. The state with the highest number of POTA arrests before the law was repealed was Jharkhand which has not traditionally been understood to face a significant or sustained problem with terrorism. Maoist violence in the state is a recent phenomenon.⁷ Such a trend, however, is not prevalent in the Sri Lankan case.

ABUSE

Abuse of counter-terrorism legislation is most evident in both countries. The special laws are not only ‘draconian in effect and character’ but also ‘incompatible with our cultural traditions, legal history and treaty obligations’.⁸ Time and again apex courts of both countries pointed out with concern the ‘sheer misuse and abuse’ of these laws by the police.⁹

One of the potential sources of abuse is the scope for preventive detention under security laws without even the limited constitutional protections required for preventive detention laws, much less the exacting standards of international law. Under counter-terror laws, it is easier to obtain a preventive detention order, with its lower evidentiary standard and burden of proof, than a criminal conviction, which requires a full-blown trial and proof of guilt beyond a reasonable doubt. David Bayley noted in this regard, ‘Preventive detention is sure under special laws although conviction is uncertain and time-consuming’.¹⁰ Thus, counter-

⁷See J. Venkatesan, ‘No POTA Application in 15 States, 6 UTs’, *The Hindu*, 2 October 2003.

⁸Letter from Justice Ranganath Misra dated 20 February 1995 in National Human Rights Commission of India, *Annual Report: 1994-95*, Annexure I.

⁹In India, this was observed by its Supreme Court in *Kartar Singh vs. State of Punjab*, 2 S.C.R. 375, 1994.

¹⁰David H. Bayley, ‘The Indian Experience with Preventive Detention’, *Pacific Affairs*, vol. 35, no. 2, Summer, 1962, p. 115.

terror laws in both countries functioned primarily as preventive detention laws than legislation for prosecution and conviction of terrorists; prolonged detention without charge or trial appeared to be the norm. For instance, under TADA and POTA of India, the number of cases that finally witnessed convictions was admissibly low.¹¹ So is the case with the PTA of Sri Lanka.

Yet another pattern of abuse in both countries comes in the form of use of terror laws to settle political, communal and such other ethnic scores. For instance, some state governments used POTA against minorities, particularly Muslims, Dalits and other lower caste groups, and tribals.¹² In Sri Lanka, PTA was used to silence dissenters, especially minorities and journalists.¹³

The special laws in both countries give enough power to security forces personnel to arrest suspects without warrant at any time with overwhelming use of force if need be. Such arrests take place usually with ransacking of detainees' homes and intimidation of their family members. Ironically, the terror laws do not safeguard against taking family members as 'hostage detainees' by the police until the prime suspect submit themselves to custody.¹⁴

Under terror laws, it is not difficult to subject detainees to cruel, inhuman, or degrading treatment while in custody. Use of torture as the 'principal forensic tool' has become a routine due to fewer restrictions on use of confessions as evidence.¹⁵ Above all, oversight by magistrates of police detention and interrogation

¹¹According to Indian statistics, the final conviction rate under TADA was 0.81 per cent and under POTA it was 1 per cent. Compared to this, conviction rate under normal criminal laws are 6.5 per cent.

¹²Smita Narula, 'Overlooked Danger: The Security and Rights Implications of Hindu Nationalism in India', *Harvard Human Rights Journal*, 2003, pp. 46-52.

¹³'Sad Saga of Post Rajapakse Media Freedom', *The Sunday Leader*, 25 November 2007. Also see 'Sri Lanka', Country Summary by Human Rights Watch, January 2009.

¹⁴Petition of the Tamils of Sri Lanka Deprived of their Internationally Protected Human Rights for a Grant of United Nations Effective Remedy and Declaratory Relief', *Denver Journal of International Law and Policy*, vol. 21, no. 1, 1992, pp. 205-7.

¹⁵'POTA: It continues to be TADA reincarnated', *The Indian Express*, 22 December 2003.

practices under special laws has not been effective.¹⁶ Indirectly, the kith and kin of detainees arrested under terror laws experience the emotional trauma of not knowing when their spouses might be released apart from the practical demands associated with sudden single parenthood and the need to assume responsibility to find other sources of family income.¹⁷

STIGMA

The stigma of having been charged under terror laws is one of the worst side effects both to the detainees and their family members. Once a person is arrested for alleged involvement in terrorism, even after his release on proving innocence, the stigma remains. As a result, he/she may not only find it difficult to obtain employment, but also face ostracism from his/her community. The community may hesitate to associate with any of his/her near and dear ones due to the lingering stigma even if the detainee is absolved of all charges. The stigma associated with terror laws is such that it facilitates overreach especially by the special courts. They fail to be liberal when examining bail applications, but also in protecting the rights of the accused.¹⁸

LINGERING SHADOWS

Even if a particular special law lapses or is allowed to lapse, ghosts of that law continue to haunt the detainees. This is truer in the Indian case. For instance, cases initiated while TADA was in force were not automatically dismissed upon its lapse. Both central and state governments have authority to institute new cases based on allegations arising from the period when TADA was in effect.

¹⁶Deepika Udagama, 'Taming of the Beast: Judicial Responses to State Violence in Sri Lanka', *LST Review*, vol. 9, Issue 137, March 1999, pp. 31-3.

¹⁷Interview with Vellaiyamma, wife of a detainee, Kanchipuram, 12 November 2008.

¹⁸Anil Kalhan et al., 'Colonial Continuities: Human Rights, Terrorism and Security Laws in India', *Colombia Journal of Asian Law*, vol. 20, no. 1, 2006, p. 195.

Such provision has given way to new proceedings under TADA by fraudulent backdating of factual allegations.¹⁹

CONTINUITY

Even if a particular terror law is repealed, that did not apply retroactively to pending cases. Also, the repealed laws continue to apply to incidents that occurred during the period in which the law was in effect. Apart from maintaining some continuity in such retroactivity provisions, the governments often also try to inherit preferred provisions from repealed laws into new legislation. Indian special laws have followed such tradition ever since colonial times, while Sri Lankan counter-terror laws tried to copy from provisions of other countries. To cite few examples in the Indian case, the Rowlett Act preserved orders issued under the lapsed Defence of India Act of 1915; MISA's provisions were re-enacted in the form of the NSA; TADA's provisions were found in POTA, which, in turn, preserved several of its provisions as amendments to the Unlawful Activities (Prevention) Act of 1967. Notwithstanding this continuity in provisions that raise serious human rights concerns, several Indian states have their own version of terror laws that provide additional authority to tackle terrorism.²⁰ In the Sri Lankan case, its PTA contained many provisions from similar legislation especially of Britain and South Africa.

WITNESS PROTECTION

Provisions for the protection of witnesses are discriminatory in the counter-terrorism legislation in both countries. While the prosecution witness could seek protection, the witness of the defendant does not have similar right. In reality, defence witnesses

¹⁹ National Human Rights Commission of India, *Annual Report 1995-96*, Chapter IV(A).

