### Chapter 15

### NEOLIBERAL NATIONAL SECURITY: WIELDING COUNTERTERRORISM POWERS TO PROTECT ECONOMIC GROWTH

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#### **INTRODUCTION**

The last two central administrations in India—both the government led by the Congress Party and the former Prime Minister Manmohan Singh from 2004 to 2014, and the current government led by Bharatiya Janata Party (BJP) and Prime Minister Narendra Modi—have embraced liberalization and the growing role of multinational corporations as an integral part of the Indian economic plan, and the key to the growing influence of India on the global economic and political stage. The executive order issued by the Modi government in June 2016 to open up the Indian economy to foreign business and investment serves as a prime example: the ordered rules changes allow for foreign investors to establish 100 percent ownership in many types of companies, including those related to defense and security. Issuing this order was part of Prime Minister Modi's work toward fulfilling a 2014 campaign promise to increase the rate of growth in the Indian economy, and reflected part of the 25 years-long process of liberalization, privatization and globalization in India.

Protecting India's economic interests and the ability of corporations to thrive is of paramount importance to the government, even as terrorism has been perceived for many years as posing a serious threat to the growth of the Indian economy.<sup>2</sup> In March 2016, the External Affairs Minister of India, Sushma Swaraj, noted that terrorism posed a major threat to the stability of the Indian economy and its growth potential, and that strong and effective anti-terrorism measures were necessary to secure India's current and projected economic growth.<sup>3</sup>

The link between strong anti-terrorism measures as a predicate for strong economic growth is more than just a matter of political rhetoric. Under the 2012 amendments to the Unlawful Activities (Prevention) Act (UAPA) 1967, the definition of national security includes economic security, and the definition of terrorism includes threats or actual damage to public or private economic interests.<sup>4</sup> Hence, anything deemed by the government to threaten economic development can be viewed as a national security threat and, therefore, can be met with the anti-terrorism powers that have been accorded to the Central Government. The national security powers of the Central Government are remarkably broad and far-reaching, and should raise questions as to the potential for government overreaching or abuse. One example

<sup>&</sup>lt;sup>1</sup>Geeta Anand and Hari Kumar, *Hoping Jobs Follow, India Clears Investors' Path*, NY Times, 21 June 2016, at A1

<sup>&</sup>lt;sup>2</sup>India's National Security: Internal and External Threats, livemint.com, 27 June 2007, available at http://www.livemint.com/Specials/I10fKzf1lcWD6BG2zFuB3H/India8217s-National-Security-Internal-and-External-Threa.html (discussing how the process of growing and protecting the Indian economy is jeopardized by inadequate responses to internal and external national security threats).

<sup>&</sup>lt;sup>3</sup>Terrorism impinging on economic growth: Sushma Swaraj, zeenews.com, 1 March 2016, available at http://zeenews.india.com/news/india/terrorism-impinging-on-economic-growth-sushma-swaraj\_1861255 html. <sup>4</sup>Section 15 of the Unlawful Activities (Prevention) Amendment Act 2012.

discussed later in this chapter involves the Indian Telegraph Act of 1885, which authorizes the interception and storage of telegraph messages by the Central or State Governments in times of "public emergency, or in the interest of the public safety" if it is deemed necessary or expedient to do so in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence. Later interpretations and adaptations, such as Indian Telegraph Rules of 1951 and their amendments, allow for widespread surveillance and data collection (both content and metadata) in the name of national security. The Central Monitoring System (CMS) is currently being developed and used by the Central Government to collect enormous amounts of data under the authority of these statutes. Based on the current UAPA definition, that surveillance capability can be deployed in any instance in which the government believes that a threat to the economic security of India is at stake.

The combination of these three strands—an imperative to protect and grow India's economy, the definition of economic insecurity as a national security threat, and vast powers granted to deal with national security—has created a powerful vehicle by which the government can deal with perceived threats, but it also has created a potential for abuse that should be addressed and limited in order for India to maintain the character of its democracy and adherence to the rule of law. This chapter proceeds by first examining how economic security became to be a part of what the law considers to be national security. Second, it considers two contexts in which the government has used its extremely broad counterterrorism powers to crack down on perceived threats in the name of national security. In each of these contexts, the government has painted the picture of a near-existential threat that must be dealt with harshly, regardless of the risk of abuse of civil rights and civil liberties. The government's actions in terms of cracking down on anti-nationalist protest in one instance, and in secretly implementing a broad data collection and surveillance regime in another, illustrate the dangers of empowering the government to use its vast powers to prevent, curtail or punish those who pose or are perceived to pose a threat to the economic security of India.