²⁰ Several BJP-ruled states adopted their own counter-terror laws as the UPA government repealed POTA in 2004. 'Party Nod to Terror Law in BJP States', *The Telegraph*, 13 September 2004.

are likely to fear more intimidation or coercion by the police than as prosecution witnesses.²¹

SPECIAL COURTS

The use of special courts is provided under terror laws in India, although such provision is not found in Sri Lankan security laws. The procedural rules followed by these courts infringe upon judicial independence and violate the right to a fair trial guaranteed by both the Constitution and the International Covenant on Civil and Political Rights (ICCPR).²² Under the UN Basic Principles on the Independence of the Judiciary, individuals are guaranteed 'the right to be tried by ordinary courts or tribunals using established legal procedures', rather than special tribunals 'that do not use the duly established procedures of the legal process'.²³ Under special courts provisions, the executive and not the judiciary, assigns cases to particular judges.²⁴ Such provision attracts undue political interference in the judicial process and maximises potential bias. As one scholar points out, in a charged atmosphere of a terrorist attack, the institutions tend to adopt 'crusading spirit' and a Judge of the Special Court considers himself as a 'patriotic warrior' against terrorism.²⁵

EFFECTS AND SIDE-EFFECTS

Given the above-mentioned negative characteristics, counter-terrorism laws in both India and Sri Lanka did not serve the very purpose for which they were enacted. Most importantly, they

²¹ Interview with N. Kandasamy, Centre for Human Rights and Development, Colombo, August 2006.

²² Article 50 of the Indian Constitution and Article 14 of the ICCPR.

²³ See Clause 5 of the UN Basic Principles on the Independence of the Judiciary.

²⁴ UN Basic Principles on the Independence of the Judiciary, Sections 3 and 5.

²⁵ See Preeti Verma (ed.), *The Terror of POTA and other Security Legislation: A Report on the People's Tribunal on the Prevention of Terrorism Act and Other Security Legislation*, New Delhi: Human Rights Law Network, 2004.

could not help in apprehending the key members of terrorist organizations involved in violence. Instead, the laws were liberally used as 'political weapons' to settle scores with political rivals and those who dissented with the ruling regimes. As a result, it removed moderate voices from the scene allowing enough space for the militant ones to fill in.

The anti-terror legislation could not prevent harassment of innocent civilians. This increased public discontent and in effect strengthened belief in the repressive nature of regimes. Consequently, those innocents who were affected due to harassment of security laws played into the hands of the militants to resist 'repressive regimes'. As the Supreme Court of India rightly recognised, 'terrorism often thrives where human rights are violated', and 'the lack of hope for justice provides breeding grounds for terrorism'.²⁶ In the Sri Lankan case, the very name 'prevention of terrorism' (in PTA) sent wrong signals to the Tamil minority community, who had already lost trust in the State. These legal provisions entrusted the security forces with enormous discretionary powers, which were blatantly misused. This inflicted more wounds by creating a 'uniform phobia' in Tamils. Thus, PTA and Emergency Regulation (ERs) brought down the legitimacy of the state and its institutions further. They were seen as part of 'grand design for legitimizing repression'.

The safeguards in terror legislation of both countries were not adequate enough to prevent the misuse. Judiciary in the Sri Lankan case mostly pronounced 'political justice'²⁷; and other bodies like the Advisory Board (provided under Section 13 of the PTA) or the Human Rights Commission were not sufficiently empowered to prevent the arbitrariness of these laws. Had these safeguards worked by giving some sense of justice to the Tamil community, it could have reduced the numbers that favoured militancy to an extent. Most importantly, the special laws hid the rot in the entire criminal justice system. In both countries, media and diaspora worked effectively in publicizing the ill effects of the counter-

²⁶ People's Union for Civil Liberties *vs.* Union of India, AIR 2004 SC 456, 465.

²⁷ It implies here what Otto Kirchheimer calls 'politicization of criminal justice'.

terror legislation both domestically and internationally. In the Sri Lankan case, oral traditions in Tamil community carried the stories of those affected by these legal instruments to the next generation.

The net effect was that the terror laws quickened the isolation of the community and increased the number of sympathisers and recruits of militancy. Those who fled their homes felt more secure in the militant ranks than being at home or at work. Even if some of the youth did not like to join militancy, parents forced them to leave the country or join any militant organization just to escape the grip of these laws. The alienated, as a result, are also less likely to cooperate with law enforcement, depriving the security forces of information and resources that can be used to counter terrorism.

Such a trend is evident in Sri Lanka and Jammu & Kashmir and the north-east of India. Citing the example of counter-terrorism in Punjab, Jaswant Singh noted that the singling out of Punjab for Emergency treatment might have contributed to the 'psychological isolation of beleaguered state'.²⁸ This applied to other states of India as well. The enactment of powerful, nation-wide anti-terrorism laws without sufficient safeguards to constrain its misuse and ensure national uniformity in its application led to human rights abuses and disparate patterns of enforcement throughout the country. Even developed countries like Britain are not devoid of such a trend. When the House of Lords found that legislation permitting the administrative detention of foreign terrorist suspects violated human rights, Lord Hoffmann observed:

Terrorist crime, serious as it is, does not threaten our institutions of government or our existence as a civil community. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for parliament to decide whether to give the terrorists such a victory.²⁹

²⁸ Jaswant Singh, 'Beleaguered State', *Seminar*, May 1988, p. 19.

²⁹ Clare Dyer, 'It calls into question the very existence of an ancient liberty of which this country is proud: freedom from arbitrary arrest and detention', *The Guardian*, 17 December 2004.

Since terrorists often deliberately seek 'to provoke an over-reaction' and, thereby, drive a wedge between government and its citizens – or between ethnic, racial, or religious communities – adhering to human rights obligations when combating terrorism helps to ensure that advocates of violence do not win sympathy from the ranks of those harmed and alienated by the state.³⁰ One reason why state terrorism goes unrecognized is that often it 'masquerades as justice'.³¹ In the words of the Supreme Court of India, 'if the law enforcing authority becomes a law breaker, it breeds contempt for law, it invites every man to become a law unto himself and ultimately it invites anarchy'.³²

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

Internationally, the world is seeing an increasing misuse of what I call the 'T-Word'—terrorism—to demonise opponents to throttle freedom of speech and the press, and to delegitimize legitimate political grievances. . . . Just as terrorism must never be excused, so must genuine grievances never be ignored. True, it tarnishes a cause when a few wicked men commit murder in its name. But, it does not make it any less urgent that the cause be addressed, the grievance heard, and the wrong put right. Otherwise, we risk losing the contest for the hearts and minds of much of mankind.³³

Such concerns are more widespread in developing countries. Here special laws undergo less democratic scrutiny compared to the developed states. The institutions in the developing democracies are not adequate to conduct such scrutiny. This is not to say that

³⁰Anil Kalhan et al., 'Colonial Continuities: Human Rights, Terrorism and Security Laws in India', *Colombia Journal of Asian Law*, vol. 20, no. 1, 2006, p. 96.

³¹Michael E. Tigar, 'Terrorism and Human Rights', *Monthly Review*, November 2001.

³²Kartar Singh vs. State of Punjab, (1994) 2 S.C.R. 375, 1994 Indlaw SC 525, p. 366.

³³Address by Kofi Annan at the 4688th meeting of the Security Council, 20 January 2003.

the scrutiny is far superior in developed democracies; it is only comparatively better.

While terrorism is destructive of human rights, counter-terrorism, its opposite, does not necessarily restore and safeguard human rights. These special anti-terrorism laws have not proven particularly effective in combating terrorism. Terrorism has persisted as a problem notwithstanding the presence of numerous special laws, under which few of those charged have been convicted. Ironically, several major terrorist acts, including the attack on the Akshardham Temple complex and the 2003 Mumbai blasts took place when POTA was in existence. In fact, the attack on Indian Parliament on 13 December 2001 also took place when POTA was in existence in ordinance form. The Indian state of Maharashtra has had a comprehensive anti-terrorism legislation in place for several years. Yet most of the terrorist attacks took place in this state. So is the case with Sri Lanka. Despite a host of counter-terrorism legislation, the LTTE continued and its defeat certainly cannot be attributed to the effectiveness of special laws of the island state. As Jaswant Singh commented in 1988 on the use of such laws in Punjab,

Unfortunately, [the Indian] government is a classic example of proliferating laws, none of which can be effectively applied because the moral authority of the Indian government has been extinguished, and because the needed clarity of purpose (and thought) is absent. Not surprisingly, therefore, [the government] falls back to creating a new law for every new crime . . . and a new security force for every new criminal. . . . But the primary error lies in seeking containerized, instant formulae; there is no such thing as the 'solution'.³⁴

As a noted human rights lawyer and former Attorney General of India observed '[A] liberal democratic system that replicates the methods of terrorists in its anti-terrorist policies threatens to undermine its own foundations.'³⁵

One therefore cannot firmly conclude that counter-terrorism legislation in both countries increased overall security in general.

³⁴ Jaswant Singh, 'Beleaguered State', *Seminar*, May 1988, p. 14.

³⁵ Soli J. Sorabjee, 'Subverting the Constitution', *Seminar*, May 1988, pp. 35-9.

On the other hand, they were counter-productive because of significant human rights concerns. As one commentator aptly puts it, 'if the purpose of terrorism is to terrorize, that of anti-terrorism is to terrorize more'.³⁶ Some go to the extent of arguing that the danger to democratic values 'comes more from our reaction to terrorism than the thing itself'.³⁷ As Ignatieff emphasises, '... the historical record shows that while no democracy has ever been brought down by terror, all democracies have been damaged by it, chiefly by their own overreactions'.³⁸ Such situations, thus, result in the ultimate paradox of the response of democracies to the threat of terrorism: it is not the terrorism itself, but the reaction to that threat that can destroy the democratic states.³⁹ Andrew Silke writes in this respect:

Terrorist groups can endure military strikes, 'targeted assassinations' and other harsh measures not because the people and resources lost are not important, but because the violence works to increase the motivation of more members than it decreases, and works to attract more support and sympathy for the group than it frightens away.⁴⁰

³⁶ Shaukat Qadir, 'The Concept of International Terrorism: An Interim Study of South Asia', *Round Table*, 2001, no. 360, July, p. 333.

³⁷ Benjamin Friedman, 'Terrorism Hysteria Watch', *Cato@Liberty*, 23 January 2009.

³⁸ Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror*, Princeton: Princeton University Press, 2004, p. 80.

³⁹ Asta Maskaliunaite, 'Protecting Democracy from Terrorism: Lesser Evil and Beyond', *Baltic Security & Defence Review*, vol. 9, 2007, p. 15.

⁴⁰ Andrew Silke, 'Fire of Iolau: The Role of State Countermeasures in Causing Terrorism and What Needs to be Done', in Tore Bjorgo (ed.), *The Root Causes of Terrorism: Myths, Reality and Ways Forward*, London: Routledge, 2005, p. 254.

Conclusion

The Indian and Sri Lankan experiences are instructive for all democracies that face the challenge of developing effective legal responses to terrorism and other security threats while at the same time wish to protect human rights in an enduring way. Both countries have justified the enactment and use of counter-terror laws pointing fingers at what 'developed democracies' were doing to counter terrorism. India has been facing serious threats to its security both from terrorism and other forms of political violence. Various forms of anti-terror and security laws have been brought in to tackle the menace. However, the legal framework has only witnessed limited success. Counter-terror laws in India have come into being reflecting the Indian style of handling terrorism: adhocism. No single law pervaded throughout. From time-to-time, depending on the regime at the centre, special laws came into being and faded. In the Sri Lankan case, the counter-terror legislation, in fact, has resulted in increasing the motivations for terrorism further. Comparative analyses of linkage between counter-terror laws and security in India and Sri Lanka show many interesting findings.

POLITICAL CONSENSUS ON TERROR LAWS

There has been no political consensus on the use of special laws in India. While the right wing parties like BJP took a pro-legal framework against terrorism, centrist parties like Congress thought otherwise. Thus, there is no consensus on the use of the law as an effective antidote to terrorism. The opposition parties opposed anti-terror laws on the grounds of 'repressive character', but, when

they came to power, have invariably been able to resort to new laws conferring similar, overlapping authority. There is, thus, a cyclical pattern of enactment and repeal without addressing the underlying structural issues. In Sri Lanka, however, except Sri Lankan Tamil parties, all other political parties favoured extraordinary laws despite knowing the ineffectiveness of such measures. Political interests determined parties' perceptions on terror laws rather than the merit of the situation.

ENACTMENT

In both countries, the most prevalently used counter-terrorism laws were brought in haste without much public debate or expert scrutiny. In the case of India, especially, terror laws in most cases were enacted in response to a particular crisis and often repealed when faced with strong political opposition or a perception that the crisis moment had passed. 'Urgency' of a situation cannot be an excuse for hasty enactment of counter-terror laws. What is required is careful drafting with the foresight of 'effects' and 'side effects' of such laws. The draft should be widely circulated and given sufficient time for parliamentary and public scrutiny. In that case, a government can expect wider acceptance by the people than in a situation where laws are brought as a surprise. Simultaneously, the laws should be placed for intense judicial examination before being passed as a law.

'One size does not fit all' is what one would be provoked to say when looking at the legal transplants and colonial traditions in counter-terror laws of both countries. While the PSO of Sri Lanka and Police Act of India have strong colonial inheritance, Sri Lankan PTA is dominated by provisions borrowed from similar such legislations in Britain and South Africa. Every country should deal with threats of militancy in its own way by taking into consideration the local conditions and not just imitating other countries. The laws should confirm 'rule of law' and 'due process of law'. If the response is not in confirmation with democratic norms, it might cause a 'credibility gap' for the government.

IMPLEMENTATION

In the case of Sri Lanka, there was a difference in how security forces implemented counter-terror laws in tackling Sinhala and Tamil militancy. While meticulously following 'winning hearts and minds' approach in dealing with southern militancy, the security forces failed to do so in the case of Tamil militancy. Language was one of the critical variables that determined the behaviour of the security forces apart from consistent provocations of the LTTE. Ethnically mixed forces should have avoided such problems. If a single ethnic group in a plural society dominates security forces, then it might give way for biased law enforcement. So, proportional representation, at least approximately, in the security forces still probably looks as the best solution.

Good laws remain good as long as the people who implement are good. The provisions of special laws should be clear and unambiguous enough not to give room for enormous discretionary powers to the law enforcement. There should not be any political interference as well. Use of police should be considered in implementing counter-terror laws. The employment of armed forces, which is principally trained to wage war, should be avoided to maintain law and order. They should be summoned only in the case of extreme emergency. Proper safeguards should be built-in to prevent any kind of misuse by the law enforcement.

THE POLICE

While institutional continuity has served India and Sri Lanka well in some respects, in other respects both countries have struggled to fully reconcile the inherited institutions of colonialism with its post-Independence commitment to democracy, fundamental rights, and the rule of law.¹ Police is one of those inherited institutions. Police, especially, remained principally an instrument of coercive state power and political intelligence. It is not far from the truth

¹ K.S. Subramanian, 'Response: The Crisis of the IPS', *Frontline*, 2-15 February 2002.

to say that 'the Raj lives on' in the police force of contemporary India and Sri Lanka.² In this regard, the Supreme Court of India observed that the Indian Constitution 'did not seek to destroy the past institutions; it raised an edifice on what existed before'.³

Meaningful reform of police in both countries has been elusive since Independence. Initiatives for police reforms have been several in the Indian case, but so were the failures. Many reports of commissions set-up to look into reforms of the police lay idle. The main reason behind the lack of reforms is lethargy of the federal units of India to which belong law and order. However, there has been a serious effort in the recent past from the central government to replace the Police Act of 1861 and implement significant reform to the police in India.⁴ But, nothing tangible is visible on the ground. Presently, politicization of decision-making is the fundamental issue that has been plaguing the police institution. Therefore, one of the critical reforms required in the Indian police is granting of functional autonomy from undue political interference.⁵ The Government of India and all the state governments have to seriously consider implementing the recommendations of the National Police Commission (NPC). The NPC inter alia suggested the establishment of a statutory, state security commission in each state to exercise superintendence over the police and the establishment of a fixed, four-year tenure of office for the state Director-General of Police, who would be selected from a panel of three IPS officers from within the state police force.⁶ While insulating the police from political interference, sufficient checks should be incorporated to make sure that democratic accountability of the police is preserved so that the police bureaucracy does not become

²Arvind Verma, 'To Serve and Protect', *India Together*, 10 January 2006.