#### HOW "NATIONAL SECURITY" CAME TO ENCOMPASS "ECONOMIC SECURITY"

India has struggled with internal and external national security threats since its independence in 1947.<sup>7</sup> India's legal response to those threats has relied on a framework of constitutionally and statutorily granted emergency powers, plus non-emergency criminal laws granting broad intelligence-gathering and police powers that in many ways operate similar to emergency powers.<sup>8</sup> This makes it all the more precarious for individuals or organizations labeled as "terrorists," who often find themselves with curtailed protections of civil liberties, and possibly subject to a draconian framework that compromises constitutional rights such as access to counsel, protection against torture and abuse, and other procedural rights in terrorism-related cases.<sup>9</sup> From a rule of law perspective, India should be ensuring that the legal definition of

<sup>&</sup>lt;sup>5</sup> Section 5(1) of the India Telegraph Act 1885.

<sup>&</sup>lt;sup>6</sup>E.g., Rule 419(*a*) of the Indian Telegraph Rules of 1951, Subs, by G.S.R. 193 (E), dated 1.3.2007 (w.e.f. 12.3.2007).

<sup>&</sup>lt;sup>7</sup> Anil Kalhan *et al.*, *Colonial Continuities: Human Rights, Terrorism and Security Laws in India*, vol. 20 Colum. J. Asian L., p. 93 at 99 (2006) (describing violence related to terrorism as a "chronic crisis of national security").

<sup>&</sup>lt;sup>8</sup> Articles 352-356 of the Constitution of India amended by The Constitution (Ninety-fourth Amendment) Act 2006 (stating the emergency powers provisions).

<sup>&</sup>lt;sup>9</sup> Surabhi Chopra, *National Security Laws in India: The Unraveling of Constitutional Constraints*, 17OR. REV. INT'L L.1, pp. 24-33 (2015) (describing the broad scope of India's antiterrorism laws, and the sometimes abusive effects on individuals within their purview); Sudha Setty, *Comparative Perspectives on Specialized* F: Sairam Bhat | LPG – P-3 Ch 13 | 2.01.2017 | R from Author 8-2-2017 | ELH Edit 3 Pf 28-2-2017

terrorism remains narrowly written and construed so as to avoid the potential for abuse. Yet the history of India's expansive definition of terrorism and its application to a variety of conventional and unconventional contexts suggests that the Indian Government is more focused on maintaining broad authority to investigate and prosecute security threats as it sees fit to define them, and less concerned with the civil and human rights abuses that may follow.

#### The evolving definition of terrorism

In the year after Emergency Rule ended in 1977, political, economic, and security-related pressures continued to undercut stability and economic growth in India. In the early 1980s the Punjabi separatist movement fueled fears that anti-nationalist movements throughout India would gain strength, motivating Parliament to pass the Terrorist Affected Areas (Special Courts) Act of 1984 (TAAA).<sup>10</sup> This statute contained the first legislative definition of a "terrorist," which required that a person kills, acts violently, disrupts essential services, or damages property; with the purpose of intimidating the public, coercing the government, endangering the sovereignty or integrity of India, or "affecting adversely the harmony between different religious, racial, language or regional groups or castes or communities." This definition is relatively broad, although it is tethered to conventional understandings of what constitutes terrorism, and is applicable only to designated "affected areas" within India.

Due to political unrest over the assassination of Prime Minister Indira Gandhi in 1984, the Terrorist and Disruptive Activities (Prevention) Act (TADA) was passed in 1985. This new Act defined terrorism in even broader terms as TAAA, with no geographic restriction to "affected areas." TADA included as "terrorists" those who acted violently "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..."<sup>13</sup>

TADA expired in 1995,<sup>14</sup> but the definition of terrorism was broadened further with the enactment of the Prevention of Terrorism Act 2002 (POTA), which was passed quickly by the Indian Parliament after the September 11 attacks in the United States and the attacks on the Parliament in Delhi in 2001. POTA defined a terrorist as one who acts with violence:

[W]ith intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances ... of a hazardous nature or by any other means whatsoever, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community.... or detains any person and threatens

*Trials for* Terrorism, vol. 63 ME. L. REV. p. 131,at 164 at 171 (2010) (discussing rule of law concerns with regard to the specialized courts used to try some terrorists in India).

<sup>&</sup>lt;sup>10</sup> The main objective of Terrorist Affected Areas (Special Courts) Act of 1984 (TAAA) is "An act to provide for the speedy trial of certain offences in terrorist affected areas and for matters connected therewith."

<sup>&</sup>lt;sup>11</sup> Section 2(1)(h) of the Terrorist Affected Areas (Special Courts) Act 1984.

<sup>&</sup>lt;sup>12</sup> "The Terrorist and Disruptive Activities (Prevention) Act, 1985, aims to make special provisions for the prevention of, and for coping with, terrorist and disruptive activities and for matters connected therewith or incidental thereto."