³State of Gujarat *vs* Mithibarwala, A.I.R. 1964 S.C. 1043.

⁴Madhav Godbole, 'Police Reforms: Pandora's Box No One Wants to Open', *Economic and Political Weekly*, 25 March 2006.

⁵R.K. Raghavan, 'An Insider's View: From the Outside', *Frontline*, 8-21 December 2001.

⁶This was recommended by the Second National Police Commission, August 1979.

so autonomous that it is able to act with impunity.⁷ In Sri Lanka, under the 17th Amendment to the Constitution, the Constitutional Council was constituted in March 2002 to recommend persons to independent commissions such as the Public Service Commission, the Judicial Service Commission, the Elections Commission, the Police Commission, the Bribery Commission, the Human Rights Commission and other designated commissions. The main aim was to reduce political interference.⁸ However, practically the functioning of the Constitutional Council is not free of political interference. This requires further reforms

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

CRIMINAL JUSTICE SYSTEM

On analysing counter-terror laws of both countries yet another important lesson is the need to improve the overall capacity of the criminal justice system. The overhauling is required in all three stages of the criminal justice process: investigation, prosecution, and adjudication.

- Principally, investigative procedures and mechanisms are not up to the mark in both countries. Low morale and lack of investigative skills in police are the main reasons that cause large-scale human rights violations. As a result, there is disproportionate reliance on confessions and witness statements.⁹ There has to be conscious and serious effort to strengthen the

⁷R.K. Raghavan, 'Reforming the Police', *Frontline*, 24 November-7 December 2001.

⁸See Rukshana Nanayakkara, 'The 17th Amendment to the Constitution', *State of Human Rights-2002*, Colombo: Law & Society Trust, 2002.

⁹Ved Marwah, 'Reforming Police Investigation', *Seminar*, June 1995, p. 30.

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

- The second concern in the criminal justice system that requires attention is the independence of prosecution. The more the prosecution is independent of the executive, the more the quality of the prosecution especially in terrorism-related cases. This aspect has been over and again emphasized in the Indian case by the Supreme Court, the Law Commission and the National Human Rights Commission.¹⁰
- This brings us to a pertinent issue of the quality of judiciary in both countries that is vested with the responsibility of adjudication. The Indian judiciary, at least at the higher level, has been more assertive, independent, and fairly free of political interference and rights conscious. However, the main problem is the huge backlog of cases due to resource and manpower constraints.¹¹ Due to this, there were enormous delays in the adjudication, increase in litigation costs, loss or diminished reliability of evidence by the time of trial, and unevenness and inconsistency in the verdicts that ultimately are reached at trial. Consequently, large numbers of under-trials languish in jails while awaiting trial. In many cases, the detention under trial even exceed beyond the maximum periods to which they could be sentenced if convicted. Justice delayed is of course justice denied. Such incapability of justice in delivering justice on time has the danger of reduction of faith in the justice system among members of the public. Therefore, this problem should be addressed on priority basis.

¹⁰Arvind Verma, 'Cultural Roots of Police Corruption in India', *Policing: An International Journal of Police Strategies & Management*, vol. 22, Issue 3, pp. 268-9.

¹¹At the end of 2005, there were approximately 3.5 million pending cases in the Indian High Courts of which approximately 6,50,000 were criminal cases. The situation in the subordinate courts were worse where there were over 25 million pending cases of which approximately 18 million were criminal cases.

In the case of Sri Lanka, its courts failed to check the repressive character of counter-terror laws. Lack of independence and undue political interference are partly responsible for this. However, it is appreciable that in some cases like *Joseph Perera vs. Attorney General*, *Boosa Prison case*, *Krishanthi Kumaraswamy case* and *Velu Arshadevi case*¹² the judiciary was bold enough to address the human rights aspects of counter-terror laws. But such 'checks' seem exceptions and not a norm.

CIVIL SOCIETY

The role of civil society is vital in moderating the abusive nature of the security laws. In India, human rights activists, bar associations and individual lawyers have long played an important role in challenging human rights violations that have occurred in the name of security. But in the Sri Lankan case, although individual lawyers raised voices against human rights concerns, there is no evidence of involvement of bar associations but for some civil society groups. Unlike in India, the Sri Lankan media has not been capable and assertive enough to provide accurate, reliable, and timely information on human rights which is crucial in highlighting the seriousness of human rights violations by special laws and the consequent redressal. This also brings out the larger question of

¹² In the *Joseph Perera* case in 1987, the Supreme Court for the first time struck down an Emergency Regulation by ruling that posters critical of the government fell within constitutionally protected rights. In 1992, the Supreme Court in the *Boosa* cases sought to remove procedural barriers (under Article 126 of the Constitution) to enable victims of extraordinary legislations to seek justice. The apex court also directed organizations like the Bar Association of Sri Lanka to provide legal aid to the victims. However, there was no follow-up action. In the *Krishanthi Kumaraswamy* case, the High Court in Colombo on 3 July 1998, for the first time, granted members of the armed forces and police maximum sentences of death for human rights violations caused due to misuse of PTA and Emergency Regulations. The Sri Lankan Supreme Court, in a landmark judgment on 25 January 2002, awarded SLR 150,000 as compensation to *Velu Arshadevi*, who was arrested under PTA and later raped in custody of the Sri Lankan security forces. This was the first time that the court awarded compensation to a rape victim, confirming that rape in custody constitutes torture.

freedom of the media on the island. Those sections of the media that dared to take an independent and objective line are suppressed by various means in the name of security.

COMPREHENSIVE APPROACH

As one strategist has noted, 'terrorism is not ubiquitous and neither is it uncontainable, but the potential for its occurrence is virtually as widespread as is the manifestation of bitter political antagonisms . . . reduce the latter and you will reduce, though not eliminate, the former.'¹³ The main objective of security laws should be to moderate political antagonisms rather than aiding the repressive arm of the state. It should be acknowledged that socio-economic pressures, unmet political aspirations, personal bitter experiences of innocents and their relations with the repressive arm of the state, etc., contribute to the terrorist reservoir. The aim of the terror laws should be to take all these into consideration. As David Fromkin said, 'Terrorism wins only if you respond to it in the way that the terrorists want you to: which means that its fate is in your hands and not in theirs.' It is in the hands of the state. As the former UN Secretary General pointed out, 'we should all be clear that there is no trade-off between effective action against terrorism and the protection of human rights. On the contrary, I believe that in the long term we shall find that human rights, along with democracy and social justice, are one of the best prophylactics against terrorism.'¹⁴ Security laws could be one of the 'best prophylactics' in countering terrorism provided they plug all loop holes that provide space for human rights abuses. The core counter-terrorism strategy should revolve around 'less fear-mongering' and 'more confidence'.¹⁵ Adhering to human rights obligations when combating terrorism, therefore, helps to ensure that advocates of violence do not win sympathy from the ranks of those harmed and alienated by the

¹³ Colin S. Gray, 'Combating Terrorism', *Parameters*, Autumn 1993, p. 20.

¹⁴ Kofi Annan's address to the UN Security Council meeting, 21 January 2002.

¹⁵ Benjamin Friedman, 'Terrorism Hysteria Watch', *Cato@Liberty*, 23 January 2009.

state.¹⁶ It must be emphasized that attentiveness to human rights concerns is not simply a moral and legal imperative, but also a crucial strategic imperative. Special laws must also seek to ensure that terrorism-related offences are investigated, prosecuted, and adjudicated more effectively and, in turn, bring down the 'crisis of legitimacy'. For this, comprehensive reforms are required in the entire criminal justice system.

¹⁶ Chaman Lal, 'Terrorism and Insurgency', *Seminar*, November 1999.

Bibliography

- Adiri, Jonathan, *Counter-terror Warfare: The Judicial Front—Confronting the 'Democratic Dilemma' Counter-terror Warfare and the Evolution of the 'Probable Scope'*, Herzlia International Policy Institute of Counter-terrorism, July 2005.
- Alles, A.C., *Insurgency – 1971: An Account of the April Insurrection in Sri Lanka*, Colombo: The Colombo Apothecaries' Co. Ltd., 1977.
- Amersinghe, A.R.B. and S.S. Wijeratne, *Human Rights: Theory to Practice—Essays in Honour of Deshamanya R.K.W. Goonesekere*, Colombo: Legal Aid Commission of Sri Lanka & Human Rights Commission of Sri Lanka, 2005.
- Anderson, David and David Killingray (eds.), *Policing and Decolonisation: Politics, Nationalism, and the Police, 1917-65*, Manchester: Manchester University Press, 1992.
- Arasaratnam, S., 'The Ceylon Insurrection of April 1971: Some Causes and Consequences', *Pacific Affairs*, vol. 45, no. 3, 1972, pp. 356-71.
- Arnold, David, 'Police Power and the Demise of British Rule in India, 1930-47', in David Anderson and David Killingray (eds.), *Policing and Decolonisation: Politics, Nationalism, and the Police, 1917-65*, Manchester: Manchester University Press, 1992.
- Ayoob, Mohammad, *The Third World Security Predicament: State-making, Regional Conflict and International System*, Boulder: Lynne Rienner, 1995.
- , 'State Making, State Breaking and State Failure: Explaining the Roots of Third World Insecurity', Paper prepared for the seminar on 'Conflict and Development: Causes, Effects and Remedies', The Hague, Netherlands Institute of International Relations, 22-4 March 1994, pp. 2-3.
- Bakshi, G.D., *Left Wing Extremism in India*, Manekshaw Paper no. 9, New Delhi: Centre for Land Warfare Studies, April 2009.

- Balasuriya, Fr Tissa, 'Youth, Insurrection and Democracy in Sri Lanka: 1971-1987: Can Sri Lanka Avoid Blood Bath of Youth?' *Logos*, vol. 26, no. 2, August 1987, p. 32.
- Banerjee, Dipankar, *Security Studies in South Asia: Change and Challenges*, New Delhi: Manohar, 2000.
- Banerjee, Sumanta, *In the Wake of Naxalbari*, Kolkata: Subarnarekha, 1980.
- Barrier, N. Gerald and Verne A. Dusenbery (eds.), *The Sikh Diaspora: Migration and Experience beyond Punjab*, New Delhi: Chanakya Publications, 1989.
- Bayley, David H., 'The Indian Experience with Preventive Detention', *Pacific Affairs*, vol. 35, no. 2, Summer, 1962, pp. 99-115.
- Bjorgo, Tore (ed.), *The Root Causes of Terrorism: Myths, Reality and Ways Forward*, London: Routledge, 2005.
- Booth, Ken (ed.), *New Thinking about Strategy and International Security*, London: HarperCollins Academic, 1991.
- Bose, Sumantra, *Kashmir: Roots of Conflict, Paths to Peace*, New Delhi: Vistaar Publications, 2003.
- Brar, K.S., *Operation Blue Star: The True Story*, New Delhi: South Asia Books, 1993.
- Buzan, Barry, *People, States, and Fear*, Hemel Hempstead: Harvester Wheatsheaf, 1991.
- Carter, Ashton B., John Deutch & Philip Zelikow, 'Catastrophic Terrorism', *Foreign Affairs*, vol. 77, no. 6, 1999, pp. 80-94.
- Centre for Rational Development, *Sri Lanka: Myths and Realities*, Colombo: Centre for Rational Development, 1984.
- Clutterbuck, Lindsay, 'Law Enforcement', in Audrey Kurth Cronin and James M. Ludes (eds.), *Attacking Terrorism: Elements of a Grand Strategy*, Washington D.C.: Georgetown University Press, 2004, pp. 140-61.
- Cohen, Stephen Philip, 'The Jihadists Threat to Pakistan', *Washington Quarterly*, vol. 26, no. 3, Summer 2003, pp. 7-25.
- Cronin, Audrey Kurth and James M. Ludes (eds.), *Attacking Terrorism: Elements of a Grand Strategy*, Washington D.C.: Georgetown University Press, 2004.
- Dash, Satya Prakash, *Naxal Movement and State Power*, New Delhi: Sarup and Sons, 2006.
- Davis, Anthony, 'Tamil Tiger International', *Jane's Intelligence Review*, vol. 8, no. 10, 1996, pp. 469-73.

- Dayal, John and Ajoy Bose, *The Shah Commission Begins*, New Delhi: Orient Longman, 1978.
- Dhavan, Rajeev, 'Sugarcoating POTA', *The Hindu*, 31 October 2003.
- Dickson, Brice, 'Law versus Terrorism: Can Law Win?', *European Human Rights Law Review*, Issue 1, 2005, pp. 11-28.
- Dillon, Michael, *Politics of Security: Towards a Political Philosophy of Continental Thought*, London: Routledge, 1996.
- Doval, Ajit, 'Islamic Terrorism in South Asia and India's Strategic Response', *Policing: A Journal of Policy and Practice*, vol. 1, no. 1, 2007, pp. 63-9.
- Dubey, Swaroop Rani, *One-day Revolution in Sri Lanka: Anatomy of 1971 Insurrection*, Jaipur: Aalekh Publishers, 1988.
- Dyer, Clare, 'It Calls into Question the Very Existence of an Ancient Liberty of which this Country is Proud: Freedom from Arbitrary Arrest and Detention', *The Guardian*, 17 December 2004.
- Friedman, Benjamin, 'Terrorism Hysteria Watch', *Cato@Liberty*, 23 January 2009.
- Ganguly, Sumit, *The Crisis in Kashmir: Portents of War, Hopes of Peace*, Washington, D.C.: Woodrow Wilson Center, 1997.
- Ganor, Boaz, 'Preface', in Jonathan Adiri, *Counter-terror Warfare: The Judicial Front—Confronting the 'Democratic Dilemma' Counter-terror Warfare and the Evolution of the 'Probable Scope'*, Herzlia International Policy Institute of Counter-terrorism, July 2005.
- Gerges, Fawaz A., *The Far Enemy: Why Jihad Went Global*, New York: Cambridge University Press, 2005.
- Gill, K.P.S., 'The Imperatives of National Security Legislation in India', *Seminar*, no. 512, April 2002.
- , *Punjab: The Knights of Falsehood*, New Delhi: Har-Anand, 1997.
- Godbole, Madhav, 'Police Reforms: Pandora's Box No One Wants to Open', *Economic and Political Weekly*, 25 March 2006.
- Gosh, Shankar, *The Naxal Movement: A Maoist Experiment*, Kolkata: Firma K.L. Mukhopadhyay, 1974.
- Gray, Colin S., 'Combating Terrorism', *Parameters*, Autumn 1993, pp. 17-23.
- Gurr, Nadine and Benjamin Cole, *The New Face of Terrorism: Threats from Weapons of Mass Destruction*, London: I.B. Tauris, 2000.
- Halliday, F., 'The Ceylonese Insurrection', *New Left Review*, no. 69, September-October 1971, pp. 55-91.
- Hellmann-Rajanayagam, Dagmar, *The Tamil Tigers: Armed Struggle for Identity*, Stuttgart: Franz Steiner Verlag, 1994.