<sup>&</sup>lt;sup>13</sup> Section 3(i) of TADA.

<sup>&</sup>lt;sup>14</sup> Kartar Singh v State of Punjab, (1994) 2 SCR 375 (India) (upholding the constitutionality of TADA after acknowledging potential problems of overreach).

to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act..<sup>15</sup>

The POTA definition came under critique for, among other human rights concerns, long-term preventive detention of Muslims, poor people, members of tribal groups, protesters and Dalits as "terrorists." It was also criticized for enabling selective prosecution of such marginalized groups in special courts with diminished protections for defendants, <sup>16</sup> whereas other persons accused of the same acts were often not prosecuted at all, or were charged with ordinary criminal offenses and were tried in ordinary courts. <sup>17</sup> This was not a new phenomenon in the time of POTA. Security policies, regulations, and laws aimed at punishing anti-government act have been part of the governance of India since the East India Company established rules for dealing with separatists and seditionists in 1793. For over two centuries, various statutes and regulations have allowed for selective preventive detention of those perceived to be dangerous to society and, therefore, a security risk—even when there were no grounds for trial of the suspect.

#### Selective application of the "terrorist" label

Perhaps the most graphic recent example of the selective application of the label of "terrorism" occurred after the 2002 train fire in the town of Godhra, Gujarat. In that fire, 59 people, most of whom were members of the Vishwa Hindu Parishad, a group affiliated with the Hindu conservative political party, the Bharatiya Janata Party (BJP), died. A large group of Muslim residents of Godhra surrounded the train at the time and were in a contentious argument with those on the train. Investigations by the Gujarat State Government concluded that those outside of the train were a "mob" that intentionally lit the fire, whereas the Indian Central Government's investigators concluded that the fire originated accidentally. Violence and rioting broke out in numerous areas after the fire, resulting in the killings of approximately 1,100 people, most of whom were Muslims. 19

POTA was used to charge many of the Muslims who were part of the crowd outside of the train. Seventy-nine such suspects were held in POTA-authorized pre-trial detention for

<sup>&</sup>lt;sup>15</sup> Section 3(1)(a) of the Prevention of Terrorism Act 2002 (POTA),

<sup>&</sup>lt;sup>16</sup>Sudha Setty, *Comparative Perspectives on Specialized Trials for* Terrorism, vol. 63 ME. L. Rev. p. 131,at 164 at 171 (2010).

<sup>&</sup>lt;sup>17</sup> Ujjwal Kumar Singh, The *State, Democracy and Anti-Terror Laws in India*, pp. 165-219 (Routledge 2007) (documenting selective prosecution under POTA); Amos Guiora, Legislative and Policy Responses to Terrorism, A Global Perspective, vol.7, *San Diego Int'l L.J.* p. 125 at 171 (2005) (noting that some described POTA as a "terrorist law [that would be] ... used to terrorise minorities"); Sudha Ramachandran, Filling India's Anti-terrorism Void, Asia Times Online, 23 September. 2004,

http://www.atimes.com/atimes/South\_Asia/FI23Df03.html (noting that while the majority of the 32 organizations banned under POTA were Muslim, none of the Hindu extremist groups were ever targeted). 

18 Compare Report by the Commission of Inquiry Consisting of Mr. Justice G.T. Nanavati and Mr. Justice Akshay H. Mehta, Part I, 8th Sept. 2008, at p. 227 (the Gujarat Government's commission concluded that the train fire was a premeditated crime that was part of a larger conspiracy intended to kill Hindu activists); Fatal '02 Hindu train fire laid to accident, not mob, www. nytimes.com, 18 January 2005, available at <a href="http://www.nytimes.com/2005/01/17/world/asia/17iht-india html">http://www.nytimes.com/2005/01/17/world/asia/17iht-india html</a> (reporting that the Central Government's investigating concluded that the train fire was an accident).

<sup>&</sup>lt;sup>19</sup>Celia W. Dugger, *Religious Riots Loom Over Indian Politics*, nytimes.com, 27 July 2002, available at <a href="http://www.nytimes.com/2002/07/27/international/asia/27INDI.html">http://www.nytimes.com/2002/07/27/international/asia/27INDI.html</a> (describing the heinous ways in which many Muslims were killed and injured during the riots).

approximately seven years.<sup>20</sup> They were transferred for ordinary criminal processing only in early 2009, after the POTA Review Committee found that the designation of "terrorism" was inappropriate under the circumstances, and the Gujarat High Court affirmed that the starting of the train fire may have been criminal, but was not an act of terrorism.<sup>21</sup> Notably, POTA was never used to charge any Hindus involved in the violence and rioting. This disparity led to allegations of selective prosecution<sup>22</sup> and complicity by law enforcement and government officials as to the anti-Muslim violence.<sup>23</sup> This disparity also supported the critique that the government's vast counterterrorism authorities, when unchecked and employed freely, often led to abusive practices.

POTA was repealed in 2004 over sustained concern of human rights abuses by the police and intelligence community, but even at that time, the bulk of its powers were encapsulated in other statutes.<sup>24</sup> An expansive definition of terrorism was entrenched further in 2008 after the Mumbai terrorist attacks that left more than 160 people dead and hundreds more wounded.<sup>25</sup> Shortly after the attack and with little debate, Parliament passed two pieces of counterterrorism legislation: further amendments to the UAPA, and the National Investigation Agency Act 2008. Both statutes increased the power conferred on the Central Government to investigate and prosecute terrorist acts, with the latter law also establishing the National Investigation Agency.<sup>26</sup>

The difference in potential consequences between an ordinary criminal prosecution and that of a UAPA case is significant and problematic:<sup>27</sup> for example, in 2012 a UAPA-based prosecution of a prominent Communist Party leader on charges of impersonation, cheating, forgery, and criminal conspiracy for assuming a fake identity and forging documents was dismissed due to the failure to follow proper prosecution procedures. A court ordered the terrorism-related charges against the defendant dropped and, as a result, the defendant faced only the possibility of charges under the Indian Penal Code. If he were to have been found guilty under the UAPA sentencing guidelines, he would have faced potential life imprisonment; under the Indian Penal

<sup>&</sup>lt;sup>20</sup>POTA not applicable in Godhra riots case: Gujarat HC, thehindu.com, 13 February. 2009, available at http://timesofindia.indiatimes.com/india/Pota-not-applicable-in-Godhra-riots-case-Gujarat-HC/articleshow/4120487.cms.

<sup>&</sup>lt;sup>21</sup>POTA review panel's recommendations binding on Gujarat: Supreme Court, thehindu.com, 22 October. 2008, available at http://www.thehindu.com/todays-paper/tp-national/pota-review-panels-recommendation-binding-on-gujarat-supreme-court/article1361671.ece.

<sup>&</sup>lt;sup>22</sup>See Human Rights Watch, We Have No Orders to Save You: State Participation and Complicity in Communal Violence in Gujarat, April 2002, available at http://www.hrw.org/reports/2002/india/.

<sup>&</sup>lt;sup>23</sup>*Ibid.*. *See also* Gardiner Harris & Hari Kumar, *Stiff Sentence for Former Gujarat Minister*, nytimes.com, 31 Aug. 2012, available athttp://india.blogs.nytimes.com/2012/08/31/stiff-sentence-for-former-gujarat-minister/ (describing the decades-long sentences for 32 Gujarat government officials in conjunction with the 2002 riots); *See* Ellen Barry, *U.S. Reaches Out to Indian Opposition Leader It Once Rebuked*, nytimes.com, Feb. 10, 2014, available at <a href="http://www.nytimes.com/2014/02/11/world/asia/us-reaches-out-to-indian-opposition-leader-it-once-rebuked.html">http://www.nytimes.com/2014/02/11/world/asia/us-reaches-out-to-indian-opposition-leader-it-once-rebuked.html</a> (describing the diplomatic chill between the United States and Narendra Modi as a result of Modi's governance of Gujarat during the 2002 riots).

<sup>&</sup>lt;sup>24</sup>Unlawful Activities (Prevention) Amendment Ordinance, 2004, No. 2, § 15, Acts of Parliament, 2004 (India) (adopting the POTA definition of terrorism in its entirety).

<sup>&</sup>lt;sup>25</sup> Somini Sengupta & Keith Bradsher, India Faces a Reckoning as Terror Toll Eclipses vol. 170, *N.Y. Times*, 30 Nov..2008, at A1 (questioning whether Indian authorities could have better anticipated the terrorist attack and ensured heightened security).

<sup>&</sup>lt;sup>26</sup> Human Rights Watch, Back to the Future: India's 2008 Counterterrorism Laws p. 1 (2010).

<sup>&</sup>lt;sup>27</sup> Repeating the Mistakes of the Past, Human Rights Documentation Center (Jan. 22, 2009), http://www.hrdc.net/sahrdc/hrfeatures/HRF191.htm (noting that the UAPA definition institutionalizes the worst overreaching and missteps from TADA and POTA because it relates not only to counterterrorism policy, but to other "disruptive" activities).