- Howard, Col. Russ, 'The New Terrorism', MIT Security Studies Program Seminar, 9 March 2005.
- Humphrey, Michael, 'Human Rights, Counter-Terrorism, and Security', Paper presented at the seminar on 'Terrorism and Security Law' as part of the 'Globalisation and Human Rights Seminar Series', The Australian Human Rights Centre, UNSW Faculty of Law, 27 August 2003.
- Hussain, Wasbir, 'Insurgency in India's Northeast: Cross-border Linkages and Strategic Alliances', *Faultlines*, vol. 17, February 2006, pp. 105-25.
- Ignatieff, Michael, *The Lesser Evil: Political Ethics in an Age of Terror*, Princeton: Princeton University Press, 2004.
- Iyer, Venkat, *States of Emergency: The Indian Experience*, New Delhi: Butterworths, 2000.
- Jenkins, Brian Michael, 'The New Age of Terrorism', in David Kamien (ed.), *The MacGraw-Hill Handbook on Homeland Security*, Santa Monica: RAND Corp., 2006, pp. 117-30.
- Jinks, Derek P., 'The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India', *Michigan Journal of International Law*, vol. 22, no. 2, Winter 2001, p. 311.
- Joseph, Josy, 'Securitisation of Illegal Migration of Bangladeshis to India', *RSIS Working Paper no. 100*, January 2006.
- Kalhan, Anil et al., 'Colonial Continuities: Human Rights, Terrorism and Security Laws in India', *Colombia Journal of Asian Law*, vol. 20, no. 1, 2006, pp. 93-234.
- Kamien, David (ed.), *The MacGraw-Hill Handbook on Homeland Security*, Santa Monica: RAND Corp., 2006.
- Kang, Charanjit Singh, *Counterterrorism: Punjab a Case Study*, Thesis submitted to the School of Criminology, Simon Fraser University, Spring 2005.
- Kanwal, Gurmeet and N. Manoharan, *India's War on Terror*, New Delhi: Knowledge World, 2010.
- Kearney, Robert and Janice Jiggins, 'The Ceylon Insurrection of 1971', *Journal of Commonwealth and Comparative Politics*, vol. XIII, March 1975, pp. 40-64.
- Krahmann, Elke (ed.), *New Threats and New Actors in International Security*, New York: Palgrave Macmillan, 2005.
- Kumar, Suneel, 'Linkages between the Ethnic Diaspora and the Sikh Ethno-national Movement in India', *Faultlines*, vol. 19, April 2008.

- Lal, Chaman, 'Terrorism and Insurgency', *Seminar*, Issue no. 483, November 1999.
- Laqueur, Walter, 'Postmodern Terrorism', *Foreign Affairs*, vol. 75, no. 5, September-October 1996, pp. 24-36.
- , *The New Terrorism: Fanaticism and the Arms of Mass Destruction*, London: Oxford University Press, 1999.
- Latimer, William Scott, *What Can the United States Learn from India to Counter Terrorism?* Thesis submitted to the Naval Postgraduate School, Monterey, California, March 2004.
- Lesser, Ian O., 'Countering The New Terrorism: Implications for Strategy', in I.O. Lesser et al., *Countering the New Terrorism*, Santa Monica: The RAND, 1999.
- Lesser, O. et al., *Countering the New Terrorism*, Santa Monica: RAND, 1999.
- Makinda, S.M., 'Security and Sovereignty in the Asia-Pacific', *Contemporary Southeast Asia*, vol. 23, no. 3, 2001, pp. 401-19.
- Marty, Martin E. and R. Scott Appleby (eds.), *Fundamentalism and the State*, Chicago: Chicago University Press, 1993.
- Marwah, Ved, 'Reforming Police Investigation', *Seminar*, June 1995.
- , 'India's Internal Security Challenges', IDSA Foundation Day Lecture, 11 November 2003.
- , *Uncivil Wars: Pathology of Terrorism in India*, New Delhi: Centre for Policy Research, 1996.
- Maskaliunaite, Asta, 'Protecting Democracy from Terrorism: Lesser Evil and Beyond', *Baltic Security & Defence Review*, vol. 9, 2007, pp. 5-27.
- Mathur, Kuldeep, 'The State and the Use of Coercive Power in India', *Asian Survey*, vol. 32, no. 4, April 1992, pp. 337-49.
- Morgan, Mathew J., 'Origins of New Terrorism', *Parameters*, vol. 34, no. 1, Spring 2004, pp. 54-71.
- Muni, S.D., 'Responding to Terrorism: An Overview', in S.D. Muni (ed.), *Responding to Terrorism in South Asia*, New Delhi: Manohar, 2006.
- Nadesan, S., *The JVP Insurgency of 1971: A Speech made in the Ceylon Senate on 14 and 15 May 1971*, Colombo: The Nadesan Centre for Human Rights through Law, 1988.
- Nanayakkara, Rukshana, 'The 17th Amendment to the Constitution', *State of Human Rights 2002*, Colombo: Law & Society Trust, 2002.

- Narula, Smita, 'Overlooked Danger: The Security and Rights Implications of Hindu Nationalism in India', *Harvard Human Rights Journal*, 2003, pp. 46-52.
- Natarajan, Sarayu & Ananth Lakshman, 'Admissibility of Confessions Taken Under POTA for Conviction of Offences Under the IPC', *Asia Rights Journal*, Issue 3, December 2004.
- National Human Rights Commission of India, *Opinion in Regard: The Prevention of Terrorism Bill, 2000*, available at http://nhrc.nic.in/annexDoc00_01.htm#no2.
- Noorani, A.G., 'Preventive Detention in India', *Economic and Political Weekly*, vol. 26, no. 46, 16 November 1991, p. 2608.
- Oberoi, Harjot Singh, 'Sikh Fundamentalism: Translating History into Theory', in Martin E. Marty R. Scott Appleby (eds.), *Fundamentalism and the State*, Chicago: Chicago University Press, 1993.
- Obeyesekere, Gananath, 'The Institutionalisation of Political Violence and the Dismantling of Democracy in Sri Lanka', in Centre for Rational Development, *Sri Lanka: Myths and Realities*, Colombo: Centre for Rational Development, 1984.
- Pape, Robert, 'The Strategic Logic of Suicide Terrorism', *American Political Science Review*, vol. 97, no. 3, August 2003, pp. 343-61.
- Perera, Sasanka, 'Political Violence, Structural Amnesia and Lack of Remorse', in Jayadeva Uyangoda and J. Biyanwila (eds.), *Matters of Violence: Reflections on Social and Political Violence in Sri Lanka*, Colombo: Social Scientists' Association, 1997.
- Pettigrew, Joyce, *The Sikhs of the Punjab: Unheard Voices of State and Guerrilla Violence*, London: Zed Books, 1995.
- Qadir, Shaukat, 'The Concept of International Terrorism: An Interim Study of South Asia', *Round Table*, 2001, no. 360, July, pp. 333-43.
- Raghavan, R.K., 'An Insider's View: From the Outside', *Frontline*, vol. 18, no. 25, 8-21 December 2001.
- , 'Reforming the Police', *Frontline*, vol. 18, no. 24, 24 November-7 December 2001.
- Ramanathan, Usha, 'Extraordinary Laws and Human Rights Insecurities', *Asia Rights Journal*, Issue 1, July 2004, pp. 1-6.
- Roberts, Michel, 'Filial Devotion in Tamil Culture and the Tiger Cult of Martyrdom', *Contributions to Indian Sociology*, vol. 31, no. 2, July-December 1996, pp. 245-72.
- Schalk, Peter, 'The Concept of Martyrdom of the LTTE', *Temenos*, vol. 33, 1997, pp. 151-90.