Code, he faced a maximum of seven years' imprisonment.<sup>28</sup>

#### Broadening "terrorism" to include economic matters

Since the effect of being charged under the UAPA is enormous, the rule of law demands appropriate safeguards to protect against overly broad use or misuse. Yet the definition of terrorism in the UAPA amendments of 2012 makes clear that the law is moving the opposite direction: first, "security" includes "economic security," which in turn includes "financial, monetary and fiscal stability, security of means of production and distribution, food security, livelihood security, energy security, ecological and environmental security." Secondly, the "person" who can be viewed under the UAPA as engaging in terrorist activity not only includes natural persons, but also can be a company; a firm; an organization or an association of persons or a body of individuals, whether incorporated or not; every artificial juridical person...; and any agency, office or branch owned or controlled by any person falling within any of the preceding sub-clauses. Thirdly, the production or smuggling or circulation of high quality counterfeit Indian currency is defined as a terrorist act. In the control of the production of the production of the production of high quality counterfeit Indian currency is defined as a terrorist act.

The UAPA definition is not tethered to the commonly understood elements of terrorism, such as political violence meant to intimidate a group of civilians, or violence involving serious injury or killing, hostage-taking or large-scale destruction.<sup>32</sup> This repeated expansion of the definition of "terrorism" is particularly noteworthy given the current BJP platform on national security, which calls for increasing the counter-terrorism powers that it claims were "dismantled" under the previous government.<sup>33</sup> As of this writing, it is not yet apparent if or how the BJP plans to increase the government's counter terrorism powers and whether those powers will be directed against perceived threats to economic security, yet the UAPA's sweeping definition of terrorism provides cause for concern.

## HOW BROAD DEFINITIONS OF TERRORISM MAY LEAD TO ABUSE UNDER THE GUISE OF MAINTAINING ECONOMIC SECURITY

The authority of Indian intelligence and law enforcement agencies to combat security threats forcefully is long-standing and comes with inadequate limitations and checks. These particular concerns are evident in two recent contexts: first, the government's willingness to crack down on anyone that it believes has an "anti-nationalist" tendency, even if those anti-government sentiments could be characterized as unpopular but protected expression. This treatment of unpopular expression as a near-existential security threat raises broader concerns as to what actions the government might take if it comes across a perceived threat to the economic growth

<sup>&</sup>lt;sup>28</sup>Jiby Katakayyam, *Cops Goofed Up, Ghandy Cleared*, thehindu.com, 30 Mar. 2012, available at <a href="http://www.thehindu.com/todays-paper/tp-national/tp-otherstates/cops-goofed-up-ghandy-cleared/article3260527.ece">http://www.thehindu.com/todays-paper/tp-national/tp-otherstates/cops-goofed-up-ghandy-cleared/article3260527.ece</a>. The presiding judge held that sufficient evidence supported charges against the defendant under Sections 419 (punishment for cheating by personation), 420 (cheating by dishonestly inducing delivery of property), 468 (forgery for purpose of cheating), 474 (having knowing possession of certain forged documents and intending their use as genuine), and 120B (punishment of criminal conspiracy) of the Indian Penal Code. *Id.* 

<sup>&</sup>lt;sup>29</sup>Section 2(1)(*ea*) Unlawful Activities (Prevention) Act, 1967, inserted by Amendment Act of 2012.

<sup>&</sup>lt;sup>30</sup>Section 2(1)(ec), Ibid.

<sup>&</sup>lt;sup>31</sup>Section 15(1)(*a*)(*iiia*), *Ibid*. These acts have long been criminalized under British colonial and Indian law. *See* Indian Penal Code (1860), sections 465, 468, 489D.

<sup>&</sup>lt;sup>32</sup> Sudha Setty, *What's in a Name? How Nations Define Terrorism Ten Years After 9/11*, vol. 33 *U. PA. J. INT'L L.*, p. 1, at 6-17 (2011) (describing the common working definitions of terrorism used at the international level). <sup>33</sup>Bharatiya Janata Party, Election Manifesto 2014, at p. 38, available at

Dialatiya Janata Farty, Election Mannesto 2014, at p. 36, available at

of India, which it may then consider as a national security threat. Second, the government's efforts to gather, store, and access huge troves of personal and private electronic data in its drive to root out any and all terrorist threats that the government itself perceives has corroded the rule of law norms by which the government ought to abide. Such broadly and vaguely understood counterterrorism programs, justified by the government as necessary to maintain the integrity of the nation, should be held to better transparency and accountability standards. If economic security is used in the future as the justification for this or any other similarly intrusive counterterrorism effort, the precedent being set now suggests that few controls will be readily available to constrain government officials or hold them to account when abuses occur.

#### Cracking down on so-called "anti-nationalists"

Historically, the government has not hidden the fact that it will crack down on any person or group that it deems to be "anti-nationalist" or a security threat. Many critiques of the government's abuse of power against anti-nationalists are not new—not only have they existed since the time of British colonial rule, but they persisted through the years of Emergency rule and in the decades since then.<sup>34</sup>The events surrounding protests at Jawaharlal Nehru University (JNU) in 2016 illustrate a continuation of this zero-tolerance policy toward anti-nationalist rhetoric, and they also illustrate the dangers of allowing the government to re-characterize anti-government opinions and non-violent protest as seditious and, therefore, a threat to national security.

In February 2016, students at JNU organized massive and disruptive rallies on campus to protest various government policies, including those that led to the 2013 execution of Afzal Guru, a Kashmiri separatist convicted of involvement in the deadly attacks on the Indian Parliament building in 2001.<sup>35</sup> The JNU students involved in the protest were shouting comments and slogans that questioned the authority of the government and denigrated the fairness of the Indian criminal justice system in its treatment and prosecution of Guru.<sup>36</sup> Two things occurred in response to the student protests: first, counter-protestors, many of them aligned with the governing BJP, simultaneously rallied to try to drown out the message of the JNU students. From a legal perspective, this was not at all problematic or controversial, since these counter-protests were a form of protected speech. The second development, however, was more troubling. A spokesman for the BJP said that the JNU student protestors should not be protected by India's constitutional free speech protections,<sup>37</sup> since the JNU students were arguing that the legal process afforded to Guru was inadequate and that Guru's execution

<sup>&</sup>lt;sup>34</sup>Anil Kalhan *et al.*, *Colonial Continuities: Human Rights, Terrorism and Security Laws in India*, vol. 20 Colum. J. Asian L., p. 93 at 99 (2006).

<sup>&</sup>lt;sup>35</sup>Sandeep Joshi & Ashok Kumar, *Afzal Guru hanged in secrecy, buried in Tihar Jail*, thehindu.com, 10 Feb. 2013, available at http://www.thehindu.com/news/national/afzal-guru-hanged-in-secrecy-buried-in-tihar-jail/article4396289.ece.

<sup>&</sup>lt;sup>36</sup>Julie McCarthy, *Protests Widen As India Debates When Speech Is Sedition*, npr.org, 16 Feb. 2016, available at http://www.npr.org/sections/parallels/2016/02/16/466974582/indian-students-say-its-free-speech-government-calls-it-sedition.

<sup>&</sup>lt;sup>37</sup>Article 19 of the Constitution of India guarantees the "freedom of speech and expression" and the right to "assemble peaceably and without arms." However, under Art 19(2) those free speech rights can be constitutionally limited "in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, [or] defamation or incitement to an offence."

should be more accurately characterized as an act of murder.<sup>38</sup> The Home Minister, Rajnath Singh, warned that anybody using anti-India slogans at the JNU protests "will not be spared," and asked the police in Delhi to take the "strongest possible action" against any anti-government protestors.<sup>39</sup> The Minister for Chemicals and Fertilizers echoed this statement, characterizing the JNU protest as a "betrayal to the country" and promising that the government would take "strict action" against anyone supporting the protests o on Guru's treatment.<sup>40</sup>

In response, the Delhi police arrested a student leader of the protests, Kanhaiya Kumar, and other student protestors.<sup>41</sup> Kumar was charged with sedition—long a favorite tool of those seeking to dispel anti-government rhetoric as a threat to national security—and held for twenty days in jail.<sup>42</sup> Notably, Kumar was held under the same sedition provision that had been used by the British colonial government to arrest and charge Mohandas Gandhi during the 1940s independence movement.<sup>43</sup>At Kumar's bail hearing, the presiding Delhi High Court judge stated that the JNU protests were not protected by free speech provisions of the Constitution of India,<sup>44</sup> and instead should be considered as "a kind of infection which needs to be controlled," further noting that "if the infection results in infecting the limb to the extent that it becomes gangrene, amputation is the only treatment."<sup>45</sup>

This zero-tolerance attitude toward speech and protest that questions the wisdom or legality of government action is notable in that it both enables harsh treatment of the protester, and also characterizes such speech as a near-existential threat to national security. Such a dynamic around the treatment of the JNU protestors bears directly on the continued priorities of the Modi Government with regard to liberalization, privatization, and globalization. Liberalization and globalization involves winners and losers in terms of economic power and human rights, and protests regarding the economic liberalization policies of the Modi government seem likely if and when Indian businesses or the human and civil rights of Indian citizens are negatively impacted. Legally, such protesters may be considered under the UAPA definition of terrorism as threats to the economic and national security of the country, and be treated very harshly as a result.