- Schofield, Victoria, *Kashmir in Conflict: India, Pakistan and the Unfinished War*, London: I.B. Tauris, 2000.
- Seminarist, 'Time to end abuses', *Seminar*, Issue 512, April 2002.
- Senadhira, Sugeeswara P., 'Internal and External Factors in Security Studies in Sri Lanka', in Dipankar Banerjee, *Security Studies in South Asia: Change and Challenges*, New Delhi: Manohar, 2000.
- Senaratne, Jagath P., 'The JVP and Tamil Secessionist Insurrections of Sri Lanka and the Naxalite Insurrection(s) of India: A Provisional Comparative Assessment', Paper presented at the Workshop on the 'Naxalite Movement' organised by Observer Research Foundation, Chennai, India, 28-9 January 2005.
- Sezhiyan, Era, 'Perverting the Constitution', *Frontline*, vol. 18, no. 25, 8-21 December 2001.
- Silke, Andrew, 'Fire of Iolau: The Role of State Countermeasures in Causing Terrorism and What Needs to be Done', in Tore Bjorgo (ed.), *The Root Causes of Terrorism: Myths, Reality and Ways Forward*, London: Routledge, 2005.
- Singh, Jaswant, 'Beleaguered State', *Seminar*, no. 345, May 1988, pp. 14-19.
- Singh, Khushwant, *History of the Sikhs*, Volume 2: 1839-1988, Colombia: South Asia Books, 1999.
- Singh, Ujjwal Kumar, 'POTA and Federalism', *Economic and Political Weekly*, vol. 39, no. 18, 1 May 2004, pp. 1-7.
- Sorabjee, Soli J., 'Subverting the Constitution', *Seminar*, no. 345, May 1988, pp. 35-9.
- Spencer, Alexander, 'Questioning the Concept of "New Terrorism"', *Peace, Conflict & Development*, Issue 8, January 2006, pp. 1-33.
- Subramanian, K.S., 'Response: The Crisis of the IPS', *Frontline*, 2-15 February 2002.
- Tan, Andrew & Kumar Ramakrishna (eds.), *The New Terrorism: Anatomy, Trends and Counter-Strategies*, Singapore: Eastern Universities Press, 2002.
- Tatla, Darshan Singh, *The Sikh Diaspora: The Search for Statehood*, Seattle, Washington: University of Washington Press, 1999.
- Tellis, Ashley J., *Pakistan and the War on Terror: Conflicted Goals, Compromised Performance*, Washington D.C.: Carnegie Endowment for International Peace, 2008.
- Thomas, Caroline, 'New Directions in Thinking about Security in the Third World', in Ken Booth (ed.), *New Thinking about Strategy*

- and *International Security*, London: HarperCollins Academic, 1991), pp. 267-89.
- Tigar, Michael E., 'Terrorism and Human Rights', *Monthly Review*, vol. 53, no. 6, November 2001.
- Tucker, David, 'What's New About the New Terrorism and How Dangerous Is It?' *Terrorism and Political Violence*, vol. 13, Autumn, 2001, pp. 1-14.
- Udagama, Deepika, 'Taming of the Beast: Judicial Responses to State Violence in Sri Lanka', *LST Review*, vol. 9, Issue 137, March 1999, pp. 31-3.
- Uyangoda, Jayadeva, 'A State of Desire?—Some Reflections on the Unreformability of Sri Lanka's Post-colonial Polity', in S.T. Hettige and Markus Mayer, *Sri Lanka at Crossroads: Dilemmas and Prospects after 50 Years of Independence*, Delhi: Macmillan India Limited, 2000.
- Uyangoda, Jayadeva and J. Biyanwila (eds.), *Matters of Violence: Reflections on Social and Political Violence in Sri Lanka*, Colombo: Social Scientists' Association, 1997.
- Vayrynen, Raimo, 'Towards a Comprehensive Definition of Security: Pitfalls and Promises', Paper prepared at the 31st Annual Convention of the International Studies Association, Washington, D.C., 10-14 April 1990.
- Verma, Arvind, 'Cultural Roots of Police Corruption in India', *Policing: An International Journal of Police Strategies & Management*, vol. 22, Issue 3, pp. 264-79.
- , 'To Serve and Protect', *India Together*, 10 January 2006.
- Verma, Preeti (ed.), *The Terror of POTA and other Security Legislation: A Report on the People's Tribunal on the Prevention of Terrorism Act and Other Security Legislation*, New Delhi: Human Rights Law Network, 2004.
- Walker, Rob, 'The Concept of Security and International Relations Theory', Working Paper no. 3, First Annual Conference on 'Discourse, Peace, Security and International Society', Ballyvaughn, Ireland, 9-16 August 1987.
- Walt, Stephen M., 'Rigor or Rigor Mortis? – Rational Choice and Security Studies', *International Security*, vol. 23, Issue 4, pp. 5-48.
- , 'The Renaissance of Security Studies', *International Studies Quarterly*, vol. 35, no. 2, June 1991, pp. 211-39.
- Warnapala, W.A. Wiswa, 'The Marxist Parties of Sri Lanka: The 1971 Insurrection', *Asian Survey*, vol. 15, no. 9, 1975, pp. 745-57.

- Warnapala, W.A. Wiswa, *Ethnic Strife and Politics in Sri Lanka: An Investigation into Demands and Responses*, New Delhi: Navrang, 1994.
- Wickremasinghe, Suriya, 'Emergency Rule in the Early Seventies', in A.R.B. Amersinghe and S.S. Wijeratne, *Human Rights: Theory to Practice: Essays in Honour of Deshamanya R.K.W. Goonesekere*, Colombo: Legal Aid Commission of Sri Lanka & Human Rights Commission of Sri Lanka, 2005.
- Wilkinson, Paul, *Political Terrorism*, London: Macmillan, 1974.
- Wilson, A.J., 'Ceylon: The People's Liberation Front and the 'Revolution' that Failed', *Pacific Community*, vol. 3, no. 2, 1972, pp. 364-77.
- , *Sri Lankan Tamil Nationalism: Its Origins and Developments in the 19th and 20th Centuries*, London: C. Hurst & Co, 2000.