<sup>&</sup>lt;sup>38</sup>Julie McCarthy, *Protests Widen As India Debates When Speech Is Sedition*, npr.org, 16 Feb. 2016, available at http://www.npr.org/sections/parallels/2016/02/16/466974582/indian-students-say-its-free-speech-government-calls-it-sedition

<sup>&</sup>lt;sup>39</sup>JNU protests row: Will not spare those who raise anti-India slogans, Rajnath Singh says, timesofindia.com, 13 Feb. 2016, available at http://timesofindia.indiatimes.com/india/JNU-protest-row-Will-not-spare-those-who-raise-anti-India-slogans-Rajnath-Singh-says/articleshow/50975823.cms (internal quotations omitted). <sup>40</sup>Ibid.

<sup>&</sup>lt;sup>41</sup>Aneesha Mathur, *JNU row: Kanhaiya Kumar gets bail and a lesson on thoughts that 'infect...(like) gangrene*,' indianexpress.com, 3 March 2016, available at http://indianexpress.com/article/india/india-news-india/kanhaiya-kumar-bail-jnu-delhi-high-court/.

<sup>&</sup>lt;sup>42</sup>JNU protests row: Will not spare those who raise anti-India slogans, Rajnath Singh says, timesofindia.com, 13 Feb. 2016, available at http://timesofindia.indiatimes.com/india/JNU-protest-row-Will-not-spare-those-who-raise-anti-India-slogans-Rajnath-Singh-says/articleshow/50975823.cms (internal quotations omitted). <sup>43</sup>Ibid.

<sup>&</sup>lt;sup>44</sup> Article 19(1)(*a*) of the Constitution of India makes free speech a fundamental right, but this may be qualified in the "interest of the sovereignty and integrity of India, the security of the State" or other reasons. First Amendment to the Constitution (18 June 1951). *See also* Indian Penal Code, section 153A (Promoting enmity between different groups on grounds of religion, rare, place of birth, residence, language, etc. and doing acts prejudicial to maintenance of harmony.)

<sup>&</sup>lt;sup>45</sup>Kanhaiya Kumar v State of NCT of Delhi, W.P. (CRL) 558/2016 & Cri.M.A. Nos. 3237/2016 & 3262/2016 (Delhi High Court, 2 March 2016) (Rani, J.), at ¶¶ 47-48.

<sup>&</sup>lt;sup>46</sup>Geeta Anand and Hari Kumar, *Hoping Jobs Follow, India Clears Investors' Path*, NY Times, 21 June 2016, at A1.

# Secret surveillance and the possibility of using counterterrorism tools to protect "economic security"

Beyond arrest and potentially being charged with a terrorism-related crime, another example of overly broad and poorly constrained counterterrorism powers is the authority of the Indian Government to use broad and secret surveillance to build a case against those it perceives as threats to economic security.

The authority of the Indian Government to conduct warrantless surveillance and data collection is long-standing and broad, and does not include effective checks, judicial or otherwise, to control against potential abuse. Authority for current policies of warrantless wiretapping and surveillance, like its sedition laws and many other of India's counter-terrorism authorities, finds its roots in colonial-era legislation that was meant to control the Indian population and prevent possible uprisings against the British colonial government.<sup>47</sup>

The Indian Telegraph Act of 1885 specifically authorizes the interception and storage of telegraph messages by the Central or State Governments in times of "public emergency, or in the interest of the public safety" if it is deemed necessary or expedient to do so "in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence." This permissive language set the stage for over a century of legislation, executive action and judicial enabling of broad surveillance of all forms of telecommunications, even in peace time, so long as such surveillance has a security-related nexus.

As part of the government's expansion of counterterrorism powers after the November 2008 terrorist attacks in Mumbai, Parliament amended the Information Technology Act 2000. These amendments allowed for surveillance of all digital communications of all individuals within India, regardless of whether security threats were at issue.<sup>49</sup> The amendments also made clear that the scope of warrantless surveillance authority includes all types of telephony data and internet data.<sup>50</sup> By 2009, the government had leveraged the authority granted in 1885 and 2008 to announce creation of the Central Monitoring System (CMS), a data collection and analysis system meant to capture all electronic data throughout India.<sup>51</sup> The specific parameters of this program remain secret and operate without external oversight, despite efforts by civil society organizations to create privacy legislation to curtail the reach of the CMS, to challenge the constitutionality of the CMS in court, and to ensure that the broad capabilities of the CMS are applied narrowly by the government.<sup>52</sup>

<sup>&</sup>lt;sup>47</sup>Anil Kalhan *et al.*, *Colonial Continuities: Human Rights, Terrorism and Security Laws in India*, vol. 20 Colum. J. Asian L., p. 93 at 99 (2006) (examining India's security and antiterrorism laws from an historic and institutional perspective).

<sup>&</sup>lt;sup>48</sup>Section 5(2) of the India Telegraph Act 1885..

<sup>&</sup>lt;sup>49</sup> Information Technology (Amendment) Act 2008, No. 10, Acts of Parliament, 2009 (India) (authorizing broad data collection and analysis regardless of whether such investigation is related to an emergency or national security matter).