The first of these was the establishment of the
 first school in the district in 1854.
 The second was the establishment of the
 first hospital in the district in 1861.
 The third was the establishment of the
 first police station in the district in 1868.
 The fourth was the establishment of the
 first court in the district in 1875.
 The fifth was the establishment of the
 first prison in the district in 1882.
 The sixth was the establishment of the
 first railway station in the district in 1889.
 The seventh was the establishment of the
 first telegraph office in the district in 1896.
 The eighth was the establishment of the
 first post office in the district in 1903.
 The ninth was the establishment of the
 first bank in the district in 1910.
 The tenth was the establishment of the
 first cinema in the district in 1917.
 The eleventh was the establishment of the
 first motor car in the district in 1924.
 The twelfth was the establishment of the
 first motor bus in the district in 1931.
 The thirteenth was the establishment of the
 first motor truck in the district in 1938.
 The fourteenth was the establishment of the
 first motor cycle in the district in 1945.
 The fifteenth was the establishment of the
 first motor boat in the district in 1952.
 The sixteenth was the establishment of the
 first motor car in the district in 1959.
 The seventeenth was the establishment of the
 first motor bus in the district in 1966.
 The eighteenth was the establishment of the
 first motor truck in the district in 1973.
 The nineteenth was the establishment of the
 first motor cycle in the district in 1980.
 The twentieth was the establishment of the
 first motor boat in the district in 1987.
 The twenty-first was the establishment of the
 first motor car in the district in 1994.
 The twenty-second was the establishment of the
 first motor bus in the district in 2001.
 The twenty-third was the establishment of the
 first motor truck in the district in 2008.
 The twenty-fourth was the establishment of the
 first motor cycle in the district in 2015.
 The twenty-fifth was the establishment of the
 first motor boat in the district in 2022.

RCSS PUBLICATIONS

- *Defence, Technology and Cooperative Security in South Asia: Report on the Proceedings of the Tenth Summer Workshop* (RCSS, 2004)
- *Environment Development and Human Security: Perspectives from South Asia* (2003)
- *Terrorism in South Asia: Impact on Development and Democratic Process* (SIPRA, 2003)
- *South Asia and the War on Terrorism* (India Research Press, 2003)
- *Shaping the Future—A South Asian Civil Society Dialogue* (RCSS, July 2002)
- *Small Arms and Human Insecurity* (RCSS, July 2002)
- *SAARC in the Twenty-First Century: Towards a Cooperative Future* (July 2002)
- *Memories of a Genocidal Partition: The Haunting Tale of Victims, Witnesses and Perpetrators* (RCSS, July 2002)
- *South Asian Security Futures: A Dialogue of Director's Regional Strategic Studies Institutes* (March 2002)
- *Globalization and Non-Traditional Security in South Asia* (September 2001)
- *The Simla Agreement. 1972: Its Wasted Promise* (Manohar, 2001)
- *Ending the Displacement Cycle: Finding Durable Solutions through Return and Resettlement* (RCSS, 2011)
- *Documents on Sri Lanka's Foreign Policy 1947-1965* (RCSS, 2005)
- *Terrorism in South Asia: Impact on Development and Democratic Process* (RCSS & Konrad Adenauer Foundation, 2003)
- *Environment, Development and Human Security: Perspectives from South Asia* (University Press of America, 2003)

- 50 Extremism in Pakistan and India: The Case of Jamaat-e-Islami and Shiv Sena (RCSS, 2010)
- 49 Democracy as a Conflict Resolution Model for Terrorism: A Case Study of India and Pakistan (RCSS, 2010)
- 48 Understanding Suicide Terrorism and Bangladesh and Sri Lanka (RCSS, 2010)
- 47 India's Security Dilemma vis-à-vis China: A Case of Optimum or Sub-Optimum Restraint? (RCSS, 2009)
- 46 Beyond the Security Impasse: State, Development and People (RCSS, 2008)
- 45 Conflict Transformation from Ethnic Movement to Terrorist Movement: Case Studies of Tamils in Sri Lanka and Mohajirs in Pakistan (RCSS, 2008)
- 44 Indo- US Nuclear Cooperation: Altering Strategic Positioning & Shifting Balance of Power in South Asia (RCSS, 2008)
- 43 Peace Building in Afghanistan: Revisiting the Global War on Terrorism (RCSS, 2008)
- 42 Getting to Rapprochement over Kashmir: Is Using the 'China Model' a Viable Alternative? (RCSS, 2007)
- 41 Role of a Third Party in Conflict Resolution: A Case Study of India and Norway in Sri Lanka (RCSS, 2007)
- 40 International Non-Governmental Organizations in Arms Control and Disarmament Potential and Viability (RCSS, 2007)
- 39 India- Pakistan Dialogue: Bringing the Society in (RCSS, 2007)
- 38 The 'People's War' in Nepal (RCSS, 2006)
- 37 Impact of Partition Refugees in Pakistan: Struggle for Empowerment and State's Response (Manohar, 2006)
- 36 Maritime Cooperation between India and Sri Lanka (Manohar, 2006)
- 35 Nuclear Risk Reduction Measures in South Asia: Problems and Prospects (Manohar,2006)
- 34 Indo-Pak Conflicts: Ripe to Resolve? (Manohar, 2005)
- 33 Small Arms and the Security Debate in South Asia (Manohar, 2005)

*R. Pathmanaba Iyer
27-B, High Street,
Plaistow*

Terrorism raises genuine security concerns that the state attempts to address through various measures. The use of counter-terrorism legislation is one such means, employed especially by democracies. The basic rationale is that the legal framework deals with terrorism, which is considered undemocratic, in a democratic way. In other words, legislation ought to adequately deter terrorist groups, but at the same time, prevail on the State from encroaching on human rights of the innocents.

The key questions addressed in this study are: Do counter-terror laws enhance security? If so, in what manner? If not, why and what are the problems involved? The study assumes that there is an inherent tension between State security and the security of its subjects. Measures like counter-terror legislation imposed for safeguarding State security end up eroding the basic rights of the individuals and ultimately threatening the 'comprehensive security' of the State. Comparative analyses of linkage between counter-terror laws and security in India and Sri Lanka – two important cases of 'developing democracies' that witnessed terrorism and political violence – throw many interesting findings. Jointly undertaken by two leading scholars of India and Sri Lanka, the study intends to fill the gap in the existing literature on legal aspects of terrorism & counter-terrorism.

N. Manoharan is currently Senior Fellow & Head, Internal Security Programme, at the Vivekananda International Foundation, New Delhi. His areas of interest include internal security, terrorism, Sri Lanka, Maldives, human rights, ethnic conflicts, multiculturalism, security sector reforms and conflict resolution. His recent books include '*Security Deficit: A Comprehensive Internal Security Strategy for India* (2012) and *India's War on Terror* (2010).

Dayani Panagoda is currently National Technical Advisor attached to the GIZ/FLICT/Ministry of National Languages and Social Integration in Sri Lanka. Her areas of interest are in Counter Terrorism, Insurgency and Civil-Military Relations, Conflict Resolution, Peace Studies (Negotiation and Mediation), International Relations and International Trade Law, Democratization and Human Rights Policy and Strategic Planning on Post War Early Recovery, Disarmament Demobilization and Reintegration, Security Sector Reforms and Social Integration.

Rs. 295

www.manoharbooks.com

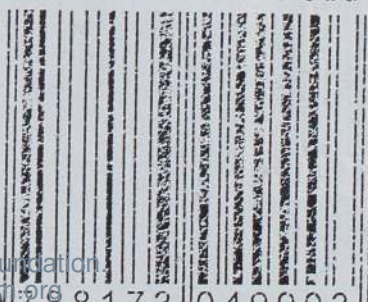
MANOHAR PUBLISHERS & DISTRIBUTORS

4753/23 Ansari Road, Daryaganj, New Delhi 110 00

Phones: 23284848, 23289100 • Fax: 23265162

E-mail: manbooks@vsnl.com

ISBN 978-81-7304-990-3



071999