<sup>&</sup>lt;sup>50</sup>Ibid.

<sup>&</sup>lt;sup>51</sup>Rajya Sabha, Ministry of Communications and Information Technology ,*Centralised System to Monitor Communications*, PRESS INFO. BUREAU(Nov. 26, 2009, 17:50 IST)

http://pib nic.in/newsite/erelease.aspx?relid=54679 (noting that the system was necessary "to strengthen the security environment in the country").

<sup>&</sup>lt;sup>52</sup>HUMAN RIGHTS WATCH, *India: New Monitoring System Threatens Rights* (7 June 2013),

 $<sup>\</sup>frac{http://www.hrw.org/news/2013/06/07/india-new-monitoring-system-threatens-rights}{continuous presence of the continuous presen$ 

Few constraints seems likely given the typical deference of the Indian judiciary with regard to national security initiatives and the ongoing attacks that have buoyed public support for extremely strong counterterrorism powers. It seems unlikely that the Indian judiciary would find a constitutional violation in the type of surveillance authorized under the 2008 amendment to the Information Technology Act, or that which is perhaps taking place under the CMS. On one hand, the Supreme Court has previously interpreted Article 21 of the Constitution of India, which articulates the fundamental right to life, as including privacy of persons and personal thought.<sup>53</sup> The court has used its interpretation of Article 21 as the basis for inferring the need for procedural safeguards against potentially abusive and overly intrusive surveillance.<sup>54</sup> On the other hand, the Indian judiciary has historically been extremely deferential to legislative and executive decision-making on counterterrorism matters, even when human rights and civil liberties are at stake.<sup>55</sup> The various counter-terrorism statutes enabling broad surveillance to be deployed in any instance in which the government believes that a threat to the economic security of India is at stake likely would not be struck down by a court. This means that those powers will remain intact unless public or political pressure on the Government forces a change to the laws such that CMS is limited to reflect India's commitment to rule of law principles.

#### **CONCLUSION**

Three strands are discussed in this chapter: first, the political imperative of the Indian Government to protect and grow the economy while dealing with the fear that terrorism may derail India's economic development; second, the inclusion of "economic insecurity" in the legal definition of a national security threat; and third, the vast powers granted to and used by intelligence and law enforcement agencies deal with perceived national security threats with little judicial or other external constraint. These strands should be viewed in conjunction with each other to understand the concern surrounding the use of counterterrorism powers to preserve neo-liberal goals in the face of criticism and protest. In these strands, we see a powerful means by which the government can deal with perceived threats, but also a strong potential for abuse. The exemplars analyzed here—the characterization of anti-nationalist protest as a form of sedition that led to the harsh treatment of the JNU protesters, as well as the largely secret but extremely broad CMS data gathering and surveillance system—offer some insight into the concerns that arise when national security and counterterrorism powers are granted broadly and without strong oversight or constraint.

Parliament should reconsider its current authorization of the use of counterterrorism powers to deal with potential economic threats, and courts should be willing to look closely at cases in which the rights to expression, due process, and privacy are curtailed in the name of economic security. If India is to ensure adherence to the rule of law while fulfilling the national priority of growing its economy, better transparency and accountability must be insisted upon by the Parliament, courts, and the public.

CMS); *see also* Pranesh Prakash, Can India Trust Its Government on Privacy?, *N.Y. TIMES*, 11 July 2013, <a href="http://india.blogs.nytimes.com/2013/07/11/can-india-trust-its-government-on-privacy/?">http://india.blogs.nytimes.com/2013/07/11/can-india-trust-its-government-on-privacy/?</a> php=true& type=blogs& r=0.

<sup>&</sup>lt;sup>53</sup>Kharak Singh v State of Uttar Pradesh AIR 1963 SC 1295 (1964)1 SCR 332 (holding that the meaning of personal liberty as guaranteed under Article 21 of the Constitution of India included a citizen's freedom from encroachments on private life).

<sup>&</sup>lt;sup>54</sup>People's Union for Civil Liberties v Union of India AIR 1997 SC 568; (1997)1 SCC 301.

<sup>&</sup>lt;sup>55</sup>Mrinal Satish & Aparna Chandra, Of Maternal State and Minimalist Judiciary: The Indian Supreme Court's Approach to Terror-Related Adjudication, vol. 21 *NAT'L LAW SCH. OF INDIA REV.*, p. 51 (2009) (assessing the Supreme Court's lack of effectiveness in providing a judicial check on overreaching counterterrorism policies). F: Sairam Bhat | LPG – P-3 Ch 13 | 2.01.2017 | R from Author 8-2-2017 | ELH Edit 3 Pf 28-2-2017